THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

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CASE NO. 2014-CP-26-7790

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Richard Ciampanella ..... Respondent

vs.

City of Myrtle Beach ..... Appellant

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# FINAL BRIEF OF RESPONDENT

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II. Did the Circuit Court properly grant a new trial on negligent design and construction where there was sufficient evidence to show that Appellant created the hazardous condition by failing to design and construct the walkway in accordance with industry standards and practices?

III. Is an order granting or denying a motion for new trial appealable?

## STATEMENT OF THE CASE

Respondent, Richard Ciampanella, filed this lawsuit against the City of Myrtle Beach ("Appellant" or "City"), on November 20, 2014, after Ciampanella fell from a beach access walkover when the railing collapsed.[1] (Compl.) (R. p. 9) He suffered a transverse process fracture to his spine and accumulated $16,508.90 in medical expenses. (R. p. 70, lines 3-25.) Respondent's Complaint asserted that the City of Myrtle Beach, through its officers, agents, or employees, was negligent, reckless, and willful in one or more of the following:

(a) failing to properly construct the walkover;

(b) failing to properly maintain the walkover;

(c) failing to make sure the walkover railing would not fail;

(d) using improper nailing techniques on the walkover;

(e) failing to properly affix the railing to the walkover;

(f) nailing the railing to the outside of the post in violation of generally accepted construction practices;

(g) failing to inspect the boardwalk and railing on a regular basis to ensure that it was properly affixed;

(h) failing to warn the Respondent of the dangers of the railing on the boardwalk; and

(i) failing to take that degree of skill and care which a reasonable or prudent person would have done under the same or similar circumstances.

Respondent also asserted that his injuries were the direct and proximate result of the City's negligence. (Compl.) (R. p. 9).

[1] A "beach access walkover," or "walkover" is a bridge over a sand dune that allows access to the beach. *S.C. Dep't. of Health and Env't. Control*, Ocean and Coastal Res. Mgmt.

The City timely filed an Answer denying any wrongdoing and asserting that Ciampanella's claims were subject to the South Carolina Tort Claims Act and the South Carolina Recreational Use Statute. S.C. Code Ann. § 15-78-60(15); S.C. Code Ann. §§ 27-3-10, 27-3-70. (Answer) (R. p. 12).

The case proceeded to a jury trial before The Honorable Thomas A. Russo the week of January 23, 2017. At the close of Ciampanella's case, the City moved for a directed verdict. (R. p. 396, line 7). The trial court granted the City's motion as to liability under the South Carolina Tort Claims Act and the South Carolina Recreational Use Statute. S.C. Code Ann. § 15-78-60(15); S.C. Code Ann. §§ 27-3-10, 27-3-70. (Order Granting Directed Verdict) (R. p. 1).

On February 3, 2017, Ciampanella timely moved for a new trial under South Carolina Rule of Civil Procedure 59(a). (Respondent's Motion for New Trial and to Alter or Amend Judgment) (R. p. 19). After reviewing the transcript, briefs, and hearing oral arguments from counsel, the trial court granted Ciampanella's motion for a new trial on all causes of action related to the negligent design and construction of the walkover. (Order Granting New Trial) (R. p. 3). The trial court did not grant Ciampanella's motion for new trial on claims related to the maintenance, security, or supervision of the walkover, finding that the South Carolina Tort Claims Act precluded such claims. *Id.* The trial court also referenced its previous ruling, in which it granted partial summary judgment as to simple negligence under the South Carolina Recreational Use Statute. *Id.* However, the trial court did not grant summary judgment as to the City's gross negligence under the South Carolina Recreational Use Statute. *Id.*

The City moved for reconsideration on October 5, 2018. (Appellant's Motion for Reconsideration) (R. p. 28). The trial court denied the City's motion by Order entered on November 21, 2018. (Order Denying Reconsideration) (R. p. 6).

The City then served a Notice of Appeal on December 17, 2018, appealing the September 25, 2018, Order granting Respondent's motion for a new trial on negligent design and construction as well as the November 21, 2018, Order denying Appellant's motion for reconsideration. The City served its Initial Brief on May 9, 2019. (Appellant's Initial Brief.)

