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**Mar 17 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

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Appellate Case No. 2018-002270  
Case No. 2014-CP-26-07790

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Richard Ciampanella, .....Respondent,

v.

City of Myrtle Beach, .....Appellant.

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**Appellant City of Myrtle Beach's Petition for Rehearing**

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## Introduction

Pursuant to Rule 221(a) of the South Carolina Rules of Civil Procedure, Appellant City of Myrtle Beach (“the City”) petitions for a rehearing of this Court’s opinion affirming the circuit court’s order, which granted Respondent a new trial on the issue of whether the City was grossly negligent in designing and constructing a walkover to the beach. The City respectfully submits the Court of Appeals overlooked or misapprehended the distinction between simple negligence and gross negligence. The City further respectfully submits the Court of Appeals overlooked or misapprehended the distinction between testimony establishing the *construction and/or design* of the walkway and testimony establishing the *maintenance* of the walkway. Finally, the City respectfully submits that viewed in the light most favorable to Respondent, no evidence established (1) the City was grossly negligent in designing or constructing the walkover or (2) an industry standard of care for the design and/or construction of the walkover at the time the walkover was built.

Based on the foregoing, the City requests this Court alter or amend its opinion to reverse the circuit court’s order granting Respondent a new trial. Alternately, the City requests this Court amend its opinion to omit references to the International Property Maintenance Code, as the admission of this code at a subsequent trial on the issue of whether the City was grossly negligent in designing and constructing the walkover will only serve to confuse the jury.<sup>1</sup> See Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

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<sup>1</sup> The City is cognizant that it can move to exclude such evidence at the new trial based on Rule 403, SCRE, or other grounds. As a practical matter, however, the City is concerned that the circuit court may feel constrained by this Court’s opinion citing to and relying on the maintenance code, which may preclude any meaningful analysis of whether such evidence should be admissible in a subsequent trial related only to construction and design.

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

### Argument

#### **I. The Court of Appeals overlooked or misapprehended the distinction between negligence and gross negligence.**

The trial judge granted the City’s motion for directed verdict on several grounds, including a lack of evidence establishing liability under section 15-78-60(16)<sup>2</sup> of the South Carolina Tort Claims Act and under the South Carolina Recreational Use Statute (“RUS”). (**R. 415, 419-421, 424-426, 428-429, 432**). The trial court subsequently granted Respondent’s new trial motion only in part on the causes of action related to negligent design and/or construction. The trial court specifically denied Respondent’s motion for a new trial as to any causes of action related to maintenance, security, or supervision of the walkover and reaffirmed its prior ruling that such claims are precluded by §15-78-60(16) due to lack of evidence of actual notice. The trial court further reaffirmed its prior ruling finding the RUS applies and granting a directed verdict on Respondent’s simple negligence cause of action pursuant to the RUS, leaving only Respondent’s claim for gross negligence to survive. The trial court specifically rules that “issues related to the City’s inspection schedule, inspection methodology, and claims related to the adequacy of the City’s preventative and corrective maintenance subsequent to original construction shall not be addressed during the new trial.” (**R. 3-4**) (emphasis in original). Accordingly, the narrow issue presented by this appeal is whether Respondent submitted sufficient evidence for a jury to find the

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<sup>2</sup> S.C. Code Ann. §15-78-60(16) provides that a governmental entity is not liable for loss resulting from “maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition.”

City was *grossly* negligent in designing and/or constructing the walkover.<sup>3</sup> Respectfully, the Court of Appeals overlooked or misapprehended the distinction between negligence and gross negligence.

“Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care.” Clyburn v. Sumter Cty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). “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.” Id. “Gross negligence ordinarily is a mixed question of law and fact.” Id. “When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court.” Id. at 53, 451 S.E.2d 887-88 (1994).

