

Apr 22 2022

S.C. SUPREME COURT

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Unpublished Opinion No. 2022-UP-003 (S.C. Ct.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

v.

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.....Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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### QUESTIONS PRESENTED

1. The Court of Appeals' decision, declining to consider Petitioner's arguments as to whether expert testimony was necessary, was proper and did not constitute reversible error.
2. The Court of Appeals' decision holding Petitioner needed the testimony of an expert witness to survive summary judgment, was proper and did not constitute reversible error.

### STATEMENT OF THE CASE

Petitioner has requested this Court issue a writ of certiorari to review the Court of Appeals' opinion, affirming the Circuit Court's Order Granting Summary Judgment in favor of Respondents, Thrift Development Corporation (hereinafter "Thrift") and the South Carolina Department of Transportation (hereinafter "SCDOT"). The Petition should be denied, as no matters raised in the Petition justify consideration by this Court.

This action arises out of an October 23, 2014, pedestrian-vehicle collision at an intersection which had previously been under construction. (R. 35-47). Petitioner, a student at Clemson University, was attempting to cross the busy Highway 123 at College Avenue in Clemson at approximately 9:56 pm when a car being driven by Calvin Williams struck Petitioner. (R. 36; R. 232). The impact occurred in the middle eastbound lane of Highway 123, after Petitioner had successfully crossed the westbound lanes of traffic. (R. 233). At the time of the accident, Petitioner was carrying a friend on his back. (R. 204-205). A blood test taken at the hospital that night revealed Petitioner's blood alcohol level was .122. (R. 254). Petitioner, despite claiming otherwise in his Petition, testified in his deposition that the traffic light turned yellow, after he entered the midpoint of the intersection. (R. 26-34). As the Circuit Court determined, this meant the light was

green when Petitioner ran across the intersection, therefore, establishing violations of South Carolina law and evidence of negligence per se. (R. 11-25). The intersection where the accident occurred had been under construction prior to the accident but was not an active construction zone. (R. 49). Petitioner was found to have contributed to the accident by the investigating officers, as Petitioner was unlawfully in the roadway and failed to yield to traffic. (R. 11-25).

Petitioner filed his initial Summons and Complaint on October 21, 2016, in which he named as defendants Calvin Williams (the driver of the vehicle involved in the accident), Clemson University, SCDOT, and “ABC Corporation” (identified as “an unidentified corporation conducting business in Pickens County, South Carolina”), the company performing construction at the intersection. Petitioner subsequently amended his Complaint on February 15, 2017, identifying Thrift as that entity and removing “ABC Corporation.” (R. 35-47). In his Amended Complaint, Petitioner alleges Respondents violated “industry standards” relating to the “construction area.” Petitioner’s Amended Complaint also alleges Respondents:

- a. Negligently created and/or constructed the intersection;
- b. Negligently allowed a dangerous condition to exist at the intersection;
- c. Failed to eliminate known dangerous conditions at the intersection;
- d. Failed to properly and adequately maintain a construction zone at the intersection;
- e. Failed to warn of dangerous conditions; and
- f. Otherwise negligently maintained, inspected, and/or repaired the intersection

and/or the area surrounding the intersection during construction.

(R. 42-43).

On October 25, 2017, a Consent Scheduling Order was entered into by all parties which, in part, required Petitioner to “file and serve a document identifying by full name, address, and

telephone number each person whom Plaintiff expects to call as an expert at trial by January 1, 2018.” (R. 1-3).

Petitioner failed to identify any expert witnesses by the deadline imposed by the scheduling order and did not seek to expand the time to identify any experts. (R. 66-126). Petitioner’s attorneys filed a motion to be relieved as counsel on January 12, 2018, 11 days after the deadline to identify experts. (R. 127-128). On January 19, 2018, Respondents filed Motions for Summary Judgment premised upon 1) the lack of expert testimony and 2) Petitioner was greater than 50% liable for his injuries. (R. 129-131). Clemson University also filed a Motion for Summary Judgment. (R. 11-25). The Court granted Petitioner’s prior counsel’s motion to be relieved on January 25, 2018. (R. 4-6). Petitioner then retained new counsel, which included his stepfather, who is licensed to practice law in Massachusetts, and is admitted *pro hac vice* in South Carolina for this case. (R. 26-34). Petitioner never requested a consent order extending the deadline to identify expert witnesses, despite requesting and obtaining consent from Respondents to a continuance of the hearing on the Motions for Summary Judgment, to allow Petitioner’s new counsel time to prepare. (R. 26-34). Petitioner also never moved the Court for an extension of the expert testimony deadline. (R. 26-34).