## STANDARD OF REVIEW

The grant or denial of a new trial motion rests within the sound discretion of the trial court, and its decision should not be disturbed on appeal unless the findings are wholly unsupported by the evidence, or the conclusions reached are controlled by an error of law. *Brinkley v. S.C. Dep't. of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). The reviewing Court should determine "whether evidence exists to support the trial court's order." *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267 (1990). In doing so, the Court should consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Brinkley*, 386 S.C. at 186, 687 S.E.2d at 56. The party challenging the trial court's ruling has the burden of showing abuse of discretion. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

## STATEMENT OF THE FACTS

Respondent, Richard Ciampanella, was a visitor to the City of Myrtle Beach in 2014 when he injured his back after the railing of a City-owned beach walkover collapsed.

Ciampanella decided to walk toward the beach and used the beach walkover to cross the dune. (R. p. 94, line 20--R. p. 95, line 7.) Once he was about halfway down the walkover, built and maintained by the City of Myrtle Beach, he leaned on the handrail. (R. p. 103, lines 15-25). The rail immediately gave way, causing Ciampanella to fall to the ground, fracturing his vertebrae upon impact. (R. p. 96, lines 13-15; p. 103, lines 19-25; p. 104, lines 1-2)). He incurred medical

expenses from treatment totaling $16,508.90 and sustained permanent injuries. (R. p. 105, lines 10-18.) Respondent filed this negligence action against the City of Myrtle Beach on November 20, 2014. (Compl.) (R. p. 9). At trial, the judge directed a verdict for the City. (Order Granting Directed Verdict) (R. p. 1). Respondent timely filed a Rule 59 Motion for New Trial and to Alter or Amend Judgment. After reviewing the transcript, briefs, and hearing oral arguments, the trial court granted Respondent's motion for new trial on September 25, 2018. (Order Granting New Trial) (R. p. 3). The City of Myrtle Beach then appealed the trial court's Order Granting New Trial and the trial court's Order denying reconsideration.

## ARGUMENT

Negligence is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person, under existing circumstances, would not have done." *Jones v. American Fidelity & Casualty Co.*, 210 S.C. 470, 481, 43 S.E.2d 355, 359 (1947). To determine whether certain conduct constitutes negligence, the Court should look to the circumstances of the particular case. *Jarvis v. Green*, 257 S.C. 558, 562, 186 S.E.2d 765, 767 (1972).

To prove negligence, the plaintiff must show: (i) a duty on the part of the defendant owed to the plaintiff; (ii) a breach of that duty by an affirmative act or omission; and (iii) the breach of duty was the proximate cause of the plaintiff's injury. *Sherrill v. Southern Bell Tel. & Tel. Co.*, 260 S.C. 494, 499, 197 S.E.2d 283, 285 (1973). Here, the trial court properly granted a new trial on all causes of action related to the negligent design and construction of the walkover. (Order Granting New Trial) (R. p. 3). Although the trial court found the South Carolina Recreational Use Statute applicable to this case, that statute does not limit a landowner's liability for grossly negligent,

willful, or malicious failure to guard or warn against a dangerous condition or structure. S.C. Code Ann. § 27-3-60(15).

Gross negligence is "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 571, 780 S.E.2d 252, 258 (2015). Gross negligence has also been defined as the absence of care that is necessary under the circumstances. *Id.* Determining gross negligence is a mixed question of law and fact and is an issue that is best resolved by the jury. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). Only when the evidence supports but one reasonable inference does the question become a matter of law for the Court. *Id.* In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. *Id.*

## I. THE TRIAL COURT PROPERLY RELIED ON *CREECH V. S.C. WILDLIFE MARINE RES. DEP'T.*, IN GRANTING A NEW TRIAL.

Appellant has yet to address *Creech v. S.C. Wildlife and Marine Res. Dep't.*, 328 S.C. 24, 491 S.E.2d 571 (1997), which the trial court below, in its Order Granting New Trial, specifically referenced as authority for its decision. *Creech* is strikingly similar to the present case in that both involve the negligent design and construction of railings.

In *Creech*, the plaintiff was injured after she fell off a public boat dock at Steamboat Landing in Charleston County. *Id.* at 27, 491 S.E.2d at 572. The dock had a railing on only one side, and Creech fell off the other side that did not have a railing. *Id.* The jury returned a verdict for Creech, finding her 49% negligent, the County 16% negligent, and the Wildlife Department 35% negligent. *Id.* at 28, 491 S.E.2d at 572-73. The court affirmed the verdict, holding: "In short, based on the evidence, the jury reasonably could have inferred that Wildlife Department was negligent in its design and construction of Steamboat Landing." *Id.* at 34, 491 S.E.2d at 576.

