THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Unpublished Opinion No. 2022-UP-003 (S.C. Ct. App. Filed Jan. 5, 2022)

Kevin M. Granatino, ... Petitioner,

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.

PETITION FOR WRIT OF CERTIORARI
OF PETITIONER KEVIN M. GRANATINO

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Mar 25 2022
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CERTIFICATION OF PETITIONER'S COUNSEL

The undersigned counsel for Petitioner hereby certifies and affirms that a petition for rehearing from the decision of the Court of Appeals for which this writ of certiorari is sought was made in a timely fashion, and that it was finally ruled upon by the Court of Appeals on February 25, 2022. Thirty (30) days after such date occurs on March 27, 2022.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision constitutes reversible error by holding that the Court would decline to consider Petitioner's arguments as to whether expert testimony was necessary for any part of Petitioner's personal injury claim to survive summary judgment?

2. Whether the Court of Appeals' decision constitutes reversible error by holding that Petitioner needed the testimony of an expert witness to survive summary judgment?

STATEMENT OF THE CASE & PERTINENT FACTS

The petition presents the opportunity for the Supreme Court to once again address three issues which commonly arise in trial and appellate proceedings: (i) issue preservation; (ii) summary judgment; and (iii) whether expert testimony is necessary to the ability of a personal injury claim to survive a motion for summary judgment. As explained below, these commonly recurring procedural questions arise from a horrific factual circumstance.

At approximately 10pm on Thursday, October 23, 2014, Petitioner took a step that literally changed the course and direction of his life forever. Petitioner had awoken that morning as a senior at Clemson University. (R. 168.) He would finish the day fighting for his life.

The events of this case take place, in the most substantial part, around a particular intersection in the City of Clemson. It is the intersection of South Carolina Highway 123—also known as Tiger Boulevard—and College Avenue ("**the Intersection**"). Tiger Boulevard is among the main commercial arteries of Clemson; it is flanked by fast-food restaurants, retail stores, and apartment complexes, (R. 170), and is heavily trafficked. Heading south from Tiger Boulevard, College Avenue leads first to Downtown Clemson, then to the University's main campus. The Intersection is busy most every hour of every day.

In the weeks during and around fall 2014, the Intersection was undergoing construction. (R. 170.) Because Tiger Boulevard is a state highway, design and construction efforts at the Intersection were conducted under the auspices of the South Carolina Department of Transportation ("**SCDOT**"). SCDOT, in turn, had subcontracted a substantial portion of the work to Thrift Development Corporation ("**Thrift**").

Petitioner was no stranger to the Intersection. Petitioner started Clemson during Fall 2011. (R. 168.) Many times over the following three years, Petitioner had frequented Starbucks, Walgreens, restaurants, churches, and other businesses, all located in the immediate vicinity of the Intersection. (R. 170.)

Earlier in the evening of October 23, 2014, Petitioner had crossed the Intersection by foot, specifically, from the southern side of Tiger Boulevard—the Clemson University side—to the northern side. (R. 170.) He was going to visit some friends at their home. (R. 170.) Later that evening, just shy of 10pm, it was decided that the group of friends would walk Downtown. (R. 203 at 11:13-19.) This would require them to cross over the Intersection at the exact place that Petitioner had done so earlier; Petitioner was essentially retracing his steps. (R. 170.)

What happened next is both tragic and unclear. (R. 205-06 at 20:22-25:22.) Petitioner approached the northern side of the Intersection with his friends. He hoisted a friend of his onto his back, giving her a piggy-back ride. Petitioner then looked both ways and entered into the Intersection. There is a dispute about what color the lights on Tiger Boulevard were when Petitioner left the curb—green or yellow. Regardless, Petitioner made it safely to the midway point of Tiger Boulevard before stopping again to check traffic. At this point, the light controlling traffic on Tiger Boulevard was either yellow or red. Petitioner perceived that traffic was coming to a halt at the stop-bar, and so he took his fateful step into the Intersection.