Although the Court of Appeals used the term *gross negligence* and cited to law regarding gross negligence, it actually applied a simple negligence standard in its opinion. As discussed more fully below, Respondent failed to submit evidence from which a jury could find the City *intentionally, consciously* failed to do something it should have done or did something *intentionally* that it should not have done. See id. Respondent likewise did not submit evidence from which a jury could find the City failed to exercise slight care in *designing and constructing* the walkover. In fact, Respondent’s own expert acknowledged the walkover, as constructed, would have withstood the load capacity he testified was necessary at the time it was constructed. He further testified the galvanized fasteners used by the City would have lasted seven years before

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<sup>3</sup> Respondent did not appeal the circuit court’s denial of his motion for a new trial on claims of negligent maintenance, security, or supervision of the walkover. Respondent likewise did not appeal the circuit court’s partial grant of summary judgment to the City on his claims related to simple negligence. These unappealed rulings thus are law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”).

beginning to corrode. The City's construction of a walkover in a manner that would withstand the requisite force and using screws that would last at least seven years cannot amount to *gross* negligence. The fact Respondent's expert opined the walkover could have been built better is not evidence of gross negligence. See Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (holding fact school could have done more or better did not negate fact it exercised slight care with regard to preventing violence). There is no evidence the City failed to do something it ought to do—Campbell testified the railing needed to withstand 200 lb. of concentrated force when constructed and also testified that the railing was in fact designed and constructed to meet this standard. (**R. 375, 381-383**). Thus, although the Court of Appeals used the term gross negligence, it overlooked and/or misapprehended the distinction between gross negligence and simple negligence and instead applied a simple negligence standard.

**II. The Court of Appeals overlooked or misapprehended the distinction between testimony establishing the *construction and/or design* of the walkover and testimony establishing the *maintenance and/or inspection* of the walkover.**

At trial, Respondent's theory of negligent design and/or construction relied on the City's use of number 9 screws rather than lag bolts to construct the walkover railing. To support this theory, Respondent presented expert testimony from Alan Campbell, an engineer.

In finding some evidence of gross negligence, the Court of Appeals relied on Campbell's testimony that (1) guidelines from the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management (OCRM) recommended half-inch bolts rather than number 9 screws, (2) "handrails must be designed to be able to withstand a concentrated load of 200 pounds," whereas Campbell opined Respondent would have exerted only 30 to 40 pounds of force when he leaned on the railing, and (3) the use of half-inch lag bolts was preferable for constructing a walkover. In relying on this evidence, however, the Court of Appeals

misapprehended and/or overlooked the distinction between negligent design and/or construction and negligent maintenance and/or inspection.<sup>4</sup>

Viewed in context, Campbell's testimony does not support an inference that the City was grossly negligent in using number 9 screws to design or construct the walkover. See Jackson v. S.C. Dep't of Corr., 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) ("A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing."); id. at 126-27, 390 S.E.2d at 468 ("Gross negligence involves a conscious failure to exercise due care."). Although Campbell testified OCRM recommended half-inch lag bolts for construction, he acknowledged OCRM did not mandate the use of half-inch lag bolts. **(R. 350)**. As the Court of Appeals noted, Campbell testified a person designing and/or constructing a walkover could "make modifications as long as they satisfy building code requirements, industry standards[,] and construction guidelines." Based on the foregoing, the use of number 9 screws rather than lag bolts did not in and of itself establish gross negligence.

In relying on Campbell's testimony regarding the use of screws rather than lag bolts as evidence of negligent design and/or construction, the Court of Appeals conflated testimony about design and/or construction with testimony about maintenance and/or inspection. Campbell opined the railing ultimately failed because the screws were "so badly corroded, they could not carry any . . . sizable load." **(R. 269)**. He explained the walkover "was damaged by corrosion over a long and extended period of time," and the City did not have an appropriate maintenance schedule. **(R.**

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<sup>4</sup> The City understands the unique posture this case presents given the trial court's unappealed ruling limiting the issues on retrial to only whether the walkover was designed and/or constructed in a grossly negligent manner. This limitation is precisely why the Court must closely scrutinize Campbell's opinions to determine if they relate to construction/design or maintenance/inspection. When the rationale for Campbell's opinions is properly considered, at their core, all Campbell's opinions relate to the increased maintenance he opines accompanies the use of screws rather than lag bolts—that is the sole reason he takes issue with screws.