Much like *Creech*, Ciampanella did nothing wrong to cause his injuries. He was walking along the walkway and stopped to watch the sunset. As soon as he leaned against the railing it collapsed, causing him to fall to the ground and fracture his vertebrae. Just as the court found in *Creech*, a jury could reasonably find that the City was negligent in the design and construction of the beach access walkover.[2] Therefore, the trial court properly relied on *Creech* in granting Respondent's motion for new trial.

Appellant not only fails to address *Creech*, but also mistakenly argues the following cases are analogous to the present case: (i) *Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002); (ii) *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010); and (iii) *Gilliand v. Elmwood Properties*, 301 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010). For the reasons stated below, the cases Appellant relies on are distinguishable and should not control this case.

First, Appellant argues that *Tommy L. Griffin Plumbing,* 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002), is similar to the case now before the Court. That case, however, is distinguishable. In *Tommy L. Griffin Plumbing*, the Court of Appeals found the plaintiff, Griffin, failed to timely present any expert affidavits or other sworn testimony, and failed to properly move the court for additional time to supply affidavits. *Id.* at 473, 507 S.E.2d at 204. The court, therefore, found that the record contained no expert testimony. *Id.*

On the other hand, in this case, Respondent has offered, and the trial court qualified Campbell as an expert witness. Campbell's detailed testimony more than establishes the standard of care the City owed to Respondent. Campbell's testimony shows the accepted construction practices

[2] The present case is stronger than *Creech* in that the City has not argued Ciampanella is contributorily negligent.

in the area, and thus allows the jury to compare the City's actions with that of a similarly situated municipality to determine if the City was negligent.

Second, Appellant erroneously argues that *Nelson,* 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), is analogous to the present case. In *Nelson*, while in the parking lot of Piggly Wiggly, the respondent accidentally stepped on the accelerator of her vehicle and pinned her granddaughter between the vehicle and the outside-wall of Piggly Wiggly. *Id.* at 386. The issue involved the appropriate safety and building standards for cement car-stops. *Id.* Piggly Wiggly had an older model car-stop and a newer model car-stop in use at the time of the accident. *Id.* The plaintiff's expert in *Nelson* did not conduct any tests and could not give an opinion about whether the newer car-stop design would have prevented the injury. *Id.* The court in *Nelson* also found that the cause of the accident was the respondent's operation of the vehicle, not the use of cement stops. *Id.* at 394.

Here, on the other hand, Respondent's expert did not simply offer his own preferences for the standard of care. As listed below, he pointed to specific building codes, industry standards, and industry practices the City violated. Additionally, unlike in *Nelson*, there was no intervening third-party that caused Ciampanella's injuries.

Lastly, Appellant cites *Gilliand v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990) to support their position. In *Gilliand*, just as in *Tommy L. Plumbing*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002), the complainant offered no evidence or testimony from an expert. Here, Campbell exhaustively detailed the industry standards and codes and has established that the City breached its standard of care by constructing the walkover in violation of those industry standards, practices, and building codes.

Ultimately, the trial court properly relied on *Creech* in its Order Granting New Trial, and the cases cited by Appellant should not control this case. Respondent testified to the City's standard of care and the City's breach thereof. As a result, the grant of a new trial was not an abuse of the trial court's discretion, and the issues on appeal are best left to the jury.

## II. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL AS THERE WAS SUFFICIENT EVIDENCE ESTABLISHING THE STANDARD OF CARE APPELLANT OWED TO RESPONDENT.

### A. NOTICE

It is well-settled law in South Carolina that notice is never required if the defendant's employees create a hazardous condition. See *Cook v. Food Lion*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997), *cert. denied* (1998) (finding that a customer need not show the store had notice of the danger created by the mats because store employees created the allegedly dangerous condition by placing the mats in the exit doors). Respondent's claim is not a slip and fall but is based on the City's employees negligent design and construction of the walkover. Because the City installed or built the walkover, there is no issue of actual notice. See *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990).

