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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 and Consulting, Inc.

Of Whom

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

RESPONDENT SPEEDWAY LLC'S AMENDED RETURN TO APPELLANTS' PETITION FOR REHEARING

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TABLE OF AUTHORITIES

Case Law

South Carolina

Other Jurisdictions

Statutes and Court Rules

As requested by this Court in its letter dated July 27, 2022, and pursuant to South Carolina Appellate Court Rule 221(a), Respondent Speedway LLC (hereinafter "Speedway") respectfully submits its Return to the Petition for Rehearing (hereinafter the "Petition") filed by the Appellants (hereinafter the "Wrights" or "Appellants"). Speedway respectfully requests that this Honorable Court deny the Appellants' Petition for Rehearing. Respondent Speedway makes this request for the reasons set forth below.[1]

STANDARD OF REVIEW

"[A] petition for rehearing must 'state with particularity the points supposed to have been overlooked or misapprehended by the court.'" Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). "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." Kennedy v. South Carolina Retirement System, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Therefore, "a party may not raise an issue for the first time in a petition for rehearing." Herron, 395 S.C. at 469, 719 S.E.2d at 644 (2011) (citing Kennedy, 349 S.C. at 532, 564 S.E.2d at 322). As explained below, the Wrights' Petition for Rehearing does not state, with any particularity, any arguments that this Court overlooked or misapprehended in its decision. On the contrary, the Wrights have filed this Petition for Rehearing in an attempt to have the case tried in this Court because they are unhappy with this Court's decision, which is not a basis to grant a Petition for Rehearing.

[1] Respondent Speedway does not make a response to Appellants' arguments regarding SCDOT's SCTA affirmative defenses because these arguments are directed toward Respondent SCDOT. To the extent this Court finds that this argument is directed toward Speedway, Speedway incorporates its Appellate Brief herein for purposes of its Return.

RETURN ARGUMENTS

For the convenience of this Court, the arguments in this Return are presented under argument headings similar to those appearing in the Petition for Rehearing and in the same general order. Two matters, however, warrant preliminary treatment.

First, some of Appellants' arguments in their Petition repeat their appellate arguments. Rather than burden this Court with a full recitation of the responsive arguments in Speedway's Brief, Speedway will summarize such responses when appropriate and reference its Brief for a more complete argument.

Second, just as the Wrights did in their appellate briefs with this Court, they continue to ignore the undisputed facts in the record to assert entirely unsupported conclusions regarding how SCDOT made the decision to maintain a flush median on Highway 17A rather than install a nontransversable raised median. The Appellants argue in their Petition that this Court erred by "discounting the 'negotiations' letter in favor of Colvin's contrary testimony." (Rhg. Pet. at 4). However, this Court did not overlook or misapprehend the "negotiations" notations on the letter. Instead, the Appellants are unhappy with the Court's consideration of the median selection issue and its decision that the alleged "negotiations" letter is insufficient to withstand summary judgment on the issue. The Court properly considered all admissible evidence in the record and correctly agreed with the trial court that there was no evidence to support the Appellants' mere conjecture that Speedway was in any way responsible for the median selection decision. Therefore, the Appellants have not stated with particularity how this Court overlooked or misapprehended any points regarding its conclusion that SCDOT alone made the decision to place the flush median on Highway 17A. Instead, Appellants are merely seeking to reargue the median selection issue before this Court a second time.

Additionally, the undisputed facts in the record establish clearly that SCDOT had the sole and exclusive statutory power and authority to make the decision to maintain the placement of a flush median on Highway 17A. It is important to note that this is not a scenario where a condition, i.e. a raised median, had been created and was physically present on Highway 17A and thereafter removed. There has never been, even to this day, a raised median present at the accident location on Highway 17A. The Wrights argue that handwritten notes on an August 28, 2000 SCDOT letter regarding some "negotiation" support their conclusion that Speedway played a role in SCDOT's decision to place a raised median, but have provided no evidence to make this unsupported leap to conclusion. (Ct. of Appeals Op. at 5-6). This Court properly "agree[d] with the circuit court that despite these notations on the letter, the evidence in the record establishes the decision to maintain a flush median in place as opposed to installing a raised median remained an SCDOT engineering decision, not the responsibility of the private entities." (Ct. of Appeals Op. at 5-6).

