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SC Court of Appeals

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
2020-CP-10-01310

Mohammed Abulaban

Vs.

City of Charleston, et als.

Webex hearing

April 18, 2022

Before the Honorable R. Markley Dennis

APPEARANCES

For the Plaintiff: Mark Whitehead

For the Defendants: Phillip Ferderigos, Cole Lawrimore

Reported by: WebEx (edited by Michael C. Watkins)

Official Court Reporter

1 (The audio starts during Mr. Lawrimore's argument.)

2 MR. LAWRIMORE: -- a little over a year after the
3 accident. That also applies to the constructive notice
4 theory, as DOT performed to the inspections that it's
5 required to inspect, and those inspections did not produce
6 or yield any evidence or inference that there was an issue
7 with that particular manhole cover. So on those grounds,
8 Your Honor, I believe that the record is devoid of any
9 information lending to the conclusion, even a scintilla
10 which nobody understands, but I think the genral consensus
11 is it ain't much, if there's not that much here, Your Honor,
12 then there's just absolutely nothing. This case is over two
13 years old at this point, and I believe there's been an ample
14 opportunity to conduct however much discovery needs to be
15 conducted. And in closing, you know, if -- everybody knows
16 about the public duty rule, no need to belabor it, if
17 plaintiff is alleging that any duties owed by DOT arise by
18 operation statute, which I don't believe there's been that
19 allegation here, Mr. Abulaban is a member of the general
20 public and there's no special class that exists that would
21 protect him under any applicable statute or regulation. So
22 for those reasons, Your Honor, I believe you ought to grant
23 DOT's motion for summary judgment.

24 THE COURT: Thank you, Mr. Lawrimore, I appreciate it.
25 Mr Ferderigos, I will be happy to hear from you now.

1 MR. FERDERIGOS: Yes, Your Honor. I represent the City
2 of Charleston. If SCDOT is first up, the City is twiced
3 removed from any potential liability. Essentially pursuant
4 to the testimony in the case, the South Carolina
5 Department's 30B6 deponent of SCDOT testified and everybody
6 agrees that the manhole is owned and maintained by SCDOT.
7 Simply put, there's no evidence that the city ever touched
8 this specific particular manhole in the record. The Tort
9 Claims Act requires for a governmental entity to be liable
10 for a loss arising out of a defect or condition, for that
11 loss -- let's see, I apologize -- for a loss arising out of
12 a defect or a condition caused by a third party unless the
13 defect or condition is not corrected by the particular
14 governmental entity responsible for the maintenance within a
15 reasonable time after actual or constructive notice. And,
16 Your Honor, here the particular governmental entity is not
17 the city, it is the SCDOT. So there's no evidence that the
18 city was responsible for this specific manhole. There's no
19 evidence that the City ever touched this specific manhole.
20 There's no evidence as to who, what, or when, or how long
21 this manhole was manipulated or by whom. The plaintiff
22 merely has --

23 THE COURT: Phillip, we lost you sound-wise. Hold on a
24 second because we're recording it. Phillip, can you hear --
25 can't hear you.

1 MR. FERDERIGOS: Have you got me now?

2 THE COURT: Got you now.

3 MR. LAWRIMORE: Okay. I apologize it's -- my computer
4 must be bewitched.

5 THE COURT: Well, I can tell you mine was as you heard
6 last night because I couldn't read a dadgum thing.

7 MR. FERDERIGOS: Not to be repetitive, there's no
8 evidence that the city is responsible for this particular
9 manhole, no evidence the city ever touched the specific
10 manhole. There's no evidence as to who, what, or when, or
11 for how long this alleged danger existed, or if the city had
12 any notice of it at all. All we have is plaintiff
13 speculating that the city may have touched this manhole at
14 some point, and that the city may have done something wrong.
15 It's speculation that the city may have had some notice.
16 That's not enough to survive judgment even under the
17 scintilla standard. And that's our position, Your Honor.

18 THE COURT: Thank you, Mr. Ferderigos. Now, Mr.
19 Whitehead, thank you for your patience, I'll be delighted to
20 hear from you, sir.

