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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, PETITIONERS,

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 RETURN TO APPELLANTS' PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

PETITIONERS' QUESTIONS PRESENTED

1. Whether the owners of highway-adjacent property that use their profit-driven concerns to convince SCDOT to remove a planned traffic safety device may be liable with SCDOT for creating the resulting traffic hazards.

2. Whether a court may grant summary judgment on South Carolina Tort Claims Act design or discretionary immunity defenses despite evidence SCDOT was constructively aware the disputed intersection was dangerous and created traffic hazards in violation of mandatory professional standards.[1]

3. Whether Petitioners' presented at least a scintilla of evidence to show Respondents' misconduct proximately caused their injuries.

RESPONDENT SPEEDWAY'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that Speedway, the former owner of a property abutting the public highway, owed no duty of care to Petitioner motorcyclists injured when a motorist who turned left into them on the highway while under the influence of cocaine and alcohol because Speedway did not own or possess the highway, did not control the design of the highway, and did not create a hazardous or artificial condition upon the highway.

2. Whether, in its decision below, the Court of Appeals appropriately declined to address proximate cause once it dispositively concluded that Speedway owed no duty of care to Petitioners.

[1] Petitioner's Second Question Presented does not concern this Respondent, Speedway. This Respondent will not present argument on the Second Question Presented but it would respectfully urge the Court to Deny Plaintiff's Petition for a Writ of Certiorari in its entirety because the Petition presents no "special and important reasons" for this Court to exercise its power of discretionary review within the meaning of Rule 242(b), SCACR.

RESPONDENT SPEEDWAY'S COUNTER-STATEMENT OF THE CASE

Petitioners filed lawsuits on March 28, 2014, and October 8, 2015, subsequently consolidated in Berkeley County, asserting negligence claims against the South Carolina Department of Transportation ("SCDOT"), Pilot Travel Centers, LLC ("Pilot"), Speedway, LLC ("Speedway"), and Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc. / Ashley Engineering & Consulting, Inc. ("Ashley").

Petitioners' claims arise from an October 6, 2012, motor vehicle collision near Summerville in which Daniel Sena, under the influence of cocaine and alcohol, attempted to make a left-hand turn from the center median of Highway 17A ("Highway") into a Pilot Travel Center. Sena failed to keep a proper lookout and failed to yield the right of way to Petitioner motorcyclists, who were traveling in the opposite direction on the Highway, and turned, colliding with Petitioner motorcyclists in his pickup. Petitioners contend that the collision would not have occurred had there been a solid raised median at this location instead of a flush asphalt median, and that this design, coupled with the location of the Pilot's driveways, created a dangerous condition upon the public Highway.

In May, 2016, Pilot moved for summary judgment, contending that Petitioners had not and could not identify a duty of care applicable to Pilot which would support their negligence action. The Honorable Roger M. Young, Sr. granted Pilot's motion for summary judgment on May 4, 2017, finding that Pilot owed no duty to Petitioners. SCDOT, Speedway, and Ashley filed similar motions in May and June 2017. The Honorable Kristi Lea Harrington heard these motions on June 26, 2017, and granted summary judgment finding that Speedway and Ashley owed no legal duty to Petitioners and that Petitioners had not presented evidence of proximate cause. Judge Harrington also granted summary judgment to SCDOT.

Petitioners filed a Notice of Appeal, and, after full briefing, the South Carolina Court of Appeals heard argument on May 27, 2020. In its unanimous opinion authored by the Honorable Stephanie P. McDonald, filed July 6, 2022, the Court of Appeals affirmed the rulings below, concluding (1) that Pilot, Speedway, and Ashley owed no duty of care to Petitioners, (2) that SCDOT was entitled to design immunity under the Tort Claims Act, (3) that there was no evidence SCDOT had constructive notice of a hazardous condition existing at the site of this collision, and (4) that SCDOT was entitled to discretionary immunity under the Tort Claims Act. Petitioners filed a timely petition for rehearing, which the Court of Appeals unanimously denied September 23, 2022.