While Respondent submits that actual notice is not required because the City built the walkover, Respondent's expert and his testimony more than meet the standard of actual notice. The decisions of the Supreme Court and the Court of Appeals have reiterated that the plaintiff may prove actual notice by the factual circumstances of the case. See *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998) (explaining that actual notice may be inferred by the factual circumstances of the case); See also *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991) (finding that the City had constructive notice of a fallen

barricade because the City placed the barricade at the accident site and occasionally assumed the duty of maintaining the barricade).

Constructive notice arises when a condition has existed for a length of time that a municipality, in the use of reasonable care, should have discovered the condition. *Major v. City of Hartsville*, 410 S.C. 1, 4, 763 S.E.2d 348 (2014). For instance, in *Major*, the plaintiff injured her ankle when she stepped into a rut while walking across an unpaved intersection owned and maintained by the defendant. *Id.* at 2. The court found that a genuine issue of material fact existed as to whether the defendant had been put on constructive notice because the rut had existed for such a period of time that the city, in the use of reasonable care, should have discovered the defect. *Id.* at 4; See also *Pickney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992) (holding that defendant was not entitled to a directed verdict where a jury might have inferred defendant had knowledge of the hazard created by the recurring condition.)

Here, Respondent's expert, Alan Campbell, offered significant testimony that the City created the hazard by using the wrong size and type of fastener for the construction of a public beach access walkover. (R. p. 314, lines 1-25; p. 315, lines 1-25; p. 316, lines 1-5). Campbell testified that the fasteners the City used are not recommended by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (OCRM). (R. p. 315, lines 10-22). The OCRM recommends half-inch diameter bolts for handrails, but the City used number 9 screws which are three-sixteenths of an inch in diameter. (R. p. 315, lines 10-14.) He testified that number 9 screws are not within industry standards because the screws are too small in diameter and corrode too easily. (R. p. 317, lines 7-13.) Moreover, the City's employees knew of the construction defects due to the use of number 9 screws because many of the other walkover railings had collapsed and needed repair. (R. p. 331, lines 6-19.)

Further evidence of the City's actual knowledge of the hazardous condition is found in the City's failure to construct the walkover in accordance with: (i) the Beach Management Act;[3] (ii) the Dune Walkover Guidelines;[4] (iii) the South Carolina Guide to Beachfront Property;[5] (iv) the Coastal Construction Manual;[6] and (v) standard building codes for constructing beach walkover accesses.[7]

In sum, because the City's employees built the walkover in violation of generally accepted industry standards and codes, thereby creating the hazardous condition, and City employees were aware of previous failures in the railing system, there is no issue of actual notice.

**B. STANDARD OF CARE**

Appellant next asserts that Respondent failed to present evidence of the City's standard of care, arguing Respondent did not identify the particular design or building code in effect at the time of construction of the walkover. However, "South Carolina law clearly allows industry standards to play an important role when formulating a party's standard of care." See *Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 U.S. Dist. LEXIS 3732, 2019 WL 142303 (D.S.C. 2019) (stating, "[m]ost importantly, the South Carolina Supreme Court does not require a party to explicitly adopt industry standards in order for them to be relevant and admissible in a negligence case.")

Here, Respondent has offered, and the trial court qualified as an expert, Alan Campbell, a professional engineer from Charleston, South Carolina, who has significant experience in the construction industry, and importantly, in building beach walkovers in the coastal region of South Carolina. (R. p. 252, lines 2-4.) Campbell's testimony is significant to the negligent design and

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[3] Exhibit 17: The City adopted by resolution the South Carolina Beachfront Management Act on October 23, 2012. In that document the City acknowledged it was responsible for the beach walkover access (R, p. 468); the life of a beach walkover access is 15 years, and 40 beach walkovers, including the one that failed in this case, needed to be replaced according to a 2010 study. ( R. p. 517).

[4] (Exhibit 18) (R. p. 563).

[5] (Exhibit 30) (R. p. 648).

[6] (Exhibit 28) (R. p. 616).

