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

Case No.: 2016-CP-08-334

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., Defendants,

Of whom 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. are the Respondents.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S RETURN TO PETITION FOR REHEARING

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TABLE OF AUTHORITIES

Cases:

Statutes:

Other:

As requested by the Court in its July 27, 2022 letter and pursuant to Rule 221(a), SCACR, Respondent South Carolina Department of Transportation, (hereinafter "SCDOT"), respectfully submits its Return to the Petition for Rehearing filed by the Appellants, (hereinafter referred to as "the Wrights" or "Appellants"). Based on the reasons set forth below, SCDOT respectfully requests that the Court deny the Appellants' Petition for Rehearing.

STANDARD OF REVIEW

In order to prevail on a petition for rehearing, appellants must state with particularity and demonstrate that the Court overlooked or misapprehended their argument. *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532 (S.C. 2001); *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640 (2011); 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 (S.C. 2001) citing Jean H. Toal, Shahin Vafai Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999). As recognized by the South Carolina Supreme Court eighty-nine years ago, "Petitions for rehearing are filed in at least three-fourths of the cases decided by this Court... It is a rare thing when the Court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a "rehash" of what the losing party has said

before, matters which the Court has already considered well and disposed of. *Arnold v. Carolina Power Light Co.*, 168 S.C. 163, 173 (S.C. 1933).

In the present case, the Wright's petition for rehearing does not articulate with particularity any argument, issue, or point of law that this Court "overlooked or misapprehended." Rather, their Petition for Rehearing is merely a "rehash" of arguments already made before the Court, and in certain sections contains argument not previously presented to the Court. As such, SCDOT respectfully requests that the Court deny the Petition for Rehearing.

ARGUMENT

As a preliminary matter, in their Petition for Rehearing, the Wrights allege that SCDOT is not entitled to immunity pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-20 et seq., specifically, sections 15-78-60(5) and (15) brief. They argue that the "Court improperly interpreted or applied design immunity, discretionary immunity, and the concept of constructive notice." With the exception of the "discretionary immunity argument," these are the same arguments that were presented to the Court in their Brief. (See Appellant's Brief, pp.29-35). While SCDOT will address each argument below, it also refers to its Brief submitted the Court for the full recitation of the facts and the complete arguments presented to the Court.

I. The Court Properly Held that SCDOT is Entitled to Immunity pursuant to S.C. Code Ann. § 15-78-60(5) and (15).

Throughout this litigation, the Appellants have taken the position that 1) SCDOT original decision to install a flush median was improper, 2) that SCDOT had notice that the flush median was a "dangerous condition" and failed to correct it and 3) that SCDOT improperly approved Pilot's encroachment permit application with regard to the location of its driveways. (See Appellant's Brief, p.29).

With regard to the installation of the flush median, the Court held that S.C. Code Ann. § 15-78-60(15) was the most applicable subsection to the Wright's claims and that pursuant this section, SCDOT was entitled to immunity. South Carolina Code Ann. § 15-78-60(15) states in pertinent part:

> (15) absence, condition, or malfunction of any sigh, sign, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, waring devices, guardrails, or median barriers referred to in this time are those used in connections with hazards normally connected with the sue of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction....

A. The Court Properly Applied South Carolina Code Ann. § 15-78-60(15).

For the first time, Appellants make the argument that the evidence in the record does not establish that the flush "median placement was decision was a discretionary act of SCDOT." They contend that *Wooten v. S.C Dept. of Transp.*, 333 S.C. 464, 511 S.E.2d 355 (Sup. Ct. 1999) required the Court to apply "section 15-78-60's limited discretionary liability for initial placement decisions not the broader design immunity" referenced in the section. (Petition for Rehearing p.9). Appellants have never presented this argument. Previously, they took the position that "while decisions regarding medians are generally immune, SCDOT can face liability when a defective median is not corrected 'within a reasonable time after actual or constructive notice." (Appellant's Brief, pp.32-33). As the argument regarding whether the median placement was a discretionary act has not previously been raised, it is not properly before the Court. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) ("The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.").

Nonetheless, SCDOT has always taken the position that the decision to install the flush median was within the discretion of the SCDOT and that it did not have actual or constructive notice of a hazardous condition. Accordingly, the record is replete with evidence to support the holding that the decision that SCDOT is

intitled to immunity pursuant to S.C. Code Ann. § 15-78-60(15) based upon both provisions contained therein; that the decision to install the flush median was a discretionary act and that SCDOT did not have actual or constructive notice that the flush median at issue was a "hazardous condition."

Discretionary immunity is contingent on proof the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. *Wooten v. South Carolina DOT*, 333 S.C. 464, 511 S.E.2d 355, 357 (Sup. Ct. 1999); see also SCDOT Brief p.12).