Petitioners filed the instant Petition for a Writ of Certiorari to the Court of Appeals on October 21, 2022. Pursuant to Rule 242(f), SCACR, Respondent Speedway, LLC (hereinafter "Speedway") respectfully submits its Return to the Petition for Writ of Certiorari (hereinafter the "Petition") filed by Petitioners. Speedway respectfully requests that this Honorable Court deny the Petition because it sets forth no "special and important reasons" within the meaning of Rule 242(b), SCACR worthy of this Court's discretionary review.

STANDARD OF REVIEW

"A petition for a writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which a [litigant] is entitled as a matter of right." Poston v. State, 339 S.C. 37, 39, 528 S.E.2d 422, 424 (2000). Issuance of a writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only when there are special or important reasons." Rule 242(b), SCACR. While the Supreme Court has broad power to exercise its discretion and to issue a writ, in general, the "special reasons" for review are novel questions of law, a dissent in the Court of Appeals, conflict between the decision of the Court of Appeals and a prior decision of the

Supreme Court, substantial constitutional issues, or a federal question in the context of a decision of the Court of Appeals conflicting with a decision of the U.S. Supreme Court. See Rule 242(b)(1)-(5), SCACR. The decision below was unanimous, as was the denial of the petition for rehearing, and it did not implicate any novel questions of law or other special reasons for which this Court should grant Petitioners a writ of certiorari.

COUNTER STATEMENT OF UNDISPUTED FACTS

Petitioners' theory of this case is that Respondents are collectively responsible for the creation of a hazardous condition upon the Highway, and that Respondents' alleged negligence proximately caused injury to them when Mr. Daniel Sena, executing a legal left-hand turn, turned his pickup into them while under the influence of cocaine and alcohol. (R. p. 193). In addition to the circumstances of the collision itself, the undisputed facts relevant to the disposition of this Petition primarily concern the relationship between Respondents and a widening project affecting the portion of Highway 17A abutting the Pilot Travel Center.

The subject accident occurred in the left lane of the Highway 17A northbound, in front of a Pilot Travel Center just outside the city limits of Summerville. The Pilot was constructed on real property abutting the highway in or around August 2002. (R. pp. 166-167). This had been the location of a previous combination convenience store and gas station owned by Speedway SuperAmerica, LLC,[2] which had three driveways with access to the Highway. It is undisputed that there was no solid raised median in the Highway preventing left turns into the existing gas station. (R. p. 400 at 256) (R. p. 166 ¶ 7). Instead, the median then present was a painted flush median allowing motorists on both sides of the Highway to make left turns into abutting businesses. (R. p. 400 at 256 lines 7-21).

[2] Respondents Pilot and Speedway were part of a joint venture to redesign an existing gas station on the property to create the Pilot Travel Center.

According to the uncontroverted testimony of SCDOT, the design plans for the Widening Project never included a raised median. (R. p. 400 at 253 line 23 — at 254 1ine16; R. p. 401 lines 2-5; R. p. 401 at 260 lines 16-24).[3] The decision to not install a raised median in front of the Pilot Travel Center was made by Leland Colvin, Jr., the Program Manager for the Widening Project. (R. p. 400 at 255 lines 11-18). This decision was made when the Widening Project design plans were prepared, finalized, and date stamped in 1998. (R. p. 401 at. 260 lines1-6). Crucially, and fatally to Petitioners' reliance on the so-called "Negotiations Letter," the evidence shows that the design plans for the Highway 17A Widening Project and the interchange project were each dated over a year *before* that August 2000 letter. (R. p. 221, lines 1-14).

Furthermore, SCDOT's uncontroverted testimony is that Mr. Colvin's decision to use a painted flush median, rather than a raised median, was made in conformance with SCDOT's Highway Design Manual. (R. p. 402 at 262 line 19 - 263 line 22). According to SCDOT, installing a raised median as part of the Widening Project would have contravened the standards set forth in the SCDOT's Highway Design Manual, which SCDOT considers "the Bible" for its design projects. (R. p. 400 at 254 lines 13-16).