Specifically, the evidence in the record, including the SCDOT engineer's testimony that it was SCDOT's sole decision to maintain a flush median and the South Carolina statute establishing SCDOT's "exclusive[] responsibility" for highway design, including placement of median barriers, properly support this Court's decision that there was no material evidence to support any assertion that Speedway played a role in SCDOT maintaining the placement of the flush median. (Ct. of Appeals Op. at 7-8) (citing S.C. Code Ann. § 57-3-110). Specifically, the evidence in the record establishes that it was always SCDOT's plan to maintain a flush median in the highway, and that there was never an expectation that there would be a raised median in this area on Highway 17A. (R. p. 221, lines 16-24). Additionally, the evidence shows that the design plans for the Highway 17A Widening Project and the interchange project were each dated over a year *before* the August 2000 letter. (R. p. 221, lines 1-14).

Simply stated, this Court properly found that there is *no admissible evidence* that Speedway altered SCDOT's design plans, caused to be removed a raised median from the Widening Project's design plans, or negotiated the removal of a raised median that has never existed to begin with, and thus no breach of this alleged duty. (Resp. Br. 16). Nonetheless, the Wrights continue to assert these completely baseless statements in support of several arguments in their appellate briefs with this Court and again in their Petition for Rehearing. As demonstrated below, this Court correctly and unanimously affirmed the trial court's holding that the Wrights had not presented enough evidence to survive a motion for summary judgment on this issue. Simply stated, to date five different judges at the trial court and appellate court levels have scrutinized this case, and all came to the same conclusion, which is to say summary judgment was, and is, appropriate.

1. **This Court unanimously and correctly applied the duty analysis in its finding that Speedway did not owe a duty to the Wrights.**

    a. **This Court properly relied on the undisputed facts and admissible evidence to conclude that the median selection was solely SCDOT's decision.**

First, the Wrights' argue in their Petition that this Court erred in discounting the "negotiations" letter in favor of Colvin's contrary testimony. (Rhg. Pet. at 4). As explained above, this Court properly relied on the undisputed facts and admissible evidence to conclude that there was no evidence in the record to support the Wrights' argument that the median selection decision did not belong solely to SCDOT pursuant to its statutory authority to "lay out, build, and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges." S.C. Code Ann. § 57-3-110. At the summary judgment stage and on appeal, the Wrights argued that the median selection decision was a product of alleged SCDOT negotiations with Pilot/Speedway. However, as explained above and extensively in Respondent Speedway's Brief,

which Speedway incorporates herein, this Court properly found that the Wrights have not asserted any admissible evidence, nor is there any evidence in the record, to support the Wrights' "competing theory" regarding the median selection decision. The Wrights' only evidence to support their theory is the written marking on the letter regarding a "negotiation," which this Court properly found was not sufficient to draw Wrights' purely conjectural inference. Harris Teeter Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture."). (Resp. Br. 9 n.4). The Wrights have not provided any sufficient evidence to survive summary judgment on this median selection issue because there is no evidence in the record establishing that the median selection decision was anything other than SCDOT exercising its exclusive and sole authority to make such a decision. Therefore, there was and is not a "factual dispute" regarding the median selection decision and thus, this Court did not err by resolving a factual dispute regarding the median selection decision during the Motion for Summary Judgment procedural stage as the Appellants now attempt to argue.

Additionally, it is important to note that even if there was evidence in the record establishing that there were negotiations between SCDOT and Speedway regarding the median selection decision, which Speedway denies exists, that would be immaterial to this Court properly finding that Speedway could not be responsible for the median selection decision. As previously explained, SCDOT has the sole and exclusive power and authority to make the decision to maintain the placement of a flush median, as provided by Statute. See S.C. Code Ann §§ 57-3-110, 57-1-30, 15-78-60 (15). The Wrights have not and cannot present any evidence showing how the median selection decision could have been a product of *any* alleged negotiations because the

evidence in the record is clear that the ultimate median selection decision rested with, belonged to, and was made by the SCDOT, not Speedway. (Resp. Br. 16).

b. This Court properly applied precedent in its analysis finding that Speedway was not liable as an adjoining landowner.