It so happens that, at the exact same moment, Defendant Calvin Williams was in his SUV, heading eastbound on Tiger Boulevard, approaching the Intersection as Petitioner crossed. It is not clear whether Williams had the right-of-way, or whether he accelerated

to beat a yellow light, or whether he intended to run a red light. What is clear, however, is that Williams' vehicle violently struck Petitioner, nearly killing him.

Petitioner was evacuated by air to Greenville Memorial Hospital where he was diagnosed with having sustained a traumatic brain injury, (R. 168), in addition to many broken bones and teeth, as well as significant internal bleeding, (R. 168). Petitioner slipped into a comatose state, where he stayed for weeks. (R. 168.)

By the grace of God, as well as the miracles of modern medicine, Petitioner survived. But he was not the same young man that he was before the accident. Petitioner had to re-learn every aspect of essential daily living, including walking and talking. (R. 169.) There are some wounds of his that will never heal. Petitioner still suffers from his traumatic brain injury. (R. 169.) He continues to have memory loss, confusion, nightmares, and poor sleep. (R. 169.) His brain processing and physical movements are slow. (R. 169.) For the rest of his life, Petitioner will have an enhanced risk of suffering seizures, strokes, and blood clots. (R. 169.)

Perhaps the greatest mercy given to Petitioner is that he has little-to-no recollection of having suffered his catastrophic injury. He recalls events from earlier that evening. Specifically, Petitioner remembers that, when he crossed Tiger Boulevard at the Intersection earlier in the evening of October 23, there was no crosswalk, just chalk lines indicating where the crosswalk should be. (R. 170.) There were also no pedestrian crossing lights, signs, barriers, or road cones. (R. 170.) Lighting was poor. (R. 170.)

The last recollection that Petitioner has of the events of October 23 relate to the seconds just before his injury. Petitioner remembers standing in the midpoint of Tiger Boulevard, waiting to cross. (R. 170.) He believes the light was red when he started to

cross the second half, (R. 170), but it could have been yellow, (R. 205-06 at 21:16-22:10). From that point on, Petitioner knows nothing, and remembers nothing, about the events of October 23 until the time that he recovered from his coma, other than what he has been told. (R. 168-69.)

Petitioner commenced the underlying personal injury claim on February 15, 2017. Initially, there were four Defendants, all sued under various negligence theories. The first Defendant was the driver of the vehicle that struck Petitioner, Calvin Williams. However, Defendant Williams reached a settlement agreement with Petitioner prior to the procedural events giving rise to these appellate proceedings, and therefore, is not presently a Respondent.

The second, third, and fourth Defendants are, respectively, Clemson University ("**Clemson**"), SCDOT, and Thrift. Consistent with the allegations of the Complaint, SCDOT and Thrift were named because Petitioner was struck by a vehicle at an intersection which was under construction by SCDOT, that work had been subcontracted to Thrift, and SCDOT and/or Thrift had failed to install any mechanisms or precautions at the Intersection that were likely to protect the safety of pedestrians. Clemson had been named a Defendant because, it was then believed, the Intersection was subject to Clemson's control.

At various times during the fall of 2017, Clemson, SCDOT, and Thrift each filed motions for summary judgment. The motions were consolidated and heard all at once before the Honorable Perry H. Gravely on June 1, 2018. By decision filed July 19, 2018, the trial court granted the motions for summary judgment of Clemson, SCDOT, and Thrift in their entirety. (R. 11.) In relevant part, the trial court granted summary judgment to

SCDOT and Thrift specifically because, as of the time of the summary judgment hearing, Petitioner had not procured the testimony of an expert witness who would be able to render an opinion about how the complete absence of safety mechanisms and precautions at the Intersection caused Petitioner's injuries, and—under the case-scheduling order then in place—the time to designate expert witnesses had expired. In short, the trial court held that such expert testimony was necessary, and that, without such testimony, no part of Petitioner's personal injury claim against any Defendant could survive.