As part of the construction of the Pilot Travel Center, Pilot redesigned the site's entrance driveways and submitted an application for an encroachment permit to SCDOT on or about May 13, 2002. SCDOT had to approve the design and location of the driveways to

[3] SCDOT testified that the initial design plans for a different project, the re-design of the Hwy. 17A / Interstate 26 interchange, the "Interchange Project," depicted a raised median on Hwy 17A in front of the site of the Pilot. These initial plans however were not prepared by SCDOT, nor were they plans for the widening of the highway, which was a separate project handled internally by SCDOT. The Interchange Project did not concern work performed to the subject portion of U.S. 17A. SCDOT performed work to this section of U.S. 17A as part of the Widening Project. According to SCDOT, the presence of the raised median in the first iteration of the unrelated Interchange Project's design plans was simply a placeholder, representing the location of the Highway in which the design plans for both projects would eventually be merged. (R. p. 401 at 257 lines 6-14).

the Pilot Travel Center before issuing the encroachment permit. According to SCDOT, it conducts an independent analysis when evaluating whether to approve an encroachment permit to ensure that the proposed driveway(s) conforms to SCDOT's regulations and standards. (R. p. 405 at 275 lines 5-24). SCDOT also considers highway safety and how access to private property affects both traffic and the general operation of the highway system. SCDOT testified that it has the ultimate authority to approve encroachment permits and that it does not compromise its standards in order to accommodate a property owner's interests. (R. p. 406 at 277 lines 16-21). SCDOT ultimately approved the encroachment permit application and issued a permit to Pilot to construct the driveways to the Pilot Travel Center.

The undisputed facts in the record establish 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, e.g., a raised median, had been created and was physically present on Highway 17A, only thereafter to be removed at the request of adjacent property owners. Petitioners argue that handwritten notes on an August 28, 2000, SCDOT letter, which they call the "Negotiations Letter," support their conclusion that Speedway played a role in SCDOT's decision to utilize a flush median, but have provided no evidence to substantiate this unsupported conclusory leap. (Ct. of Appeals Op. at 5-6). The Court of Appeals 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 utilize a flush median, and the South Carolina statute establishing SCDOT's "exclusive responsibility" for highway design, *including placement of median barriers*, properly supports the Court of Appeals' finding that there was no *material* evidence to support any assertion that Speedway played a role in SCDOT electing to utilize a flush median. (Ct. of Appeals Op. at 7-8) (citing S.C. Code Ann. § 57-3-110). Specifically, 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). As noted above, the design plans for the Highway 17A Widening Project were dated over a year *before* the August 2000 letter. (R. p. 221, lines 1-14).

Simply stated, the Court of Appeals properly found that there is no evidence in the record that Speedway altered SCDOT's design plans, caused the removal of a raised median from the Widening Project's design plans, or negotiated the removal of a raised median that never existed to begin with, and, therefore, Speedway did not breach its alleged duty of care. (Resp. Br. 16). Nonetheless, Petitioners continue to rely on baseless conclusions in support of the arguments in their Petition. The Court of Appeals correctly and unanimously affirmed the trial court, holding that Petitioners had not demonstrated the existence of a duty or of a genuine issue of material fact sufficient to survive summary judgment. To date, five different judges have scrutinized the arguments and evidence, and each came to the same conclusion, which is that summary judgment was, and is, appropriate in this matter.

1. **The Court of Appeals unanimously and correctly concluded that Speedway did not owe a duty of care to Petitioners.**

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

First, Petitioners argue that the Court of Appeals erred in discounting the "negotiations letter" in favor of Mr. Colvin's contrary testimony. (Pet. 7-9, 11). The Court of Appeals however properly relied on undisputed facts and uncontroverted evidence to conclude that no evidence in the record supported Petitioners' contention that the median selection decision belonged to any entity other than SCDOT, with 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 summary judgment and on appeal, Petitioners argue that the median selection decision was a product of alleged SCDOT negotiations with Pilot/Speedway. However, as explained above and in Respondent Speedway's Final Brief, which Speedway incorporates herein, Petitioners have not identified any evidence in the record to support their "competing theory" regarding the median selection decision. Petitioners' claim rests entirely on the conclusions they draw from a handwritten notation on the letter regarding a "negotiation," which the trial court and Court of Appeals properly found was not sufficient to uphold Petitioners' 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."). See also Resp. Br. p. 9, n.4. Petitioners have not provided any evidence to survive summary judgment on the median selection issue because there is no evidence in the record establishing that median selection was anything other than SCDOT exercising its exclusive and sole authority to make that decision. There is therefore no "factual dispute" regarding median selection in the record, and thus, summary judgment was appropriate.