[7] (See Exhibit 26, International Property Maintenance Code (R. p. 581); Exhibit 34, Standard Building Code (R. p. 681); and Exhibit 35 International Building Code (R. p. 685)).

construction of the walkover, as well as to establishing the industry standards, practices, and building codes. He testified as follows:

- Defendant's employees used the incorrect screws in the construction of the walkover. (R p. 314, line 25--p. 315, line 14.) A number 9 screw is not to be used because it corrodes easily and after seven years corrodes by a factor of 50 each year thereafter. (Exhibit 19) (R. p. 564). (R. p. 273, lines 16-22); (R p. 330, line 11—p. 331, line 11.)
- The City violated the 2012 International Property Maintenance Code (Exhibit 26) (R. p. 581), which requires the City to maintain the walkover in good repair and ensure the walkover is structurally sound and sanitary so as to not pose a threat to the public health, safety, or welfare. (R. p. 271, lines 7—p. 272, line 1.)
- The City violated the 1994 Standard Building Code (Exhibit 34) (R. p. 681), and the 2000 International Building Code (Exhibit 35) (R. p. 685), all of which the City of Myrtle Beach adopted. (R. p. 281, line 12—p. 283, line 11.)
- The City's employees knew of the design/construction problems with using the number 9 screws because many of the other beach walkover accesses had rusted screws and there were failures throughout the system. (R. p. 331, lines 6-19); (R. p. 274, lines 1-12.)
- The Beach Management Act (Exhibit 32) (R. p. 673) recommends a bolt-through style construction and not the use of screws in handrails. (R. p. 265, lines 8-20.) See Exhibit 18 (R. p. 563) (Dune Walkover Guidelines) and Exhibit 17 ) (R. p. 455) (Beach Management Act.)

- Exhibit 29 (R. p. 629), Dune Walkover Guidance, provides industry standards regarding corrosion, maintenance, safety, and construction. (R. p. 276, lines 6-11.)
- The method of construction by City employees violated the Dune Walkover Guidelines (Exhibit 18) (R. p. 563), which requires all beach walkover accesses to be built in accordance with the International Building Code. (R. p. 276, line 19—p. 277, line 6.); (R. p. 281, lines 15-20.); (R. p. 365, lines 22-25.)
- Campbell testified that standard building codes regarding how railings are to be built have not changed since the 1980s. (R. p. 277, lines 19-23.)
- Campbell testified that the 200-pound load requirement has been the industry standard as long as he has been a practicing engineer. (R. p. 277, line 24—p. 278, line 2.)
- Sand Dune Management (Exhibit 24) (R. p. 565) has a schematic detailing the proper construction of beach walkovers and requires bolts in the handrails. (R. p. 263, line 11—p. 265, line 20.)
- Campbell testified that Exhibit 32 (R. p. 673) details how the railing was to be built with bolt-through construction. (R. p. 265, lines 14-20.)
- The pictures offered into evidence (Exhibits 3-14) (R. pp. 442--453) show severely rusted screws which were not of the correct diameter when installed. (R. p. 331, line 20—p. 332, line 15.) The same photographs also show that the City failed to secure the side railing with enough screws.
- Campbell testified the City's employees' method of testing the railings for strength did not meet the Standard Building Code. City employees merely pushed on the

railing as they walked through during their inspections, which they conducted in seconds. (R. p. 332, line 19—p. 335, line 7.)

- Campbell testified the number 9 screws were not appropriate for this use, and as a result, a fastener failure occurred. (R. p. 317, lines 14-25—p. 318, lines 1-24.)
- Campbell testified the City did not build the beach walkover access railings in compliance with the 200 lb. concentrated force requirement as required for all railings. (R. p. 269, lines 6-10.); (R. p. 301, lines 18-25—p. 302, lines 1-10); (R. p. 335, line 21—p. 336, line 1.)
- Campbell testified the City did not construct the guardrails consistent with industry standards. (R. p. 327, lines 16-25—p. 328, lines 1-2.)
- Campbell testified that City employees failed to adopt representative testing of the railing to make sure they would withstand a 200 lb. concentrated force. (R. p. 336, lines 8-20.)
- Campbell testified that the railing would have only held thirty to forty pounds. (R p. 336, line 15-20.)
- Campbell testified that Respondent was injured as a result of corrosion-failure due to the use of incorrect screws, along with withdrawal failure. (R. p. 269, lines 6-10.)
- Campbell testified that Exhibit 2 (large photograph filed with Court) shows the City had lag bolts, but only used them to secure the stringers along the bottom and not the railings. The proper construction would have had lag bolts in the railings. (R. p. 374, lines 16-23.)