21 MR. WHITEHEAD: Yes, sir. May it please the Court?
22 Matt Whitehead on behalf of the plaintiff, Mohammed
23 Abulaban. Your Honor, the area where my client fell and was
24 badly hurt in this case was a curve inlet, it's a catch
25 basin with a catch iron manhole cover. And per the city's

1 30B6 witness, Matthew Fountain, that manhole cover was
2 intended to be secured in place by a certain pinning to
3 protect against tampering, and the evidence here is that the
4 manhole cover was not properly secured when it -- my client
5 came upon it. It wasn't secured, he fell and was injured.
6 And in my 17 years, Your Honor, of practicing, honestly, I
7 don't recall a premises liability case that was litigated at
8 this length, whether I was for the plaintiff or the
9 defendant that did not include a motion for a summary
10 judgment being filed. But, Your Honor, in this case I
11 believe that it is a somewhat simpler issue than it is being
12 made out to be. It has been briefed at length by the
13 parties, and an excellent job at that, and I've enjoyed
14 working with my fellow attorneys and working this case up.
15 But the talk has been about ownership and it's been about
16 notice. And in this case, Your Honor, Queen Street, per the
17 city's 30B6 witness, is a street that they share
18 responsibilities with. And, Your Honor, I've cited in my
19 brief to the Court the Vaughn v. Town of Lyman case that
20 addresses very similar issues to this. We have a Fickling
21 versus City of Charleston case that followed Vaughn and kind
22 of talks about this and breaks it down, that it's not
23 necessarily the particular manhole, but if they're assuming
24 responsibilities to address maintenance of the street, the
25 sidewalks, the manholes, these catch basins in which Matthew

1 Fountain actually did testify to, that the city would go in
2 there and clean these catch basins, that they did that in a
3 shared responsibility with the DOT, with the State who owns
4 that area. So our position, Your Honor, is that the DOT
5 certainly owes a common law duty to maintain and use
6 reasonable measures to add -- to see that these areas are
7 maintained reasonably in a reasonably safe condition for the
8 public use under common law. And certainly if it's an issue
9 such as, you know, something that somebody leaves behind,
10 there's some sort of banana peel, I know this is a street
11 and not a grocery store, but a banana peel or grapes, and
12 then the notice issue comes up in those cases, Your Honor.
13 In this case what we have is a situation where the witnesses
14 who have testified to this particular manhole cover
15 described that this cover is intended to be secured in its
16 setting and then pinned down to prevent tampering. Well,
17 the only people who can do that and should do that are these
18 defendants. There are no third parties that we're aware of
19 who have any involvement with securing the manhole covers,
20 and, Your Honor, our position is that there's sufficient
21 evidence, certainly a scintilla. And I have enjoyed -- I
22 even made a note here, Your Honor, because I've had -- back
23 when Justice Few was on our bench in Greenville, we -- these
24 came up all of the time, because I used to represent the
25 City of Greenville, and every time he would look at me and

1 he would say: Well, Mr. Whitehead, don't we have the
2 scintilla rule? I've been on the receiving end of it. But,
3 Your Honor, here we're trying to go to the jury with this
4 idea that the city and the DOT did not adequately and
5 properly do their job to secure this manhole cover, and that
6 proximately caused this plaintiff's injuries.

7 THE COURT: Okay. Mr. Lawrimore, do you wish to
8 respond as it pertains to DOT?

9 MR. LAWRIMORE: I would like to very briefly, Your
10 Honor. First, the evidence and testimony that's in the
11 record is that the manhole cover was not there, not that it
12 was improperly secured, and I think that, you know, may aid
13 the Court in its inquiry. It's not that somebody didn't
14 fasten it correctly, it's that somebody moved it and did not
15 put it back. Second, it appears as though Mr. Whitehead is
16 proceeding under a common law theory. I would just note
17 that, again, there has to be some sort of actual or
18 constructural -- or constructive notice and there's just no
19 evidence of that here at this time, and this case is over
20 two years old at this point. And as to the third party
21 liability part portion of his argument, Your Honor, I think
22 we're essentially being asked to prove a negative here of
23 the defendants being responsible for figuring out who did
24 that, and that's just quite frankly not our obligation. So
25 in light of those things I still believe you ought to grant

1 a summary judgment.