The Wrights incorrectly assert that this Court erred in finding that Pilot/Speedway could *only* owe a duty to the Wrights if they created an "artificial condition" on the highway. (Rhg. Pet. at 5). The Wrights argue that precedent establishes that an adjoining landowner may be liable for any highway dangers it helped create, and that this Court failed to properly apply this precedent from Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213, 216-17 (1961) (ov*erruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741, 744 (1985)) and Shaw v. City of Charleston, 351 S.C. 32, 43, 567 S.E.2d 530, 535-36 (Ct. App. 2002) as discussed in Epps v. U.S., 862 F. Supp. 1460, 1464 (D.S.C. 1994) (Rhg. Pet. at 5-7). In Hollifield and Shaw, both cases establish that *if* an abutting landowner creates an unsafe condition on a sidewalk or highway, the landowner can be jointly liable with the municipality. (Rhg. Pet. at 5-7). In Epps, the Court found that, for the abutting landowner to be liable, the facts must show that the landowner helped create the hazard or that the hazard was "legally traceable" to the landowner. (Rhg. Pet. at 6). However, the Wrights' argument fails for several independent reasons, as explained in the following paragraphs.

First, the Wrights' argument fails because this Court correctly considered other avenues for Speedway to have a duty to the Wrights, other than only finding that they could only owe a duty if they created an "artificial condition on the highway." Specifically, this Court said "[t]o the extent the Wrights argue that Pilot or Ashely created a dangerous condition in failing to request the encroachment permit and construct the driveways in a manner that would prevent access by travelers making left turns into the travel center from the opposite side of Highway 17A, we agree

with the circuit court that this argument must fail …Without more…[that] does not impose a duty upon a private property owner with respect to accidents that occur on the public highway." (Ct. of Appeals Op. at 8).

Additionally, this Court agreed with the circuit court that the Pennsylvania case of Allen v. Mellinger, 625 A.2d 1326 (Pa. Commw. Ct. 1993) was helpful to its analysis. (Ct. of Appeals Op. at 8-9). This Court discussed Allen, in which it was argued that the business owners created a dangerous condition on a state highway which led to the plaintiff's accident. *Id.* (citing Allen, at 1329 n.6). This Court correctly applied the analysis from Allen to the facts of this case, and correctly found that regarding any alleged dangerous condition that, "[s]imilarly, the private entities here owed no duty to warn or take other remedial action to address the safety of Highway 17A." (Ct. of Appeals Op. at 9). Therefore, this Court did not "unduly narrow[] the scope of Pilot/Speedway's potential duty" because it considered more than one avenue of attributing liability to Speedway and correctly found that there was not sufficient evidence to survive summary judgment on any theory of liability.

As another ground for this argument by the Appellants to fail, even if is found that this Court erred in not applying the Epps standard, this Court still reached the correct result because there is no evidence in the record to establish that Speedway could be liable as an abutting landowner under the Epps standard because Speedway did not help create the median "hazard," nor is the median "hazard" legally traceable to Speedway. As previously discussed, Speedway did not create the alleged hazard because the decision regarding maintaining a flush median rested solely and exclusively with SCDOT, and there is no evidence supporting the Wrights' argument that Speedway contributed in any way to SCDOT's decision to maintain the placement of a flush median on Highway 17A. For similar reasons, the alleged hazard is not legally traceable to

Speedway. SCDOT has the sole and exclusive statutory power and authority regarding the median decision and there is no evidence in the record establishing how the alleged hazard could be legally traceable to Speedway, let alone how Speedway contributed to the alleged hazard in any way. Therefore, SCDOT is the only party that this alleged hazard can arguably be legally traced to. Therefore, there would be no reason for this Court to rehear this issue when there is no basis in the record to support the Wrights' liability theory.

Thus, this Court did not err in its application of precedent and its analysis finding that Speedway was not liable as an adjoining landowner under any asserted theory.

c. This Court correctly concluded that Speedway had no duty regarding the median because SCDOT has the sole and exclusive authority over state highways, including the discretionary placement of medians.