- On cross-examination, Campbell reiterated the City was aware of and knew about the condition by constructing the beach walkover access in violation of the Standard Building Code, the International Building Code, and the International Property Maintenance Code. (R. p. 361, lines 10-13.); (R. p. 365, lines 5-13.); (R. p. 367, line 11—p. 371, line 18.)

The record does not support Appellant's contention that Campbell's testimony was based on mere guesswork and does not establish the standard of care. Campbell's 30-year career in the construction industry provides a substantial basis for determining the generally recognized and accepted practices in the profession. See *City of York v. Turner-Murphy Co.*, 317 S.C. 194, 452 S.E.2d 615 (1994) (stating that expert testimony is typically needed to establish the "generally recognized and accepted practices in the profession").

Even if this Court finds that Campbell's testimony did not identify the particular design or building code, the South Carolina Supreme Court has further held that evidence of industry safety standards can establish the appropriate standard of care. *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 181, 573 S.E.2d 789, 790 (2002). The use of the appropriate fasteners in constructing a railing system on a public walkover is without a doubt an industry safety standard. (R. p. 335, lines 8-9.)

In *Elledge,* the Supreme Court of South Carolina explained: "the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case." *Id.* In reaching its decision, the court cited:

> *McComish v. DeSoi*, 42 N.J. 274, 200 A.2d 116, 120-21 (N.J. 1964) (holding that construction safety manuals and codes were properly admitted as objective standards of safe construction); *Walheim v. Kirkpatrick*, 305 Pa. Super. 590, 451 A.2d 1033, 1034-35 (Pa. Super. 1982) (holding that safety standards regarding the safe design and use of trampolines, including ASTM standards, were admissible on the issue of the defendants' negligence, even though the defendants were unaware of the standards);

> *Stone v. United Eng'g*, 197 W. Va. 347, 475 S.E.2d 439, 453-55 (W. Va. 1996) (no error to admit evidence of safety standards for the design and guarding of conveyors even though the standards had not been imposed by statute and did not have "the force of law"); This kind of evidence is admitted not because it has "the force of law," but rather as "illustrative evidence of safety practices or rules generally prevailing in the industry." *McComish v. DeSoi*, 200 A.2d at 121.

*Elledge,* 352 at 186, 573 S.E.2d at 793. (emphasis added).

Campbell's testimony more than identifies the safety practices and rules generally prevailing in the industry, which the South Carolina Supreme Court held are relevant to establishing the standard of care.

Likewise, in *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016), the court held that the standard of care may be established "by looking to . . . administrative regulations, industry standards, or a defendant's own policies and guidelines." See *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) (noting that internal policies or self-imposed rules are often relevant to the failure to exercise due care). See also *Wooten by Wooten v. SCDOT*, 326, S.C. 516, 485 S.E.2d 119 (Ct. App. 1997), *aff'd,* 333 S.C. 464, 511 S.E.2d (1999) (concluding that whether DOT complied with its design guidelines or any other appropriate professional standard is at best a jury issue).

Here, the City had a duty to construct the walkover in accordance with accepted industry standards, practices, and building codes. As stated above, the Respondent's expert testified that the City failed to do so.[8] Not only did the City use the wrong type of fastener, but also, they used the incorrect size of fastener. (R. p. 319, lines 20-25); (R. p. 314, line 25—p. 315, line 14.) It is also common knowledge in the industry that South Carolina's coastal region is a harsh salt-water

[8] Respondent's expert testified that number nine screws are "not recommended. You should use something much larger in diameter with a heavier galvanized coating." (R. p. 319, lines 20-22.)

environment, which makes it crucial to determine the appropriate metal fasteners for designing and building exterior structures, let alone a public beach walkover.

In sum, Appellant argues that Respondent must point to a particular design or building code to establish the appropriate standard of care, yet the South Carolina Supreme Court has repeatedly held that industry safety standards and the "generally recognized and accepted practices" in the industry can establish the standard of care. *City of York,* 317 S.C. 194, 196, 452 S.E.2d 615, 617 (1994). Campbell's expertise and years of experience in the construction industry form a strong basis for establishing the industry standards and practices. Had the City constructed the walkover in compliance with industry standards, Ciampanella would not have suffered permanent injuries. (R. p. 319, lines 14-24.)

**C. BREACH**

Lastly, Appellant argues that there was no breach of the standard of care owed to Respondent even though the City constructed the walkover in violation of industry standards, practices, and building codes.

