

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2022-001489
Ct. App. Opinion No. 5921 (filed July 6, 2022)

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.,
and Munlake Contractors, 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.

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(AS TO RESPONDENTS PILOT AND SPEEDWAY)**

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REPLY ARGUMENT

1. The Court of Appeals’ overreliance on SCDOT’s statutory duties conflicts with this Court’s precedent.

Pilot and Speedway do not challenge the multiple South Carolina precedents plainly stating a state entity’s statutory responsibility for highway conditions is no barrier to liability for the owner of highway-adjacent property who creates a hazard on the highway. Hollifield v. Keller, 238 S.C. 584, 592, 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); Epps v. U.S., 862 F. Supp. 1460, 1464 (D.S.C. 1994); Chambers v. Whelen, 44 F.2d 340, 341 (4th Cir. 1930). Instead, Pilot and Speedway seem to argue the Court of Appeals did not rely on SCDOT’s statutory responsibilities in finding Speedway/Pilot owed no duty. (Pilot Return at 14-15; Speedway Return at 13-14). The Court of Appeals’ opinion rejects that argument as its final word on the Wrights’ median-related duty claim isolates the South Carolina Department of Transportation’s (“SCDOT”) statutory duties as the basis for affirming the circuit court ruling:

Even if SCDOT’s installation of a flush median in lieu of a raised median could be construed as an artificial condition in the light most favorable to the Wrights, by statute SCDOT is exclusively responsible for highway design.

Wright v. S.C. Dep’t of Transp., 437 S.C. 184, 194, 877 S.E.2d 788, 793 (Ct. App. 2022) (citing S.C. Code Ann. §§ 15-7860(15), 57-1-30, 57-3-110)).

In other words, the Court of Appeals concluded that, assuming the Wrights could fit their claim within the undue strictures of Skinner¹ by proving Pilot and Speedway’s role in median selection was an “artificial condition,” they still could not pursue claims against these entities because of SCDOT’s statutory duties. By making these statutes a decisive factor in the

¹ Skinner v. S.C. Dep’t of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009).

Pilot/Speedway duty analysis, the Court of Appeals’ ruling conflicts with this Court’s long-standing precedent from Hollifield as well as its own precedent in Shaw and persuasive authority from the Fourth Circuit and South Carolina federal district courts. Discretionary review via a writ of certiorari is aimed at resolving just this type of conflict. Rule 242(b)(3), SCACR.

2. Pilot and Speedway’s Returns show the need to clarify South Carolina law on the scope of an adjoining landowner’s duty for highway dangers.

The Court of Appeals confined its duty discussion to Skinner’s “artificial condition” analysis when South Carolina law actually imposes a duty on an adjoining landowner for any highway danger either created by or legally traceable to the landowner. Shaw, 351 S.C. at 43, 567 S.E.2d at 536 (citing Epps, 862 F. Supp. at 1464) (duty arises when landowner “created an unsafe condition” on a public way); Epps, 862 F. Supp. at 1467 (noting general rule imposes duty on adjoining landowner for any highway hazard that is “legally traceable” to the landowner). Focusing so intensely on Skinner was an error given its very different facts (Pet. at 11) and the presence of the more apt Shaw/Epps rule.

Pilot and Speedway offer different rationales in support of the Court of Appeals’ approach. Speedway seems to suggest the Court of Appeals effectively considered Shaw/Epps in its Skinner analysis because Skinner’s “artificial condition” analysis “solidifie[d]” the Shaw/Epps rule. (Speedway Return at 11); Id. at 13 (arguing the Court of Appeals “properly considered all potential theories” for an adjoining landowner duty). However, Skinner makes no mention of Shaw/Epps and neither does the Court of Appeals’ opinion. Pilot, in contrast, argues Shaw and Epps no longer have precedential force because they “predate” Skinner where the Court provided a “clarification” on the scope of an adjoining landowner’s duty. (Pilot Return at 13). But, it is hard to argue the Court’s intent was to clarify or displace Shaw/Epps in an opinion that did not mention either precedent. Plus, the Shaw/Epps rule has been cited as precedent *even after* Skinner was decided.

See Connelly v. Winsor Custom Homes, LLC, No. 2019-UP-287, 2019 WL 3714967, at * 1 (S.C. Ct. App. Aug. 7, 2019).

