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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001563

Cynthia Wright and Richard Wright, *Appellants,*

v.

South Carolina Department of Transportation, Pilot Travel Centers,
LLC, Speedway LLC, Ashley Land Surveying, Inc., f/k/a Ashley
Engineering & Consulting, Inc., and Munlake Contractors, Inc.,

Of whom

South Carolina Department of Transportation, Pilot Travel Centers,
LLC, Speedway LLC, and Ashley Land Surveying, Inc., f/k/a Ashley
Engineering & Consulting, Inc. *Respondents.*

**RESPONDENT PILOT TRAVEL CENTERS, LLC'S
RETURN TO APPELLANTS' PETITION FOR REHEARING**

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TABLE OF AUTHORITIES

CASE LAW:

Dorrell v. SCDOT, 361 S.C. 312, 605 S.E.2d 12 (2004).....6

Epps v. U.S., 862 F. Supp. 1460, 1464 (D.S.C. 1994)5, 7

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)6

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Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001).....3, 6

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Shaw v. City of Charleston, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002) 5

Skinner v. SCDOT, 383 S.C. 520, 681 S.E.2d 871 (2009) 4-7

COURT RULES:

Rule 221(a), SCACR 3

Pursuant to South Carolina Appellate Court Rule 221(a), and upon request of the Court, Respondent Pilot Travel Centers, LLC (“Pilot”) hereby responds to Appellants’ Petition for Rehearing. Appellant’s Petition for Rehearing should be denied for the following reasons:¹

ARGUMENT

I. THE COURT DID NOT OVERLOOK OR MISAPPREHEND APPELLANTS’ ARGUMENTS, AND THEREFORE, REHEARING IS NOT PROPER.

To prevail on a petition for rehearing, the petitioning party must show the Court’s oversight or misapprehension of their argument. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Id.* (citing *Jean H. Toal, Shahin Vafai & Robert Muckenfriss, Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933))).

The Court issued a well-reasoned opinion in this matter. Pilot filed a lengthy brief in support of its position on the case, and relies on its brief for a complete argument in opposition to the petition for rehearing. (*See generally* Response Brief of Respondent Pilot) Appellants’ petition does not allege that the Court overlooked or misapprehended their arguments, but simply attempts to reargue the merits of their case before this Court a second time. Pilot respectfully asks the Court to decline Appellants’ request to do so.

¹ Respondent Pilot does not offer a response to Appellants’ arguments pertaining to SCDOT’s affirmative defenses. Additionally, the Court properly declined to address the parties’ arguments on proximate cause given the dispositive and correct ruling that Pilot owed no duty. (Ct. of Appeals Op. at n.8) As the Court did not rule on the issue of proximate cause, Pilot would adopt its arguments from its Response Brief should a response be necessary on those issues in this Return.

II. THE COURT DID NOT IMPROPERLY WEIGH COMPETING EVIDENCE, AND NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER PILOT CONTROLLED SCDOT'S DECISION TO USE A FLUSH MEDIAN.

Appellants first argue the Court should grant their petition for rehearing because the Court improperly weighed evidence by discounting the “negotiations” letter, while crediting Respondents’ evidence on SCDOT’s decision to use a flush median. (Apps.’ Pet. For Reh. at pp. 4-5). Simply put, Appellants’ “negotiations” letter creates no genuine issue of material fact with respect to Pilot’s alleged duty. First, there is no evidence that the handwritten notes were made by an employee or agent of Pilot.² (Pilot’s Resp. Brief at pp. 10-11) Second, the uncontroverted testimony of Leland Colvin (SCDOT’s 30(b)(6) designee) established that the decision to *maintain* a flush median at the subject location was made in 1998, two years before the “negotiations” letter was sent, and three years before Pilot even purchased the abutting property. (R. p. 166 at ¶ 5; p. 675; and p. 407) Third, Leland Colvin testified that at no time during SCDOT’s 17A roadwork was a raised median expected; a flush median was always the design to be implemented. (R. p. 217, lines 4-12) Appellants have not—and cannot—provide evidence supporting its speculation that Pilot in some way influenced SCDOT to change its plans to use a flush median; SCDOT intended to use a flush median throughout the entirety of this project.