Petitioner subsequently filed a timely motion under Rule 59, SCRCP, which sought to alter or amend the underlying judgment only as to SCDOT and Thrift; it did not address Clemson's dismissal. (R. 263.) Consequently, Clemson is not a Respondent to these proceedings. In any event, a hearing on Petitioner's Rule 59 motion was held on October 25, 2018. By decision dated November 20, 2018, the motion was denied. (R. 26.) Petitioner subsequently filed a timely notice of appeal as to the summary judgment decisions affecting SCDOT and Thrift. (R. 274.)

With respect to the Court of Appeals, Petitioner sought a decision to reverse the trial court's grant of summary judgment in favor of SCDOT and Thrift, and to remand the case to the trial court to resume proceedings from the point at which they were improvidently terminated. (R. 276 & 332.) The primary issue presented for the Court of Appeals' consideration was whether the trial court applied the law appropriately in granting judgment as a matter of law in favor of SCDOT and Thrift. It was then—and continues to be—Petitioner's position that the trial court misapplied the calculus by which a claimant's contributory negligence may be wielded as a complete bar to his relief; that summary judgment was inappropriate based on the factual and legal posture of the case at the time

of the summary judgment hearing; and that expert testimony was not necessary to sustain one or more viable avenues of relief under Petitioner's personal injury claim.

On November 10, 2021, the Court of Appeals held oral argument. By decision dated January 5, 2022, the Court of Appeals affirmed the decision of the trial court. (R. 351.) It appears, however, that the Court of Appeals' decision rested on exceedingly narrow grounds—pertaining exclusively to the necessity of expert testimony. Specifically, the Court of Appeals held: (i) that Petitioner had not expressly made the argument to the trial court that he could prevail on at least some part of his personal injury claim, even in the absence of expert testimony; (ii) that, because Petitioner had not made such arguments to the trial court, the arguments could not be raised on appeal; and (iii) that the Court of Appeals would not find that the trial court had abused its discretion in refusing to extend deadlines established by the parties' scheduling order to allow Petitioner more time to engage an expert witness. Accordingly, through this analysis, the Court of Appeals affirmed the trial court's decision to grant summary judgment in favor of Respondents.

Petitioner timely filed a petition for rehearing of the Court of Appeals' decision on January 19, 2022. (R. 356.) However, the petition was denied by order dated February 25, 2022. (R. 369.) This petition for writ of certiorari follows.

ARGUMENT

This petition is intended to address two interrelated aspects of the Court of Appeals' decision. The first aspect is straightforward: the Court of Appeals held that Petitioner could not raise his arguments regarding the necessity of expert testimony in the course of appellate proceedings because they were not first presented to the trial court. Petitioner

respectfully disagrees with this holding, specifically because it would seem to turn Rule 56(c), SCRCP, on its head.

The second aspect of the Court of Appeals' decision at which this petition is addressed is more subtle. As noted above, the Court of Appeals held that it would not find that the trial court had abused its discretion in denying a request to amend the deadline for expert disclosures set out in the case-scheduling order. This petition is not intended to attack that decision directly, but instead, the legal proposition that is implicit in this decision: that, because the scheduling order would not be amended, Petitioner would not be able to provide expert testimony in furtherance of his personal injury claim against Respondents; and, as a necessary consequence, that, without expert testimony, Petitioner could not—as a matter of law—have a viable theory of recovery against any Respondent under any theory of his personal injury claim.

In short, the Court of Appeals necessarily, though impliedly, decided that Petitioner could not have a legally cognizable personally injury claim against either Respondent in the absence of expert testimony. That specific proposition is contrary to law, and it is the specific proposition for which this Court's discretionary review is presently sought.

A. The Court of Appeals' decision erred in holding that it would decline to consider Petitioner's arguments as to whether expert testimony was necessary for any part of Petitioner's personal injury claim to survive summary judgment.

At first blush, the Court of Appeals' decision to decline to consider Petitioner's arguments as to whether expert testimony was necessary for any part of Petitioner's personal injury claim to survive summary judgment would seem to be one of mere issue preservation. If that were the case, then Petitioner would direct the Court's attention to Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282

(2012), which addressed issue preservation in some detail, and which ought to warrant reversal of the Court of Appeals' decision. In the main body of the Atlantic Coast Builders opinion, this 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 (emphasis added).