Additionally, even if Petitioners were correct and there was evidence in the record establishing the existence of negotiations between SCDOT and Speedway regarding median

selection, which Speedway denies, that would be immaterial to the outcome of this matter because Speedway is not responsible for highway design. As discussed throughout this Return and in briefing and argument below, SCDOT has sole and exclusive power and authority to make decisions regarding the placement of a flush median upon its Highway by operation of statute. See S.C. Code Ann. §§ 57-3-110, 57-1-30, 15-78-60 (15). Petitioners have not presented and cannot present any evidence showing that the median selection was the product of an alleged negotiation because the only inference supported by the record is that the design decision rested with, belonged to, and was made by SCDOT.

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

Next, Petitioners argue that, under precedent, an adjoining landowner may be liable for any dangers it created upon the Highway, and that the Court of Appeals failed to properly apply precedent from Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213, 216-17 (1961), 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. United States, 862 F. Supp. 1460, 1464 (D.S.C. 1994), and Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009). Hollifield and Shaw establish that *if* an abutting landowner creates an unsafe condition on a public thoroughfare, the landowner can be jointly liable with the municipality for that condition. In Epps, the Court found that, for an abutting landowner to bear liability, the facts must show that the landowner helped create the hazard or that the hazard was "legally traceable" to the landowner. Skinner solidifies this concept, providing definition as to what might constitute an "artificial condition" created by a landowner upon the highway for which it may bear liability: "[e]xamples…might include materials spilled on a highway or smoke emissions that obstruct visibility." Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 525, 681 S.E.2d 871, 874 (2009).

Petitioners' argument regarding misapplied precedent fails for several independent reasons. First, Petitioners' argument fails because the Court of Appeals considered other avenues by which Speedway may have had a duty of care for Petitioners other than via the creation of an "artificial condition on the highway." The Court considered whether, for instance, the Respondents' encroachment permit application for the construction of its driveways created a duty of care as to users of the public highway. The Court of Appeals held that "[t]o the extent Petitioners 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).

The Court of Appeals also considered whether Respondents owed a duty to warn users of the Highway. In so doing, it analyzed the Pennsylvania case of Allen v. Mellinger, 156 Pa. Cmwlth. 113, 625 A.2d 1326 (1993), which it found helpful. (Ct. of Appeals Op. at 8-9). The Allen plaintiffs argued that the location of an abutting business owner's driveway created a dangerous condition on a state highway, which business owner should have allegedly remedied or warned about. Allen, 156 Pa. Cmwlth. at 116. The court however held that the state had "exclusive duty for the maintenance and repair of state highways" and that adjacent business owners were not liable for failure to erect "signs, paint lines, or place curbing or barricades" to warn and / or to prevent left-hand turning traffic from turning at a point on the highway with limited visibility. Allen, 156 Pa. Cmwlth. at 118, 119 n.6 and 119 n. 6, 625 A.2d at 1328 and 1329 n. 6 (1993). The Court of Appeals applied the analysis from Allen to the facts of this case, correctly holding 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).

Petitioners also contend that the Court of Appeals erred in its application of the Epps rule, arguing that Respondents created a "hazard" upon the Highway. (Pet. 10-11). The Court of Appeals however properly considered the precedent and found the rule inapplicable because Speedway did not help create the median "hazard," nor did it find the median "hazard" legally traceable to Speedway. Speedway did not create the alleged hazard because the decision regarding placing and maintaining a flush median rested solely and exclusively with SCDOT, which has sole and exclusive statutory power to design and maintain public highways. Moreover, the flush median has always been in place on the Highway and had been in SCDOT's plans for over a year before the "negotiations letter" which Petitioners cite in support of their contention that Speedway created a hazardous condition upon the Highway. The alleged hazard is therefore not legally traceable to Speedway.