269, 362). Importantly, Campbell testified the galvanized screws the City used “could have worked” **with more maintenance**. (R. 302, 317, 319-20). According to Campbell, the use of lag bolts instead of screws “probably would greatly have extended that maintenance schedule to make everything last a lot longer.” (R. 342-343). In context, Campbell’s testimony established number 9 screws could in fact be used to construct a walkover if the walkover was properly maintained. Campbell’s testimony further established the primary issue that led to the corrosion was the City’s maintenance schedule, which Campbell classified as inadequate. (R. 333, 357).

Campbell’s statement that corrosion on the screws showed “an absence of proper maintenance and absence of good construction” is not sufficient, when viewed in context, to support a finding of gross negligence as to the City’s construction and/or design. In relying on this statement as evidence of *gross* negligence, the Court of Appeals overlooked Campbell’s testimony indicating the walkover, as constructed, was actually adequate. Pertinently, Campbell testified the galvanized coating on the number 9 screws would last approximately seven years near the ocean. (R. 302, 317, 319-20). The only reasonable inference from this testimony is that the railing would have lasted at least seven years before it began to corrode. This inference coupled with Campbell’s testimony that there are levels of acceptable construction practices does not support a finding that the City was *grossly* negligent—i.e. so indifferent as to not give slight care—in using number 9 screws rather than bolts in designing and constructing the walkover. See Bass v. S.C. Dep’t of Soc. Servs, 414 S.C. 558, 571, 780 S.E.2d 252, 258-59 (2015) (“Normally, the question of what activity constitutes gross negligence is a mixed question of law and fact. However, ‘when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.’” (quoting Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000))).

Likewise, in relying on a standard from the International Property Maintenance Code (“Maintenance Code”), the Court of Appeals overlooked the fact it is a *maintenance* code—not a building or construction code. Campbell explained the Maintenance Code is “a document for, basically maintenance and repair because *the International Building Code is a design document . . . .* But [the Maintenance Code] is more addressed towards repair, maintenance, and to a certain extent, life safety . . . .” **(R. 324, emphasis added)**. The Maintenance Code, when setting forth unsafe conditions that should be repaired or replaced, cites to the International Building Code and the International Existing Building Code as references for construction standards—further showing the Maintenance Code is not a building or construction code. See Section 301.1.1. In relying on the Maintenance Code to set forth a standard, the Court of Appeals overlooked the fact that the narrow issue presented here is the design and construction of the walkover—not the maintenance or inspection of it.

Further, in finding “Campbell opined the City did not construct the walkover with the ability to withstand a 200 pound force,” the Court of Appeals overlooked the numerous instances wherein Campbell in fact admitted the walkover, as constructed, actually *did* meet the 200 pound load requirement.<sup>5</sup> For example, when asked on direct examination whether the railing was built to withstand a 200-pound force, Campbell responded, “I think [the City’s counsel], giving him the benefit of the doubt, brought up an issue with the fasteners through the two boards. So if . . . the fasteners went through the two boards, it would have satisfied that.”<sup>6</sup> **(R. 345-46)**. Although

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<sup>5</sup> When Campbell opined the railing “absolutely did not” have the ability to withstand a 200-pound limit, he was specifically asked about its load capacity on August 19, 2014, not at the time of construction. **(R. 335-336)**.

<sup>6</sup> In challenging a mock-up of a rail Campbell had constructed (which the court did not allow into evidence), counsel for the City had previously questioned Campbell about whether nail holes in a picture of the rail indicated a second board had been attached to the rail; Campbell acknowledged the picture did in fact have nail holes. **(R. 320-22)**.

Campbell went on to critique that design due to exposed screws, which would lead to quicker corrosion and the necessity for more maintenance, his testimony indicated that the walkover railing could in fact withstand 200 pounds of force when it was constructed with screws. **(R. 346)**. On cross-examination, Campbell acknowledged number 9 screws could be appropriate as long as the walkover was properly maintained. **(R. 375)**. After conducting calculations, Campbell admitted a railing constructed using three screws and two boards (as this walkover was constructed) would meet the 200-pound concentrated force requirement. **(R. 376-81)**. He further acknowledged the additional nails depicted in a photograph of the railing would provide additional strength to the structure, and the screws working together could have withstood up to 400 pounds of concentrated force. **(R. 382-83)**. Campbell agreed that “with all these nails,” the railing could “withstand way more than 200 pounds of concentrated pressure” on the day it was built. **(R. 383)**. He likewise agreed that in terms of construction, the rail had enough strength at the time it was constructed. **(R. 384)**. Assuming industry standards required the walkover to withstand 200 pounds, Campbell’s testimony when viewed in context is not sufficient to support a finding of negligence—much less *gross* negligence—as to the design and construction of the walkover.