The Court did not err in weighing competing evidence of Appellants and Pilot; instead, Appellants simply have not put forth admissible evidence tending to prove their speculative theory that Pilot engaged in negotiations with SCDOT for a flush versus raised median. But even assuming *arguendo* the Court did err in weighing competing evidence, *Skinner v. SCDOT*, 383 S.C. 520, 681 S.E.2d 871 (2009) forecloses any alleged duty on the part of Pilot as a matter of law. *See infra* § III.

² Additionally, as raised in Pilot’s Response Brief, the handwritten notes are unauthenticated double hearsay, which are not admissible and cannot create a genuine issue of material fact to defeat summary judgment.

III. THE COURT PROPERLY APPLIED *SKINNER* IN HOLDING PILOT OWED NO DUTY.

Appellants next argue the Court erred in construing Pilot’s duty too narrowly. (Apps.’ Pet. for Reh. at pp. 5-7) Specifically, Appellants argue the Court erred in holding “South Carolina law imposes a duty only when a landowner creates and ‘artificial condition’ on the highway.” Instead, Appellants argue “long-standing” South Carolina precedents stand for the proposition that abutting landowners can be held liable for “any highway danger the landowner helped create.” (*Id.*) Appellants go on to cite to three inapplicable cases—*Epps*,³ *Shaw*,⁴ and *Hollifield*⁵—for the proposition that adjoining landowners are liable for any hazard causing injury which is “legally traceable” to the landowner. (Apps.’ Pet. for Reh. at p. 6)

In *Skinner*, the South Carolina Supreme Court stated: “South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers.” *Skinner v. SCDOT*, 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009) (emphasis added). That is precisely the rule of law applied by the Court here, and to the extent Appellants argue that South Carolina law recognizes a greater duty on an abutting property owner is to ignore the law as stated in *Skinner*. Nevertheless, Appellants attempt to mesh the Supreme Court’s reasoning in *Skinner* with that of *Epps*, *Shaw*, and *Hollifield*, arguing that *Skinner*’s recognition of contractor liability imposes a potentially greater duty on Pilot as an abutting landowner. (Apps.’ Pet. for Reh. at p. 6) Appellants’ argument notwithstanding, the *Skinner* court took care to explicitly

³ *Epps v. United States*, 862 F. Supp. 1460 (D.S.C. 1994) (A district court order from 1994 holding an abutting landowner did not have sufficient property interest and control over a sidewalk to create a duty.)

⁴ *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002) (Dealing with an alleged sidewalk defect where there was an issue of fact remaining whether the City or an abutting landowner owned and controlled the area where plaintiff fell.)

⁵ *Hollifield v. Keller*, 238 S.C. 584, 121 S.E.2d 213, 216-17 (1961) (overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 744 (1985)) (An overturned 1961 Supreme Court decision dealing with whether an abutting landowner who emitted water onto a roadway could be joined in an action with a municipality.)

reject the notion that an abutting landowner has a duty of care similar to that of a roadway contractor who, unlike an abutting property owner, does have possession and control over roadways in the performance of roadwork. *See Skinner*, at 524-525, 681 S.E.2d at 874 (“We agree with the trial court that a contractor performing highway alterations owes a duty to travelers, but we find no analogous duty on the part of an owner of property abutting a highway who neither possesses nor controls the highway.”)

Further stretching the logic of *Skinner*, Appellants argue that if Pilot was “a driving force for the decision to place only a flush median,” then it exercised control over the “process” and may face liability. (Apps.’ Pet. for Reh. at pp. 6-7) In effect, Appellants argue that Pilot is a roadway contractor, not an abutting property owner. (*Id.* at p. 5 (“the parties’ median selection dispute will determine whether Pilot/Speedway are more like the ‘contractors’ referenced in *Skinner*”)) This is a novel argument not offered by Appellants until this Petition, and as such, is not properly before this Court. *See Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (citing *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)). But even if this argument were properly before the Court, those cases where South Carolina has recognized a duty on a road contractor are distinguishable from the case at bar. For example, the South Carolina Supreme Court held in *Dorrell v. SCDOT* that a paving contractor owed a duty of care at common law to the traveling public where its paving work created a hazardous drop off that caused a car accident. *See Dorrell v. SCDOT*, 361 S.C. 312, 605 S.E.2d 12 (2004) Again, in *Sessions v. Dickerson, Inc.*, the Supreme Court held a contractor owed a duty of care to a pedestrian who fell into an unguarded catch basin created by the contractor during a road widening project on Highway 501. *See Sessions v. Dickerson, Inc.*, 265 S.C. 579, 220 S.E.2d 876 (1975) But Pilot, unlike the road contractors in *Dorrell* and *Sessions*,