In proceedings below—both at the trial and appellate courts—Respondents have never taken the position that Petitioner failed to preserve for review the issue of whether expert testimony is necessary. It is not because Respondents were unaware that this was a procedural option available to them. Section III(b) of Respondents' brief to the Court of Appeals is entitled: "Petitioner 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 addressed other preservation objections—should not be neglected in evaluating whether the so-called "expert issue" has been preserved.

Petitioner would respectfully submit, however, that this "expert issue" is more than a matter of mere issue preservation. To the contrary, this issue cuts to the core mechanics of Rule 56(c), SCRCP, which provides that summary judgment shall be rendered only if there is no genuine issue as to any material fact and only if the moving party is entitled to judgment as a matter of law. Through this standard, and the well-worn judicial decisions that have interpreted and applied the same, what has resulted is a familiar two-step analysis. Under the first step, the party moving for summary judgment carries the prima facie burden to demonstrate that there is no genuine issue as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. If this initial burden is carried by the moving party, then the burden shifts to the non-moving party to demonstrate that either: (i) at least a scintilla of evidence exists that is capable of creating a genuine dispute of fact that must be determined at trial; and/or (ii) even if the facts are undisputed, the moving party is not entitled to judgment as a matter of law.

With respect to the instant case, when Respondents filed their motions for summary judgment, Petitioner responded with a broad-based denial that summary judgment was appropriate, on both factual and legal grounds. In short, Petitioner disputed that either Respondent had carried its prima facie burden under Rule 56(c). That broad-based denial necessarily embraced the question of whether Petitioner was required to support each and every theory of recovery under his personal injury claim with evidence supplied by expert testimony.

In granting summary judgment against the totality of Petitioner's personal injury claim, the trial court necessarily held that expert testimony was required. To reach that

conclusion, the trial court would have also necessarily held that Respondents had met their prima facie burden.

After the trial court's order granting summary judgment was entered, Petitioner filed a motion pursuant to Rule 59(e), SCRCP, which asserted general and specific reasons—both factual and legal—as to why summary judgment had been improvidently granted, again disputing the proposition that either Respondent had met their prima facie burden. This motion was denied.

In initial appellate proceedings, and continuing to the present, Petitioner has once again lodged a broad-based denial 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. If it is the case, as Petitioner believes, that the law of this State does not require expert testimony under the circumstances of this personal injury claim, then the consistent position taken by Petitioner will have been vindicated: that summary judgment should never have been granted to Respondents in the first place.

In light of all these circumstances, Petitioner would respectfully submit that the "expert issue" cannot be fairly characterized as "clearly unpreserved." The issue of preservation, in this case, is inherently, inextricably intertwined with the issue of whether summary judgment should have been entered against Petitioner, at all.

B. Relatedly, the Court of Appeals' decision erred in holding, even implicitly, that Petitioner needed the testimony of an expert witness to survive summary judgment.

As discussed in the preceding section, summary judgment should never have been issued in favor of Respondents, certainly on the basis that Petitioner had not presented the testimony of an expert witness at the summary-judgment stage. This is true regardless of

whether Petitioner had actively opposed summary judgment (which it did), or whether Petitioner had provided no response, at all. And that is because it is Respondents' prima facie burden to demonstrate to the trial court that summary judgment is appropriate. Under the circumstances of this case, this standard would require Respondents to establish that it is the law of this State that expert testimony on behalf of Petitioner was necessary in order to establish a material element of his personal injury claim. Respondents made no such showing; yet, in granting summary judgment in favor of Respondents, the trial court necessarily held that such expert testimony was required.

There does not appear to be any authority within the body of this State's laws that would militate in favor of such a conclusion. Certainly, there are some negligence claims involving professionals where expert testimony is required; there are many 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.

It has never been contended in this case—not in appellate proceedings, nor in proceedings below—that expert testimony is statutorily required in order for Petitioner to pursue personal injury claims against either Respondent. Therefore, to the extent that expert testimony is required to sustain a personal injury action against general participants

in the construction industry, that must arise because of the fact-specific complexity of the case.