Finally, in relying on Campbell’s testimony that Respondent would have exerted a 30-to-40-pound load when he leaned on the railing, the Court of Appeals misapprehended and/or overlooked the distinction between the railing’s load capacity at the time it was constructed and its load capacity on the day Respondent visited the walkover—potentially more than twenty years after the walkover was built. Any testimony regarding the load the railing could withstand on the day Respondent visited the walkover goes to whether the City properly maintained the walkover rather than whether the City properly designed and constructed the walkover. Although Campbell’s testimony could arguably support a finding of gross negligence as to the City’s

*maintenance* of the walkover, his testimony does not establish the City was grossly negligent in using screws rather than lag bolts to construct the walkover. Based on the foregoing, the Court of Appeals overlooked and/or misapprehended the distinction between the design and construction of the walkover and the maintenance and inspection of the walkover.

**III. Viewed in the light most favorable to Respondent, no evidence established the City was grossly negligent in designing or constructing the walkover.**

Respondent advanced—and the Court of Appeals relied on—two theories regarding negligent construction: the City’s use of screws rather than lag bolts and fact the rail could not withstand a 200-pound concentrated load on the day Respondent visited the walkover.

As discussed in the City’s brief, Campbell ultimately acknowledged the City’s use of screws rather than lag bolts was appropriate as long as the walkover was properly maintained, and the screws used by the City “could have worked” with proper maintenance. **(R. 317-18, 375)**. This testimony, coupled with testimony that the galvanized screws would have lasted at least seven years before beginning to corrode, supports an inference that the walkover was in fact properly designed and/or constructed—thus precluding a finding of gross negligence. **(R. 330)**.

Campbell’s testimony also established that the walkover railing could in fact withstand a concentrated load of 200 pounds at the time it was constructed. **(R. 383)**. Because the narrow issue is whether the City was grossly negligent in its design and/or construction of the walkover, the Court of Appeals erred in focusing on the load the rails could withstand the day Respondent visited the walkover rather than the load they could withstand when they were constructed.

Campbell’s testimony that lag bolts would have lasted longer than screws did not establish a duty for the City to conform to the design Campbell suggested was “best” and would require less maintenance. See Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 392-93, 701 S.E.2d 776, 781-82 (Ct. App. 2010) (finding expert’s testimony regarding his preference for the design of a

parking lot did not create a duty to conform to that design in the absence of a requirement of law, ordinance, or industry safety standard). Rather, Campbell's testimony established that the walkover was designed and constructed in an acceptable manner. The crux of Campbell's opinion continually came back to maintenance; he conceded the screws would be appropriate as long as the walkover was properly maintained. **(R. 353, 375, 383)**. Looking strictly at evidence related to design and construction of the walkover, Campbell's testimony established only that the City could have constructed the walkover in a manner that would require less maintenance; his testimony did not establish that the design and construction of the walkover reflected a failure to exercise slight care. Because no evidence supports a finding that the City was grossly negligent in designing and constructing the walkover, the circuit court abused its discretion in granting Respondent a new trial on this issue.

**IV. Viewed in the light most favorable to Respondent, no evidence established a standard of care for the design and/or construction of the walkover at the time the walkover was built.**

As discussed in the City's brief, Respondent failed to submit evidence showing the standard of care for constructing or designing a walkover that applied at the time the walkover was constructed. Campbell did not know when the walkover was constructed and relied on a City employee's best guess that the walkover was built after Hurricane Hugo, sometime around 1990. **(R. 313, 374)**. Without more, his opinions about construction and design standards at the time the walkover was constructed are based on guesswork and do not support a finding of negligence.

Assuming the walkover was built in 1990, Campbell did not submit any evidence of the design or building codes in effect in 1990. Campbell relied on diagrams provided by OCRM to support his theory that the City should have used lag bolts; however, Campbell acknowledged the diagram did not require or mandate the use of lag bolts but was just a starting point. **(R. 350)**.