Respondents and Clemson University’s motions were heard on June 1, 2018, and the Circuit Court entered an Order Granting their Motions for Summary Judgment in favor of Respondents and Clemson University on July 19, 2018. (R. 11-25). Petitioner still did not have an expert at the time of the hearing. (R. 26-34). The failure to have an expert was fatal, as expert testimony was needed to establish a breach of a duty by Respondents. (R. 26-34). The Circuit Court found Petitioner was more than 50% responsible for his injuries and therefore, barred from recovery. (R. 26-34). Petitioner was intoxicated, carrying someone on his back across a busy

intersection, and the Circuit Court found him to be in violation of at least five provisions of the South Carolina Code of Laws, which was evidence of recklessness. (R. 26-34). Despite Petitioner's assertion otherwise, the operability of the pedestrian lights is irrelevant to the liability of Respondents. (R. 26-34). By the time Petitioner was to the midway point of the intersection, Petitioner testified the light was yellow, showing he knew when he could lawfully enter the intersection (R. 26-34). The Circuit Court determined "[t]here is no combination of facts present in this case that would reduce [Petitioner's] responsibility to 50% or below." (R. 26-34). As such, there could be no liability on the part of Respondents. (R. 26-34). On July 27, 2018, Petitioner filed a motion to alter or amend, pursuant to Rule 59(e) of the SCRCPP, as to the summary judgment in favor of Respondents, but not as to Clemson. (R. 263-268). That motion was heard on October 25, 2018, and in an order filed November 20, 2018, the Circuit Court denied Petitioner's 59(e) motion. (R. 26-34). Petitioner filed his Notice of Intent to Appeal on December 7, 2018. (R. 274-275).

The Court of Appeals held oral argument on November 20, 2021. On January 5, 2022, the Court of Appeals issued a unanimous decision, affirming the Circuit Court's Order Granting Summary Judgment for Respondents. Petitioner subsequently filed a Petition for Rehearing on January 19, 2022, which was denied by Order dated February 25, 2022. On March 25, 2022, Petitioner timely filed his Petition for Writ of Certiorari with this Court.

Petitioner sets forth certain facts in his Petition regarding his injuries, none of which is relevant on appeal. Respondents do not dispute Petitioner was injured or that it was a tragic accident. Petitioner also asserts the Circuit Court misapplied Petitioner's comparative negligence, therefore, erring in granting summary judgment. The Circuit Court was clear in its determination that expert testimony was required to prove any negligence on behalf of Respondents, but

regardless, Petitioner's own actions constituted greater than 50% of the cause of damages, therefore summary judgment was properly granted.

### ARGUMENTS

#### **I. Petitioner has failed to meet the standard for review by the Supreme Court, established by Rule 242(b), SCACR.**

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. “A writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief.” *Rowe v. City of West Columbia*, 334 S.C. 400, 407-408, 513 S.E.2d 379, 383 (Ct. App. 1999). Although not fully controlling, the character of reasons for granting a writ of certiorari include: 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; and 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. Rule 242(b), SCACR.

Petitioner has failed to explain how the issues presented in his Petitioner satisfy the character of reasons, set forth in Rule 242(b), SCACR, justifying a writ of certiorari. This case raises no novel questions of law, but is founded on the well settled law, that an issue must be raised at the Circuit Court to preserve it for appellate review and that it is within a judge's discretion to not extend a scheduling order. The Court of Appeals' decision was unanimous with no dissenting opinions. This case raises no conflicts with prior decisions of the Supreme Court, nor are there any substantial constitutional issues, or federal questions.