As stated above, gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). "[A]lthough the [C]ourt is tasked with determining a party's legal duty, the jury, as the fact-finder, is tasked with determining whether that duty, which may incorporate industry standards, has been breached." *Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 U.S. Dist. LEXIS 3732, 2019 WL 142303 (D.S.C. 2019).

Here, Respondent established the standard of care the City owed to Respondent, as well as the City's breach thereof. Respondent's expert, a licensed professional engineer for nearly thirty years, stated the following in his affidavit:

> It is my opinion to a reasonable degree of engineering certainty that the failure to maintain or construct the walkover according to the applicable building code is gross negligence. . . . The photograph of the railing after the accident and of the detail by which the railing was built shows a conscious failure of City employees to construct the railing on the walkover in a workmanlike fashion.

(Aff. of Alan O. Campbell, ¶ 4) (R. pp. 811-813). Further, as listed above, Campbell testified that the use of number 9 screws in the construction of a public beach access was not within industry standards. (R. p. 273, lines 16-22.) He further testified that the City constructed the walkover in violation of numerous other codes and industry standards.

In light of the case law and evidence offered by Respondent, and after reviewing the briefs and hearing oral arguments, the trial court properly found the evidence supports more than one reasonable inference as to the City's negligent design and construction of the walkover. (Order Granting New Trial) (R. p. 3).

### 1. A NUMBER 9 SCREW IS NOT TO BE USED FOR CONSTRUCTING A WALKOVER.

In arguing there was no breach, Appellant first asserts Respondent's expert acknowledged that the use of number 9 screws was appropriate for the construction of the walkover. Appellant points to a select portion of the transcript in which Campbell states that a number 9, 10, or 12 screw may be suitable "as long as [the City] inspect[s] and maintain[s] it properly, which they absolutely did not." (R. p. 375, lines 9-16.) This, however, was not an acknowledgment of the appropriateness of the screws for construction, as the City contends; instead, it highlights the City's negligence in the design and construction of the walkover.

When designing an exterior structure, such as a public walkover at a beach access, the type of fastener used is vital to the structural integrity of the walkover. Campbell's testimony shows precisely why the use of number 9 screws is not an industry standard in the construction of exterior walkovers; it is not practical, safe, or economically efficient. If the City must continually inspect

and repair each walkover it owns because it used number 9 screws, the burden on the City would be great. On the other hand, if the City used the appropriate size and type of fastener, it would eliminate defects and increase safety. In fact, the City had the recommended lag bolts and used them in the stringers of the walkover but failed to fasten the guardrails with them. (R. p. 374, lines 16-25—p. 375, line 1.) The City's desire to save time or money during construction should not come at the cost of putting the public in harm's way.

At bottom, this decision was for the jury and could not be declared as a matter of law by the trial court. The trial court properly realized this by granting Respondent's motion for new trial.

### 2. THE RAILING DID NOT MEET THE 200-POUND CONCENTRATED FORCE INDUSTRY STANDARD.

Appellant's next argument challenging the railings ability to withstand 200 pounds of concentrated force is also unavailing. As stated above, Campbell testified that the 200-pound load requirement for guardrails has been the industry standard for nearly 30 years. (R. p. 277, line 19—p. 278, line 2.) He further testified that the railing would only support between zero and thirty pounds of sideways force. (R. p. 279, lines, 3-24.) It is true, however, that Campbell did state three screws could be enough to reach the 200-pound requirement on day one. (R. p. 381, lines 20-24.) That said, when designing an exterior structure, the City must consider additional factors. For example, (i) the quality of the materials, (ii) the durability of the materials, (iii) the life expectancy of the materials, and (iv) economics and labor costs, all need to be considered in order to ensure compliance with industry standards.[9] (R. p. 353, line 16-23.)

The use of fasteners that deteriorate easily and are too small may give support for a short amount of time, but designing a public walkover with such inadequate fasteners is not within

[9] Campbell explained: "So build it one time and make it last, as opposed to having it break down more frequently to have twice as much labor, twice as much expense, and twice as many failures." (R. p. 353, lines 20-23.)

industry standards and is a grossly negligent design failure. (Aff. of Alan O. Campbell, ¶ 4) (R. pp. 811-813). Further, this walkover access was at the end of its life. (Exhibit 17) (R. p. 517). Even if the railing would hold the required weight on day one, the City still failed to construct the walkover in accordance with industry standards and building codes, which caused the railing to fail when Ciampanella leaned against it.