Thus, to the extent the Court of Appeals relied on the diagram as establishing a standard of care to use lag bolts, the Court misapprehended and/or overlooked the fact the diagram, in and of itself, did not establish an industry standard that *required* using lag bolts to construct a walkover.

In addition to the diagrams, Campbell relied on the Maintenance Code, the Standard Building Code, and the International Building Code.<sup>7</sup> (**R. 324, 329**). These Codes, however, do not establish a standard of care for construction or design that requires using lag bolts rather than screws. In fact, Campbell acknowledged the Maintenance Code “is more addressed towards repair, maintenance, and to a certain extent, life safety.” (**R. 324**). Although Section 304-12 of the Maintenance Code section requires handrails to be firmly fastened, it offers no guidance on the type of fastener that should be used or on the design and construction of rails. (**R. 324**). Further, in relying on section 304-12 in its opinion, the Court of Appeals overlooked the fact this section addresses the *maintenance* of railings and not their construction or design.

Finally, the Standard Building Code and International Building Code do not address the type of fastener that must be used or require the use of lag bolts rather than screws. Thus, assuming Campbell’s testimony that the building codes have not changed much since at least 1980 is correct, Campbell still did not set forth a code, regulation, or ordinance that requires the use of lag bolts rather than screws. Campbell did not rely on anything other than a diagram—which he acknowledged was a recommendation rather than a requirement—and his own preference for using lag bolts rather than screws. See Nelson, 390 S.C. at 392-93, 701 S.E.2d at 781-82 (finding expert’s testimony regarding his preference for the design of a parking lot did not create a duty to conform to that design in the absence of a requirement of any law, ordinance, or industry safety

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<sup>7</sup> As noted in the City’s brief, these guidelines were all established after the walkover was purportedly built.

standard). In the absence of an ordinance or industry standard requiring the use of lag bolts, Campbell's testimony does not establish an industry standard for using lag bolts.

Based on the foregoing, Respondent has failed to set forth an industry standard of care for the construction and/or design of the walkover at the time the walkover was built. Respondent has likewise failed to set forth an industry standard that requires the use of lag bolts rather than screws.

### **Conclusion**

The City respectfully submits the Court of Appeals overlooked or misapprehended the distinction between simple negligence and gross negligence, and the distinction between testimony establishing the *construction and/or design* of the walkway and testimony establishing the *maintenance and/or inspection* of the walkway. Further, because no evidence established (1) the City was grossly negligent in designing or constructing the walkover or (2) a standard of care for the design and construction of the walkover at the time the walkover was built, the circuit court abused its discretion in granting Respondent a new trial on the issue of whether the City was grossly negligent in designing and/or constructing the walkover. Accordingly, the City respectfully requests the Court of Appeals alter or amend its opinion to reverse the circuit court's order granting Respondent a new trial. Alternatively, the City requests this Court amend its opinion to omit references to the International Property Maintenance Code, as such references directly conflict with the unappealed ruling of the trial court that "issues related to the City's inspection schedule, inspection methodology, and claims related to the adequacy of the City's preventative and corrective maintenance subsequent to original construction shall not be addressed during the new trial." (R 2-3).

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,  
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002270  
Case No. 2014-CP-26-07790

Richard Ciampanella, .....Respondent,

v.

City of Myrtle Beach, .....Appellant.

**PROOF OF SERVICE**

I certify that I have served Appellant’s Petition for Rehearing by mailing a copy of same to Respondent’s attorneys of record in the United States mail, with sufficient postage affixed thereto on the date indicated below.

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[SIGNATURE PAGE TO FOLLOW]

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March 17, 2022

**Mar 17 2022**

**SC Court of Appeals**

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March 17, 2022

The Honorable Jenny A. Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: Richard Ciampanella v. City of Myrtle Beach  
Appellate Case No. 2018-002270  
C&L File No. 000456-01017

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy of Appellant's Petition for Rehearing together with Proof of Service. A check for the filing fee in the amount of \$50.00 will be hand delivered.

Sincerely,



Amy L. Neuschafer

/aga  
Enclosures

pc: Gene M. Connell, Jr., Esquire  
Julian Z. Hanna, Esquire