As demonstrated above, the Court of Appeals properly considered all potential theories upon which Speedway, as an adjacent landowner, may have borne a duty of care to Petitioners and, considering these theories, it correctly found that there was not sufficient evidence for Petitioners to survive summary judgment on any of their theories. Their Petition should therefore be denied.

c. The Court of Appeals 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.

Third, Petitioners state that the Court of Appeals erred by concluding that "SCDOT's statutory highway duties precluded liability for an adjoining landowner." (Pet. 13). This is a gross mischaracterization of the holding below. The Court of Appeals held that, because SCDOT has a

statutory responsibility for highways, including the initial discretionary design of highway medians, that a private entity such as Speedway cannot have had a duty to a third party *regarding the median decision*. (Ct. of Appeals Op. at 5-8). It did not hold that adjoining landowners have no duties to those who travel upon public the public ways, and in fact it set forth circumstances and examples of instances under which a landowner has a duty of care to those who use the highway.[4] As discussed above, SCDOT has sole and exclusive control and authority over its Highway, which includes the initial discretion to retain an existing flush median (as was the case here) or to possibly place a raised median or median barriers upon the highway. (Ct. of Appeals Op. at 8). All decisions regarding median design and selection fall within the exclusive authority of SCDOT. Speedway therefore has no duty of care regarding SCDOT's decision here to retain a flush median on Highway 17A.

Petitioners continue to contend that SCDOT and Speedway were "joint tortfeasors," returning to their argument that Respondents acted in concert to design the highway, thereby creating a dangerous condition upon it for which all bear liability. Again, this misapprehends the Court of Appeals' holding, which was that no evidence in the record supported Petitioner's theories of liability. In spite of Petitioner's contention otherwise, the Court of Appeals did not give Speedway blanket immunity or absolution. It made a well-considered conclusion limited to the particular facts of this case. The courts below properly held that Speedway owed no duty to Petitioners, not only because of SCDOT's statutory authority over highway design, but also because the record lacks material evidence establishing Speedway's liability to Petitioners.

2. The Court of Appeals properly declined to address proximate cause.

[4] See Ct. of Appeals Op. at 8, discussing Skinner and p. 11 of this Return, supra, regarding the same.

In addition to their arguments regarding the existence of a duty of care, Petitioners contend that the Court of Appeals should have should reached the merits of their proximate cause argument. (Pet. 19-20). The Court of Appeals, citing Futch v. McAllister Towing of Georgetown, Inc., 355 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), properly declined to address proximate cause because it had already determined that Speedway owed no duty of care to Petitioners as alleged. See *Id.* 355 S.C. at 613, 518 S.E.2d at 598(1999). Because the Court of Appeals' conclusion as to the lack of duty was dispositive, there was no reason for it to address proximate cause.

Should this Court consider the issue, however, it is clear from the record that Petitioners have not provided any scintilla of evidence demonstrating that Speedway proximately caused their injuries. The only evidence in the record is that SCDOT never considered a raised nontraversable median, that SCDOT had the sole authority to determine the design of the median, that SCDOT made the design decisions for this project, and that SCDOT designed the median in conformity with its Highway Design Manual. Furthermore, the Court of Appeals properly concluded that SCDOT is solely responsible for highway design pursuant to S.C. Code Ann. § 57-3-110 (2018).

Conversely, the only inference available from the record is that the proximate cause of the collision at issue was Daniel Sena's decision to operate his vehicle under the influence of cocaine and alcohol and then to fail to keep a proper lookout and yield the right-of-way, while making a left-hand turn. This conduct does not implicate Speedway, and, contrary to Petitioner's unsupported contention otherwise, there is no evidence in the record showing that Speedway should have anticipated injuries to users of the public highway arising from a median design over which it had no control. The record is devoid of evidence showing that Petitioners' injuries most probably resulted from a cause for which Speedway was responsible; accordingly, Petitioners have not carried their burden on proximate cause. Therefore, even if the Court of Appeals had addressed

the issue, Petitioners' argument that the record contained "the required scintilla" of evidence fails. There is simply no evidence in the record that any acts or omissions, save those of Mr. Sena, were the proximate cause of their injuries and therefore the Petition should be denied.

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 Petitioner's Petition for a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

/s/ J. Bennett Crites, III
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