never had possession or control of Highway 17A. Moreover, SCDOT and its roadway contractors designed and implemented the flush median on Highway 17A, not Pilot. Appellants' inability to prove "negotiations" aside, not one case in South Carolina recognizes liability for an abutting landowner where they were "a driving force" influencing "process" behind SCDOT's design choices on a roadway. As *Skinner* recognized, an abutting landowner that neither "possesses nor controls the highway" does not owe a duty to the traveling public. *Skinner*, at 525, 681 S.E.2d at 874. (emphasis added) Therefore, the Court properly held that Pilot did not owe Appellants a duty of care under *Skinner*.

IV. THE COURT DID NOT HOLD THAT SCDOT'S STATUTORY AUTHORITY ABSOLVED PILOT OF A DUTY.

Appellants allege the Court erred in concluding SCDOT's statutory responsibility over public ways absolves private actors "who create hazardous conditions in those areas." *Id.* Appellants misstate the Court's holding.

The Court did not hold that SCDOT's statutory responsibility serves as a per se prohibition of a duty on Pilot. SCDOT's exclusive statutory authority *in conjunction with* Pilot's complete lack of possession and control over Highway 17A and the median design warranted a finding of no duty. (Ct. of Appeals Op. at p. 9 ("[T]he Wrights failed to establish any private entity owed them a duty of care because neither Pilot nor Speedway possessed or controlled the highway; possession and control of highways lies with SCDOT.")) In fact, the Court in *Epps* (the case Appellants primarily rely upon in asking the Court to reconsider its decision) cited a litany of South Carolina decisions which found a public entity's exclusive control of public ways to be important in finding no duty on an abutting landowner.⁶ Thus, the Court did not err by holding

⁶ *Epps v. United States*, 862 F. Supp. 1460, 1465-66 (D.S.C. 1994) (quoting, e.g., *Dunbar v. Charleston & Western Carolina Railway Company*, 211 S.C. 209, 44 S.E.2d 314 (S.C. 1947) ("[W]e come back to the fact that here we

SCDOT's statutory control and authority over 17A precludes liability on Pilot. SCDOT's exclusive statutory authority, in addition to Pilot's lack of possession and control over Highway 17A and the decision to install a flush median, warranted a finding of no duty.

CONCLUSION

For the foregoing reasons, Pilot would respectfully ask the Court to deny Appellants' Petition for Rehearing and affirm the Court's well-reasoned Opinion filed on July 6, 2022.

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August 5, 2022

have a collision . . . at a junction of two highways which were located by public authorities *over which such authorities had and now have sole control*. The railroad company having no control or discretion in the location, construction or maintenance thereof, it is difficult to see how a collision occurring at this intersection of two highways is to be treated differently from one occurring at the intersections of any other two highways.”))

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South Carolina Department of Transportation, Pilot Travel Centers,
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Engineering & Consulting, Inc. *Respondents.*

CERTIFICATE OF SERVICE

I, Andrew Hethington, do hereby certify that I have on this date served one (1) copy of Respondent Pilot Travel Centers, LLC’s Return to Appellants’ Petition for Rehearing upon the following counsel of record by causing said copy to be emailed in accordance with Rule 262, SCACR and *Re: Methods of Electronic Filing & Service Under Rule 262 of the South Carolina Appellate Court Rules*, S.C. Sup. Ct. Order dated May 6, 2022 (copy of email attached) addressed as follows:

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Subject: Wright v. Pilot, et al.; Service of Resp. Pilot's Return to Apps. Pet. for Rehg.
Attachments: Resp. Pilot's Return to Apps. Pet. for Rehg.pdf

Good afternoon all,

Please find attached for service Respondent Pilot's Return to Appellants' Petition for Rehearing.

Thank you,

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