The Wrights argue that this Court erred by concluding that SCDOT's statutory responsibility for highways precludes liability for private entities that are adjoining landowners. (Rhg. Pet. at 7). However, that is a misstatement of the Court's holding and not the conclusion that this Court made in its Opinion. Instead, the Court concluded that because SCDOT has a statutory responsibility for highways, including the initial discretionary placement or not of highway medians, that a private entity such as Speedway cannot have had a duty *regarding the median decision*. (Ct. of Appeals Op. at 5-8). As previously discussed, the SCDOT has the sole and exclusive control and authority over its Highway, which includes an initial discretion to maintain a flush median (as was the case here) or place median barriers on a highway. (Ct. of Appeals Op. at 8). All decisions regarding whether a flush median should be maintained or a raised median should be installed or not on SCDOT's Highway falls within the exclusive authority of SCDOT. Thus, Speedway has no duty regarding SCDOT's decision to maintain the placement a flush median on Highway 17A.

The Wrights go on to say that "precedent states that a government entity's statutory duty over public areas does not absolve private actors who create hazardous conditions in those areas" and cited the Epps analysis. (Rhg. Pet. at 7). Once again, this is a misstatement of this Court's conclusion. Instead, there was merely no evidence in the record to establish that Speedway could be liable as an adjoining landowner under any asserted theory. Thus, this Court correctly reached its conclusion finding that Speedway did not owe a duty to the Wrights, not only because of SCDOT's statutory duty over its highway, but also because there was no material evidence in the record establishing that Speedway could be liable under any theory asserted by the Appellants.

2. This Court properly declined to address proximate causation based on its resolution of the duty issue.

The Wrights argue in their Petition that this Court should reconsider its ruling and reach the merits of their proximate cause argument. (Rhg. Pet. at 16). This Court correctly decided not to address the proximate cause issue because, as thoroughly discussed herein, the record clearly establishes that Speedway owed no duty to Appellants. As this Court stated, "[b]ecause the disposition of the duty issue is dispositive" there is no need to address proximate causation. (Ct. of Appeals Op. at 10 n.8).

Additionally, the Wrights argue in their Petition that the record contains the required scintilla of evidence linking Respondents' conduct to the collision and the Wrights' injuries. (Rhg. Pet. at 16). However, even if this Court chose to address proximate causation, the Wrights have not provided evidence constituting "the required scintilla" to survive summary judgment on this issue as they claim in their Petition. As thoroughly discussed in Respondent Speedway's Brief, which is incorporated herein, there is no evidence that any act or omission by Speedway was a proximate cause of Appellants' alleged injuries, as the circuit court previously found. (Resp. Br. 19).

Conversely, all evidence in this case demonstrates that Daniel Sena's decision to operate his vehicle under the influence of alcohol and drugs, and then fail to yield the right of way to Appellants, was the proximate cause of the accident. (Resp. Br. 19). Further, as explained thoroughly in Speedway's brief, to the extent that lack of a raised median is alleged to have been a proximate cause of the accident, which is strenuously denied, that was again a design decision that rested solely with the SCDOT as per its statutory duty and not with Speedway. (Resp. Br. 19). Additionally, it was simply not foreseeable to Speedway that Appellants would be injured by an intoxicated driver, making a legal left hand turn, who then failed to maintain a proper look out and yield the right-of-way, thereby colliding with Appellants' motorcycle. (Resp. Br. 19). Appellants argue that "the collision would not have happened at an intersection with the traffic control devised and reasonably safe driveways" and that their injury was foreseeable because of the amount of traffic accidents in and around the area. (Resp. Br. 19). This is pure speculation. (Resp. Br. 19). There has been no showing that Appellants' injuries most probably resulted from a cause for which Speedway is responsible; accordingly, the Appellants have failed to carry their burden on this issue. (Resp. Br. 19).

Therefore, even if this Court had addressed the proximate cause argument, the Wrights argument that the record contained "the required scintilla" of evidence fails because there is no evidence supporting the Wrights' assertion that Speedway was a proximate cause of their injuries.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Brief of Respondent Speedway, which are incorporated herein, Speedway requests that this Court deny the Wrights' Petition for Rehearing.

Respectfully submitted,

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Of Whom

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

PROOF OF SERVICE

The undersigned hereby certifies that on this 5th day of August, 2022, he served counsel for the Appellants and counsel of record with a copy of Respondent Speedway LLC's Amended Return to Appellants' Petition for Rehearing in this matter by emailing a copy of the same to the following:

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