Although the Supreme Court has discretion to grant a writ of certiorari, Petitioner has filed to explain how the issues he raises satisfy the characters of Rule 242(b), SCACR, or otherwise present such exceptional circumstances to warrant review. Therefore, the Petition should be denied.

**II. The Court of Appeals correctly declined to consider Petitioner’s argument as to whether expert testimony was necessary for Petitioner’s personal injury claim to survive summary judgment.**

The Court of Appeals was correct in declining to consider this issue. By stipulating to the Circuit Court that an expert was necessary, Petitioner is barred from now contending no such expert is needed. Moreover, Petitioner never identifies a duty owed to him by these Respondents, precluding this Court (and Respondents) from being able to evaluate whether the alleged duty requires expert testimony.

**a. Petitioner stipulated expert testimony was required.**

“A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations are, of course, binding upon those who make them.” *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (*internal citations omitted*). Furthermore, an issue conceded in the trial court cannot be argued on appeal. *State v. Bryant*, 372 S.C. 305, 314, 642 S.E.2d 582, 587 (2007).

Petitioner now argues on appeal that expert testimony is not necessary to establish Respondents breached a duty of care to Petitioner. However, at the hearing on Respondents’ Motions for Summary Judgment, Petitioner’s counsel stipulated expert testimony was necessary to establish the claims against Respondents: “Now, I think they’re right. I mean the problem is that

[it] does get in the realm of experts” (R. 90). Petitioner’s counsel reiterated this concession during the following exchange with the Court at the hearing on Petitioner’s motion to alter or amend:

The Court: Well regardless of whether you have a scheduling order in place, this is a 2016 case. I mean, it seems like to me before, especially making claims against...the construction company, Thrift and I don’t know, the Department of Transportation. I mean, it seems like that would be – the expert he would have got before he filed the lawsuit.

Petitioner’s counsel: I can’t disagree with that, Your Honor.

(R. 113). Since Petitioner has conceded an expert witness is necessary to establish his case against Respondents, he cannot now assert otherwise.

**b. Petitioner failed to preserve the issue for appeal on whether expert testimony was necessary.**

The Court of Appeals properly found Petitioner failed to preserve the issue on whether an expert was required, therefore, declining to consider the issue on appeal. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). This well-established rule “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Id.*

In both Petitioner’s Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC, and in his arguments to the Circuit Court, Petitioner failed to raise the issue of whether expert testimony was required for his claims against Respondents. Petitioner’s Motion to Alter or Amend, raised five issues, none of which included an argument that expert testimony was unnecessary to establish his claim. Instead, Petitioner argued it was the sequence of events regarding Petitioner’s attorney withdrawing as counsel, as the grounds for why the summary judgment should not have been granted. This was a failing argument, which did not warrant extending the deadline for an expert. Petitioner’s attorney withdrew as counsel 11 days after the deadline to identify experts and

even at the hearing on Respondents' Motions for Summary Judgment, 5 months after the deadline, Petitioner still did not have an expert. In fact, counsel for Respondent consented to a continuance on the hearing on the Motions for Summary Judgment, to allow Petitioner's new counsel time to prepare for the hearing. Petitioner never filed a motion to extend the scheduling order. Nor did Petitioner, at any time, ask opposing counsel for consent to an extension.

Petitioner argues "Respondents have never taken the position that Petitioner failed to preserve for review the issue of whether expert testimony is necessary." (Petition, 8). This is demonstrably incorrect. Such a claim by Petitioner, based on a dissenting opinion in *Atlantic Coast Builders and Contractors, LLC v. Lewis*, flips the law on its head. To preserve an issue for appeal, Petitioner is required, at the lower court, to raise that issue, not Respondents. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Respondents have consistently argued Petitioner stipulated expert testimony was required, and therefore could not argue otherwise on appeal. When Petitioner asserted for the first time on appeal expert testimony was not required, Respondents addressed the issue by pointing out Petitioner had previously stipulated expert testimony was necessary. It is hard to fathom how a more direct challenge to issue preservation could be made under the circumstances presented. Contrary to Petitioner's assertion, Respondents have not been silent on this issue. Unlike in *Atlantic Coast Builders*, Respondents have been clear there was no issue preservation, as Petitioner agreed expert testimony was required.