2 THE COURT: Thank you, Mr. Lawrimore. Mr. Ferderigos,
3 in response?

4 MR. FERDERIGOS: I would just respond that Mr.
5 Fountain's speculation is not a scintilla of evidence.

6 THE COURT: Well, you know, Mr. Whitehead, I hear you,
7 but this is an area that really and truly I think the Tort
8 Claims Act exists for that purpose, to protect the entities.
9 I hear what you're saying, that obviously the logical
10 argument is, well, if somebody could pick it up and move it
11 then it wasn't pinned down, that's your point. There's a
12 case I think it was March but it came after Hugo, and the
13 reason I remember it is I had become a judge when the case
14 was tried, and this was a brother of somebody that was my
15 employee and I think I might have gotten it, and it got a
16 great verdict because a tree fell on the truck after Hugo.
17 The big issue in that was just what we were just talking
18 about, it's notice that the tree was a danger tree, and
19 fortunately for them there was, it had been reported, and
20 then that triggers then some reasonable action. I really
21 think that's where we are here. I understand you're trying
22 to link -- let me back up because there's Phillip's
23 situation. This manhole, was it on the sidewalk or was it
24 in the street?

25 MR. FERDERIGOS: Sidewalk, I believe.

1 MR. WHITEHEAD: Yes, sir.

2 THE COURT: So you have some responsibility there,
3 don't you?

4 MR. FERDERIGOS: The testimony is that different areas
5 of the city they have touched manholes, but there's no
6 evidence about this specific manhole ever being touched by
7 the city, or being maintained by the SCDOT.

8 THE COURT: I understand. But do you have it as being
9 an area that you have assumed responsibility for?

10 MR. FERDERIGOS: According to the SCDOT expert, no.
11 The city expert said there's different areas of the city
12 where we do that.

13 THE COURT: All right. There's a scintilla as to you.
14 This is on the sidewalk, so what's the DOT's responsibility
15 other than -- I mean, this isn't where traffic goes, what's
16 DOT responsibility for the sidewalk?

17 MR. WHITEHEAD: It's not -- well, it is on the
18 sidewalk, Your Honor, not in the roadway, that's correct.
19 And according to the DOT's 30B6 representative, the witness
20 they've posed in this case or presented in this case, is
21 that it was -- that this whole street including the abutting
22 sidewalks are within their jurisdiction and within their
23 responsibility. And that's how we were trying -- that's
24 how -- assuming that's the case and they are responsible for
25 the sidewalks and the catch basins and the covers on that,

1 Your Honor, that's where we were trying to get there. And
2 the only other thing that I would add, Your Honor, is I do
3 understand the notice requirement in the case such as the
4 post-Hugo accident with the tree. I think the
5 distinguishing fact in this case, Your Honor, is the Tort
6 Claims Act is intended to carve out these exceptions of
7 waiver of liability and situations where, you know, the
8 state, or state entities don't have an opportunity to
9 respond to a dangerous or defective condition, not
10 situations where they create the dangers or defective
11 condition as we believe happened here. If this -- we don't
12 know, and honestly we don't have any evidence because my
13 client -- if he had seen -- if he had seen that this manhole
14 cover was out of place even partially or all of the way, he
15 wouldn't have stepped there. That's not --

16 THE COURT: I understand.

17 MR. WHITEHEAD: So we don't -- but we don't know
18 whether it was completely removed, partially removed, we
19 just don't know that. But what we do know is that it was
20 not properly pinned, and per the city's own witness if it's
21 properly pinned it's not supposed to be tampered with.

22 THE COURT: That's fine. All right. Phillip, as to
23 you, I think you've got the scintilla creates -- I mean,
24 there is a creation of a scintilla for you. And Cole, as to
25 you I'm going to grant your motion for summary judgment on

1 the basis that you have argued and the basis in your
2 memorandum, if you'll prepare the appropriate order for
3 that. And, Phillip, just on the other one, we'll just say
4 motion for the city was denied, the motion for summary
5 judgment, if that's sufficient for you. And Matt, that
6 works for you?