### 3. THE NAILS IN THE RAILING WERE NOT INSTALLED DURING THE ORIGINAL CONSTRUCTION OF THE WALKOVER.

Appellant's final argument concerning the number of nails fastening the railing together must also fail. What Appellant overlooks is at what point the City added the additional fasteners to the railing. Campbell's testimony, cited by Appellant in his initial brief, is based on photographs taken after the accident. (Appellant's Initial Brief, p. 9.) The only thing that Campbell's testimony reveals (on this particular point) is that if all the screws and nails Appellant references were installed on day one, then the railing may have been able to withstand the 200-pound requirement, but the evidence provides otherwise.

For example, the City added fasteners to the walkover which can be found in the Culture and Leisure Work Orders (Exhibit 19) (R. p. 564) and which shows that the railings at 77th Avenue North were repaired again on two other occasions.

In short, Campbell did not admit the railing could withstand more than 200 pounds on the day it was constructed. The work reports show that in only two years, the rails of the walkover were refastened with the improper screws or nails several times. The City did not use the additional fasteners in the original construction of the walkover. As a result, Appellant's argument must fail. Again, this shows the City's negligent design in using fasteners that deteriorate so quickly. If the City had constructed the guardrail using the recommended lag bolts, rather than using the improper screws, Ciampanella would not have suffered permanent injuries.

## III. THE APPEAL OF A NEW TRIAL ORDER IS PERMITTED BUT SHOULD BE LIMITED TO WHETHER THERE WAS ANY EVIDENCE FROM WHICH THE JURY MIGHT HAVE REASONABLY FOUND THE APPELLANT WAS NEGLIGENT.

The law in South Carolina on the appealability of the granting of a new trial is summarized by Wallace K. Lightsey in South Carolina Jurisprudence, Appeal, and Error, §26(e), as follows:

> Section 14-3-330 of the South Carolina Code explicitly allows direct appeal of "[a]n order affecting a substantial right made in an action when such order . . . grants or refuses a new trial." Nevertheless, because of the constitutional and statutory restriction of the appellate jurisdiction in law cases to "correction of errors of law," a party may appeal an order granting or refusing a new trial only when the trial court's decision is based upon a principle of law. Thus, an appeal does not lie from a decision predicated on the trial court's determination as to whether the verdict is excessive or inadequate, whether the parties received a fair trial, or whether the jury understood the issues in the case. Moreover, if the trial court's decision involves questions of law and fact, it is unappealable. [citations omitted.]

Further, the court in *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976), explained the law: "An order granting a new trial on factual grounds is not appealable. But the question of existence or nonexistence of evidence is one of law; and to that extent such an order is subject to [this Court's review]." Thus, while an appeal of the trial court's Order is permitted, it should only be disturbed if this Court finds there was no evidence from which the jury might have reasonably inferred that Appellant was negligent in the design and construction of the walkover. *Id.*

Here, the trial judge's decision to grant a new trial was predicated on the testimony of the experts regarding the negligent design and construction of the beach walkover. The trial court in its Order Denying Defendant's Motion for Reconsideration found the effective date of the various building codes as well as the testimony of the expert witness on the appropriateness of the type and number of screws used to be factual issues for the jury. The trial judge's order involves questions of law and fact. Thus, this Court should not disturb the trial court's order granting a new trial.

## CONCLUSION

For the reasons stated above, this Court should affirm the trial court's order granting a new trial.

Respectfully submitted,

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**Attorneys for Respondent**

December 5, 2019

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

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CASE NO. 2014-CP-26-7790

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Richard Ciampanella ..... Respondent

vs.

City of Myrtle Beach ..... Appellant

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**CERTIFICATE OF COUNSEL**

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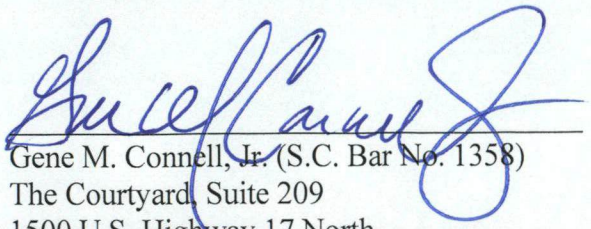
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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