In the end, the Court of Appeals erred in its failure to consider the Shaw/Epps rule and to determine whether the dangerous conditions on Highway 17A were created by or otherwise legally traceable to Pilot and Speedway. Pilot and Speedway’s varying explanations for this error only further indicate the confusion the Court of Appeals’ opinion creates in this area of the law. This Court’s review could serve the important function of providing clarity by returning to the long-standing duty creation rule applied in Shaw and Epps.

3. Pilot and Speedway stake their argument to the favorable resolution of a genuinely disputed fact.

Pilot and Speedway effectively acknowledge the Court of Appeals disregarded the Negotiations Letter and implicitly or directly defend the decision to do so. With limited exception, they do not contend the Negotiations Letter is incompetent evidence. Instead, Pilot and Speedway claim its probative value is outweighed by one other piece of evidence—the self-serving testimony of SCDOT’s corporate designee. Again and again, Pilot and Speedway insist the SCDOT designee’s word was “uncontroverted” and his statements “establish” “undisputed” facts despite directly contradictory statements by Speedway’s employee in the Negotiations Letter. (Speedway Return at 6-9; Pilot Return at 8). But, taking a side on a genuinely disputed fact does not entitle a defendant to judgment as a matter of law, and the Court of Appeals’ ruling merits review because it stands to weaken South Carolina summary judgment rules.

Summary judgment may not be granted where there is a genuinely disputed material fact. Rule 56(c), SCRCF. Since an adjoining landowner’s duty arises from exercise of control over highway conditions, Pilot and Speedway seem to acknowledge evidence of their control over Highway 17A would be material. Thus, Pilot and Speedway are left to argue their alleged control

over median selection is not genuinely disputed. In support of this defense, Pilot and Speedway rely on SCDOT representative Leland Colvin who testified he selected a painted median for the crucial portion of Highway 17A and never considered a raised median. (Pilot Return at 9-10; Speedway Return at 6-9).

The trouble lies in the contention that Colvin's testimony is "uncontroverted" and "undisputed," claims Speedway makes several times. (Speedway Return at 6-7); see also (Pilot Return at 9-10 (arguing the Negotiations Letter does not qualify as evidence because "SCDOT testified" otherwise). The Negotiations Letter (App. 732) certainly disputes Colvin's statements. Colvin claims SCDOT alone chose the painted median, but the Negotiations Letter points to a collaborative decision between SCDOT and a Speedway representative. Id. ("Approved to have . . . unmountable median . . . eliminated from the plan."). Colvin asserts that a raised median was never considered for the area in front of Pilot Travel Center, but the Negotiations Letter indicates a raised median was considered and intended only to be "altered" after SCDOT's conversations with Speedway. Id. Colvin testified the median selection was made in 1998, but the Negotiations Letter shows median selection was still being "negotiated" in September 2000. Id.

Other than Pilot's half-hearted admissibility challenge², there is no argument here that the dispute created by the Negotiations Letter is not "genuine." The "genuineness" requirement to avoid summary judgment distinguishes only between actual disputes and those that are "feigned," between a "real" issue and a "perfunctory or shadowy one." Saluda Motor Lines, Inc. v. Crouch,

² Pilot argues on appeal the Negotiations Letter cannot be authenticated and contains inadmissible hearsay. (App. 1055). However, the Negotiations Letter is printed on SCDOT letterhead, and the pertinent notes were written by an admitted Speedway employee. Since the declarant was an employee of Speedway (App. 1096), which was a partner with Pilot in the Pilot Travel Center joint venture, the Negotiations Letter is not hearsay. Rule 801(d)(2)(D), SCRE. Notably, Pilot did not include any admissibility arguments in its circuit court briefing, and Speedway does not join these arguments in its Return.

300 S.C. 43, 386 S.E.2d 290 (Ct. App. 1989) (quoting 73 Am. Jur. 2d *Summary Judgment* § 27); see also Drewitt v. Pratt, 999 F.2d 774, 778 (4th Cir. 1993) (finding “genuine” means evidence “create[s] fair doubt” over a disputed fact). The dispute between Colvin’s testimony and the Negotiations Letter is real. Speedway admits its employee wrote the crucial notes (App. 1096), and the Wrights’ duty argument relies on the clear implications of the Negotiations Letter’s unambiguous language. Plus, Pilot and Speedway have never offered an alternative explanation for the conversation memorialized in the Negotiations Letter.