Mr. Leland Colvin, the Deputy Secretary of Engineering for SCDOT and the project manager for both the Interchange Projected and the Widening Project of 17A, testified as follows regarding the considerations and the evolution of the engineering decision to install a flush median:

> Q: Nor was [the raised median] ever removed from the design plans for the 17A widening project right in front of the Pilot Travel Center, correct?
>
> A: Correct.
>
> Q: It was -- I believe you referred to it earlier as a placeholder?
>
> A: Correct.
>
> Q: And it was a placeholder that was put in by another design professional who was in charge of another project that was not the 17A widening project right in front of the Pilot Travel Center.
>
> A: Correct.

(SCDOT Brief, p.15, R.p.300, lines 2-14).

Mr. Colvin further testified:

> When – when – in my job as the program manager for the project, we had to take a set of design plans that were done by a consultant, a set of design plans for the widening – it doesn't really matter who did them – marry those two plans together.... And as part of that marrying and coming up the final design, it was -- the final design was a flushed painted median and not a raised median.

(SCDOT Brief, p.15, R.p.290, lines 14-24).

Additionally, Mr. Colvin testified that when making the decision on how to "marry" the two plans together, a raised mediation was not an option for the location at issue in this case because such a median would not have been compliant with the SCDOT Highway Design Manual, which is considered the "Bible" for design projects in South Carolina:

> Q: And I believe your testimony earlier was that there was never an expectation during the 17A widening project in front of the Pilot Travel Center to have a raised or non-transversable median because to do so would have been not compliant with the South Carolina Department of Transportation Highway Design Manual; it that correct?
>
> A: That's correct.
>
> Q: So to have put one in front of the Pilot would have been in contravention to your own manual, correct?
>
> A: Correct.
>
> Q: And I believe you referred to that manual as the Bible for design projects in the State of South Carolina; is that correct?
>
> A: Yes, sir.

(SCDOT brief, p.16; R.p.298, lines 4-20).

Further, as discussed in this Court's opinion, Mr. Colvin was questioned by Appellants regarding his decision to install the flush two-way flat median instead of a raised, non-traversable median with regard to the guidelines contained in SCDOT's 2008 ARMS manual and the South Carolina Department of Transportation Highway Design Manual. This testimony established that the tables in the ARMS manual showed that a "continuous two-way left turn lane, which is what we have . . . has the effects on that has a 35 percent reduction in total crashes, 30 percent decrease in delay, and a 30 percent increase in capacity. The same increases and decreases as a non-traversable median as noted in this table." (Ct. of Appeals Op. pp.10-11). Further, when questioned about whether there was anything that prohibited SCDOT from installing a raised median, Mr. Colvin testified that such a median would have been outside the Highway Design Manual guidelines and in conflict with the Highway Design Manual. (Ct. of Appeals Op. pp.11-12).

Appellants' new "discretionary act argument," is a merely guise to again advance the theory that the decision to install the flush median was not in the sole discretion of SCDOT but rather based on "negotiations" with Pilot and/or other private entities based on handwritten notes, dated August 28, 2000. Mr. Colvin's testimony in the record establishes and the Opinion reflects that there were no negotiations regarding the flush median and that the decision was within the sole discretion of the SCDOT. (R.p.222, line 7-p.223, line 1; R. p.402; SCDOT Brief,

pp.14-15). The Court properly held, "the record established the decision to implement a flush median as opposed to a raised median remained an SCDOT engineering decision." (Ct. of Appeals Op. at 5). Further, as recognized by the Court, "the decision to use a flush median in [Mr. Colvin's] capacity as program manager, and from his perspective, 'it was purely an engineering decision based on the Highway Design Manual, based on the difference of the two projects, the purpose and need.'" (Ct. of Appeal Op. at 5).

To the extent the Court considers this argument that was not previously raised, the record establishes that the decision to install the flush median was an SCDOT engineering decision and that Mr. Colvin, the project engineer, when faced with the decision whether to install a flush median or a raised median, actually weighed competing considerations and made a conscious choice using accepted professional standards. *See Wooten,* supra.

B. The Court Properly Held that SCDOT Did Not Have Constructive or Actual Notice that the Intersection was "Hazardous."

In their Petition for Rehearing, the Appellants do not argue that SCDOT had actual or constructive notice that the flush median was a hazardous condition but rather limit their argument regarding notice to the location of Pilot's driveways. Appellants argue that the very fact that Pilot's driveways as approved by the encroachment permit, were not in strict conformance with the ARMS manual, constitutes both constructive and actual notice that the intersection was a "hazardous condition." I note that although Appellants agreed at oral argument

that constructive notice, not actual notice, was the theory upon which they base their claims, they now take the position that "armed with *actual knowledge* that the planned driveways were inadequate, SCDOT took no action ...." (emphasis added). See *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) (South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.).