Even if the Court found Respondent did not object to the expert testimony preservation issue, the majority in *Atlantic Coast Builders* found "we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation. In fact, a rule which would permit such an 'appeal by consent' is contrary to the very core of our preservation

requirement.” *Id.* Petitioner never addressed the issue of whether an expert was necessary until its initial brief to the Court of Appeals. At such time, the argument that no expert testimony was needed, had not been preserved at the Circuit Court, leaving the Court of Appeals unable to consider such an argument.

### **III. The Court of Appeals correctly affirmed the Circuit Court’s ruling that testimony of an expert witness was required to survive summary judgment.**

Expert testimony is required to prove “both the standard of care and the professional’s deviation from that standard.” *City of York v. Turner-Murphy Co., Inc.*, 317 S.C. 194, 196, 452 S.E.2d 615, 617 (Ct. Ap1994). The only exception is if “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.* Without testimony to establish the existence of a duty and a breach, Petitioner’s claim fails as a matter of law. *See Celotex Corv. Catrett*, 477 U.S. 317 (1986) (“A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”).

Petitioner’s failure to establish, after nearly two years of discovery, the specific standard(s) of care owed by Respondents and acts demonstrating breach(es) is fatal to Petitioner’s case. As explained by the Circuit Court:

[Petitioner] has alleged that Thrift and DOT were negligent in many different respects concerning the construction at the intersection of Highway 123 and College Avenue. Those allegations include construction services and management, as well as coordination of the work of various sub-contractors. The allegations also refer to concerns [of] compliance with industry standards, including the Manual On Uniform Traffic Control Devices. Such matters are not within the area of common knowledge and experience of the layman, and therefore, expert testimony is necessary to establish both the standard of care and Thrift’s deviation from that standard.

(R. 11-25). Without an expert, there is no testimony or evidence establishing Respondents' standard(s) of care, or that a breach of such standard(s) occurred.

Petitioner asserts this case does not require expert testimony, citing to *Seiler v. Levitz Furniture Co. of the Eastern Region, Inc.* and *Jaeger v. Henningson, Durham & Richardson, Inc.*, as proof. These cases are not persuasive. *Seiler* was premised upon Delaware law, which recognizes *res ipsa loquitur*. See Rule 304, Del. R. Evid. Of course, South Carolina does not recognize *res ipsa loquitur*. See *Eickhoff v. Beard-Laney, Inc.*, 199 S.C. 500, 500, 20 S.E.2d 153, 154 (1942). Here, Petitioner has failed to show any evidence Respondents had a duty based on common knowledge or that such duty was breached. Now on appeal, Petitioner is unable to make such allegations. *Jaeger* is also inapplicable. The court did not require expert testimony there because the duty was based on the terms of a contract, and when the party failed to satisfy the contract requirements, the breach was obvious. *Jaeger v. Henningson, Durham & Richardson, Inc.*, 714 Fed. R. Evid. Serv. 1960 (8th Cir. 1983). This is not the case here. Petitioner has never provided any evidence that Respondents had a duty, what the specific duty was, or that the duty was breached.

Nevertheless, the knowledge necessary to determine if there was a duty or breach in this case is beyond that of a layperson. Petitioner's allegations regard construction services and management, and compliance with industry standards, all of which fall outside the scope of common knowledge. Correspondingly, there is no testimony that, but for any such breach, the subject accident would not have occurred. The issues of law regarding the duty of Respondents and whether they breached their duty is outside the scope of knowledge of a layperson. Therefore, expert testimony is necessary, even with or without a stipulation by Petitioner. Ultimately, the record is devoid of any evidence to establish the essential elements of Petitioner's claims against

Respondents. *See Celotex Corv. Catrett*, 477 U.S. 317 (1986). Therefore, the Petitioner should be denied.

**CONCLUSION**

As discussed hereinabove, the issues raised in the Petition do not rise to the character of reasons justifying a writ of certiorari and are incorrect depictions of the underlying facts and law, therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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