The trial court ostensibly adopted the position of Respondents wholesale, which was that expert testimony is necessary, as a matter of law, to establish every aspect of pedestrian safety in a construction zone. In arriving at this conclusion, the trial court relied in substantial part on City of York v. Turner-Murphy Co., 317 S.C. 194, 452 S.E.2d 615 (Ct. App. 1994). Excerpts of City of York were cobbled together to create the impression that claims of negligence against a general construction contractor require expert testimony for their survival. But that is not the case. It is not the holding of City of York, and more broadly, it is not the law in this State.

City of York was a professional negligence claim against a company who was engaged specifically to supervise the construction of a wastewater treatment plant for compliance with certain contract documents. It failed to do so. And at trial, a verdict was returned in plaintiff's favor. The company appealed, taking the position that the sufficiency of its professional supervisory services required expert testimony as to the pertinent industry standard by which to measure its alleged negligence. The Court of Appeals agreed. "Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct." Id., 317 S.C. at 195, 452 S.E.2d at 617 (citation omitted).

Despite the fact that City of York was a professional negligence case, it is nonetheless instructive as to when—even in an ordinary negligence case—expert

testimony is needed for the survival of a claim at a dispositive stage, and perhaps more importantly, when expert testimony is not needed. As a general proposition, expert testimony is necessary only when the subject matter of the testimony cannot be understood by a person of ordinary intellect without the assistance of special knowledge, skill, education, training, or experience. See, e.g., City of York, 317 S.C. at 196, 452 S.E.2d at 617. By contrast, expert testimony is unnecessary when the subject matter is within the common knowledge and experience of an ordinary person. Id.

Consequently, not everything requires the testimony of an expert to survive a dispositive motion. In fact, as the Court of Appeals acknowledged in City of York, there are some types of cases that would seem to require expert testimony, but don't. One example given was where an architect designed a building without waterproofing, even though the building was constructed two feet below the high-water-mark of a prior flood. See Seiler v. Levitz Furniture Co. of the Eastern Region, Inc., 367 A.2d 999 (Del. 1976). Another example is from a case where an architectural firm was hired to compare shop drawings of a proposed structure with the as-designed specifications. Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983). The firm failed to notice a discrepancy in the gauge of steel required, which resulted in the structural failure of the entire building. Neither of these cases required expert testimony for their survival.

The theories of liability presented by Petitioner's personal injury case are in substance no different than these examples. In Thrift's Memorandum in Support of its Motion for Summary Judgment, it describes the Intersection as "the busiest" in the City of Clemson. (R. 194.) *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 is actually a sharper analytical question than may appear at first blush. And it may be helpful to more carefully identify what Petitioner's contention is and is not. It is Petitioner's contention that the absence of lighting, signage, crosswalks, and functioning pedestrian lights—whose implementation were the responsibility of Thrift and SCDOT—were contributing causes to the injuries he sustained. It is not Petitioner's contention that there were some safety measures which were inadequate under the circumstances. More simply stated, it is the difference between whether Respondents' safety measures were good enough, or whether there were any at all. The latter option is absolutely within the ambit of the ordinary person's knowledge and experience, and therefore, did not require expert testimony for its survival.

This question was not expressly resolved by the Court of Appeals, despite the fact that it was squarely presented by Petitioner. As discussed elsewhere within this petition, the Court of Appeals held that: (i) it would not consider Petitioner's arguments regarding the relevance, if any, of the lack of expert testimony; and (ii) it would not find that the trial court committed an abuse of discretion with respect to the request to modify the case-scheduling order. These twin rulings were a clever way for the Court of Appeals to avoid addressing the central issue in the case, which was whether expert testimony was required, at all. Because, if expert testimony was not required, then summary judgment should never have been granted in Respondents' favor, specifically because Respondents would not have met their prima facie burden under Rule 56(c).

CONCLUDING STATEMENT

For the reasons set out herein, Petitioner would respectfully request that the Supreme Court grant certiorari in this matter, undertake further review of all matters decided in the Court of Appeals' decision, and provide such other and further relief as the Court deems just and proper.

Respectfully submitted,

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