To the extent the Court considers this position, to accept such an argument would create an impossible standard. As explained by Mr. Robert Clark, District 6 Engineering Administrator for SCDOT, it is impossible for all encroachments to be in exact conformance with the design manuals:

> If we lived in the Midwest or lived in Phoenix where everything's laid out in a grid and, as cities grow, they're always growing in a grid and every block is the same, and as you grow out, you have to opportunity to have a clean slate, you can do that.
>
> When you have properties that have been cut up for 3 or 400 years and you've got development going on on those properties, you don't have a clean slate, but you're trying to do the best you can to create an efficient effective, and safe interface with the road system.

(R.p.309, line 13-p.310, line 2; SCDOT Brief, p.21)[1].

Further, as discussed at length in the Opinion, Mr. Clark and Mr. Colvin testified extensively regarding the process SCDOT goes through when reviewing encroachment permits. Both also testified that the ARMS manual is not mandatory

[1] Leland Colvin also testified that the manuals used by SCDOT contain regulations but each manual recognizes the difficulty of being able to comply with each provision. As such, the manuals all contain "exceptions" to allow non conformance with provisions that are impossible to satisfy. (R.p.284, lines 4-25; SCDOT Brief p.21)

and just one of several resources available to SCDOT when approving an encroachment permit. (Ct. Appeals Op. p.12-13).

Appellants also seemingly assert in their argument regarding notice that SCDOT should have "monitor[ed] the frequency and pattern of collisions that this intersection" prior the 2013 traffic study[2] conducted by the Department of Public Safety. As discussed fully in SCDOT's brief, it is impossible for SCDOT to monitor and study all highly traveled intersections in the State. Moreover, Appellants do not cite to any regulation, mandate or statue requiring such monitoring. There simply is no evidence that SCDOT had any notice that the location of the driveways was hazardous prior to the Appellants accident.

C. The Court Properly Held that SCDOT was entitled to Immunity Pursuant to South Carolina Code Ann. § 15-78-60(5) with Regard to the Approval of the Encroachment Permit.

Appellant's argument regarding the approval of the encroachment permit mirrors their argument above – that the approval of the encroachment permit was not a discretionary act because the driveways were not in strict conformance with the ARMS manual.

"To establish discretionary immunity, the governmental entity must prove the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. *Pike v. SCDOT*, 343 S.C. 224, 540 S.E.2d 87 (2000). As discussed above, strict compliance with every manual is

[2] Pursuant to 23 U.S.C. (h)(4) and 23 U.S. 409, these studies are inadmissible.

impossible when an area is being redeveloped and been in existence for numerous years. Further, both Mr. Colvin and Mr. Clark testified the ARMS manual is not mandatory and one of many resources used by SCDOT when reviewing encroachment permits. (Ct. of Appeals Op. p.14). As noted in the Opinion, Mr. Clark testified at length regarding the resources other than the ARMS manual and the considerations used by SCDOT when reviewing encroachment permits. (Ct. of Appeals Op, p.14). With regard to the driveways at issue in this case, as cited in the Opinion, Mr. Clark testified that even though allowing Pilot to have three driveways did not fall into the general guidelines of the ARMS manual, SCDOT had to consider other factors such as circulation, keeping semi-trucks and automobiles separate, and the site plan in general. Ct. of Appeals Op. p.14.).

The Court also properly determined that neither of Appellants' expert affidavits were appliable to the discretionary immunity analysis of SCDOT. Both affidavits address the alleged violations of Pilot, not SCDOT. See Affidavit of John Mark Teague, R.p.687 ("It is my belief that Pilot perpetrated improper actions .... In my opinion, Pilot should have constructed the facility consistent with the cited regulations...."); and Affidavit of Richard M. Balgowan, R.p.695 ("In my opinion, Pilot ignored industry standards ....").

The record establishes and the Court properly held that SCDOT weighed competing considerations when reviewing the encroachment permit for the driveways and the decision to grant the encroachment permit was a discretionary act as contemplated by S.C. Code Ann. § 15-78-60(5).

CONCLUSION

The Appellants have failed to articulate with particularity any issue that the Court overlooked or misapprehended. Rather, they repeat arguments advanced to the Court in their Brief and advance new theories never presented to the Court. The record establishes and the Court properly held that SCDOT used its engineering judgment, and when faced with alternatives, actually weighed competing considerations and made conscious choices in both the installation of the flush median and the approval of the encroachment permit. (SCDOT Brief, p.22). Likewise, there is no evidence in the record that SCDOT had any notice that either the median or the driveways were hazardous conditions. (Id.). Accordingly, SCDOT respectfully requests that the Court deny Appellants' Petition for Rehearing.

Respectfully submitted,

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