7 MR. LAWRIMORE: I did not plug my computer in, can I do
8 that real fast before it dies?

9 THE COURT: You don't need to unless you want to.

10 MR. LAWRIMORE: I don't want my computer to die, hang
11 on just a second.

12 THE COURT: I had that happen last week. When you get
13 that message it's about 30 seconds.

14 MR. LAWRIMORE: I certainly didn't want to have fate
15 intervene when you were in the process of ruling for me at
16 all times. But just to make sure I heard you, because I had
17 that cold panic moment when that notification popped you,
18 you want me to prepare an order granting my motion for
19 summary judgment?

20 THE COURT: Based on your memo and the argument --
21 based on your memos really. But the way, for purposes of
22 review, Matt, I didn't state this but I want to state it
23 fully, you're entitled to rely on the memos as -- all of the
24 submissions that you have for purposes of review. It would
25 not be necessary for you to physically read that today, so

1 just be aware of that if you do choose to take this up.
2 It's a great argument, Matt, and I don't fault you for it
3 and -- but I just think I'm going to have to let -- as I
4 told somebody, one thing you learn when you've been doing
5 this for 28 years, you learn that some things you just do
6 the best you can to decide but you're not the one that's
7 going to decide it, you just need to frame it so whoever
8 wants it decided gets it decided by the ladies and gentlemen
9 in Columbia, and we know what that -- and that doesn't
10 offend me in the slightest. I understand I'm just part of
11 the process. But if you'll prepare that order for me I'll
12 be happy to submit it. Of course, you don't have to send it
13 to me, I'll look at it online when you file it in whatever
14 you call that damn box that I have to look at everyday, but
15 anyhow --

16 MR. FERDERIGOS: Your Honor, can I make one comment?

17 THE COURT: Yeah. You can make more than one, Phillip,
18 I won't hold you to one.

19 MR. FERDERIGOS: I would just say, I understand your
20 ruling as to there's a scintilla as to ownership, but our
21 position would be that the city prevails on the exact same
22 reason that the SCDOT prevails as well, no notice.

23 THE COURT: My friend, I would agree with you
24 100 percent, but I think that that's where we go. If that
25 comes up at the trial I would be more comfortable granting

1 a -- because now we're no longer in the scintilla world.
2 Now I'm looking at what proof do we have that you did
3 something, and now notice is going to be -- I don't think
4 Matt is thinking he's got a slam dunk here, but, I mean,
5 he's got what he believes is a good case, and I understand
6 that. But that doesn't preclude you at all from arguing
7 that at a different stage of the game. And quite frankly,
8 to be honest with y'all, I haven't even thought of that
9 until just this moment, how many times did I try cases
10 before we had the scintilla world and I thought -- summary
11 judgment was denied and I thought, well, how then do I now
12 grant directed verdict? Because it's on the same basis,
13 same thing. And so the scintilla world creates a difference
14 which allowed me at least to be more comfortable in
15 directing verdicts because it's a totally different
16 standard, I think, is applied. Now, you may say: Boy,
17 Judge, you need to go back to school on that one. But
18 anyway. Thank y'all, I appreciate it. And Cole forgive me,
19 for calling you Wade. I assume Cole is your middle name?

20 MR. LAWRIMORE: It's Wade Coleman but I've been Cole
21 all of my life.

22 THE COURT: Well, I understand. But guess what?
23 Welcome to my world. As you get older like I am, I'm now R.
24 Dennis and I can't be called by my name and it drives me
25 crazy. My daddy refused to disclose that I'm a junior.

1 When I had some surgery a couple of years ago the nurse
2 asked me: What does the R stand for? I told the story my
3 father wouldn't answer that, and when I told her it was
4 Rupert she said: Well, I don't blame him, I wouldn't answer
5 it either if that was my name. But anyhow, thank you guys,
6 I appreciate the pleasure. And I appreciate your client
7 being present, and I'm sorry he suffered this injury, and
8 good luck with the proceedings going forward then. Thank
9 you. Thank you very much, gentlemen, have a great day.

10 (End of the hearing.)

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1 To: Ms. Brandi Presnell
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7 5116 Cressingham Drive
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