Thus, while Pilot and Speedway are free to tout Colvin’s testimony over the Negotiations Letter’s contents, the Court of Appeals erred in crediting Colvin while discounting the Negotiations Letter. South Carolina’s summary judgment principles hold that only a jury may resolve this genuine dispute of material fact.

4. The deficient median selection remains a proximate cause of the Wrights’ losses despite the at-fault driver’s misconduct.

Pilot and Speedway also argue the Court should deny the Wrights’ petition because, regardless of the alleged median and driveway errors, the at-fault driver (Daniel Sena) is the sole proximate cause of their losses. (Pilot Return at 15-17; Speedway Return at 15-16). However, Pilot and Speedway mischaracterize Sena’s deposition testimony, and this Court has found a jury issue on proximate cause in cases involving intervening criminal acts on at least two occasions in the last five years.

There is no doubt Sena was *a* proximate cause of the collision and resulting injuries, but tort losses can be the product of multiple proximate causes. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) (“the plaintiff must prove the defendant’s negligence was at least one of the proximate causes of the injury”); Hughes v. Children’s Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). Contrary to Pilot and Speedway’s contentions, Sena

did not claim to be solely responsible for the collision. Sena rejected Pilot and Speedway's suggestion that, due to his drug use, he would have run over a raised median and crashed into the Wrights' motorcycle anyway. Instead, Sena testified that a raised median "could have prevented my accident and a lot more accidents and any more to come." (App. 701 at 119, lines 2-4).

That testimony is consistent with the other evidence. It would be reasonable for a jury to conclude a raised median likely would have prevented Sena from making the fateful left turn because that is precisely the purpose of installing a raised median. Colvin, SCDOT's representative, explained that a raised median's purpose is "access control" and "is not intended to be transversed by the motoring public." (App. 413 at 101, lines 9-25). Even Pilot's Vice President of Development admitted a raised median's specific purpose is to prevent the type of turns that resulted in this collision. (App. 687, lines 6-7) (acknowledging raised median's purpose would be "[t]o keep people from making a left turn"). That intent is borne out in effects as the installation of raised medians decreases traffic collisions by 35%. (App. 422 at 139, lines 1-9); see also (App. 743 ¶ 13) (the Wrights' engineering expert stating that a raised median would have significantly reduced the risk of harm to motorists).

Finally, this is one more area where the circuit court's ruling conflicts with this Court precedent. Sena's driving errors and drug use may constitute criminal behavior, but they do not necessarily sever the causal chain between others' torts and the Wrights' losses. Where a negligence claim alleges an injury directly caused by the intervening act of a third party, a "special case" is presented. Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011). In those special cases, the test becomes whether a third-party criminal act was foreseeable to the defendant. Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 591, 784 S.E.2d 670, 676 (2016). The finder of fact must determine whether "the injury at the hand of the

intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act.” Shepard v. S.C. Dep’t of Corr., 299 S.C. 370, 375, 375 S.E.2d 37, 37 (Ct. App. 1989). The Wrights need not prove the “particular chain of events” was foreseeable but only that the injury Sena inflicted was “within the general range of consequences which any reasonable person might foresee.” Cody P., 395 S.C. at 621, 720 S.E.2d at 478 (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38).

This Court has rejected summary judgment on proximate cause in cases with less foreseeable intervening criminal acts than Sena’s conduct here. In Roddey, the Court ruled a jury could still find proximate cause for a defendant retailer’s errors notwithstanding the intervening criminal acts of a security guard who chased a suspected shoplifter for miles before she suffered a fatal collision with a tree. 415 S.C. at 591, 784 S.E.2d at 676. Similarly, in Wright v. PRG Real Estate Management Inc., 426 S.C. 202, 222, 826 S.E.2d 285, 296 (2019), the Court found a jury could still find an apartment complex’s negligence in securing its premises proximately caused an assault and kidnapping of the complex’s tenant notwithstanding the intervening misconduct of her abductor—a criminal who was never identified. The proximate cause argument is much stronger here than in Roddey and Wright because the intervening bad actor has been identified, he testified that a raised median would have made a difference, and that testimony is supported by the statements of Pilot/SCDOT representatives as well as the Wright’s engineering expert. Therefore, the Court should reject Pilot and Speedway’s proximate cause argument because it would conflict with long-standing precedent holding that causation is an issue for the jury in all but the “rare or exceptional cases.” Gause v. Smithers, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (quoting Bailey v. Segars, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001)).

CONCLUSION

Based on the arguments stated above and those in their earlier filings, the Wrights respectfully request the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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