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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. 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 SCDOT)**

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REPLY ARGUMENT

1. SCDOT's preservation argument is meritless.

Rather than offering a substantive defense for how the Court of Appeals parsed the various provisions of S.C. Code Ann. § 15-78-60(15) that have been debated by South Carolina's appellate courts for decades, SCDOT asks the Court to look past the merits and reject the Wrights' petition on preservation grounds. (SCDOT Return at 9-10). There is no merit in that request.

SCDOT claims the Wrights never argued in their Court of Appeals briefing that this case should be governed by section 15-78-60(15)'s "initial placement" provision and its discretionary immunity language pursuant to this Court's ruling in Wooten v. South Carolina Department of Transportation, 333 S.C. 464, 511 S.E.2d 355 (1999). (SCDOT Return at 9-10). That is simply not true. The very first argument in the median selection portion of the Wrights' reply brief reads as follows:

Two portions of Section 15-78-60(15) should be considered for SCDOT's immunity defense to these claims. SCDOT is immune from liability for "failure . . . to initially place" a median but only "when the failure is the result of a discretionary act." For claims based on median issues after initial placement, SCDOT is immune for a raised median's absence unless the issue is not corrected "within a reasonable time after actual or constructive notice."

(App. 1178-79) (citing Wooten, 333 S.C. at 468, 511 S.E.2d at 357).¹

Thus, the Wrights raised a timely argument that the "initial placement" provision was the proper section 15-78-60(15) test to apply to the median selection dispute and expressly relied on

¹ In fact, it is the application of "design immunity" to SCDOT's actions that is the late addition to this litigation. SCDOT did not ask the circuit court to grant design immunity. SCDOT's memorandum argued only that it was entitled to section 15-78-60(15)'s discretionary immunity. (App. 299) (seeking "discretionary immunity for any loss caused by the absence of a median or the lack of a median in the initial design" of the highway). When SCDOT introduced the notion of design immunity in its Court of Appeals' briefing (App. 1154-55), the Wrights used the first available opportunity—their reply brief—to cite Wooten and explain the flaws in SCDOT's new argument. (App. 1178-79).

Wooten to support that contention. There is no merit in SCDOT’s preservation argument, and it should not prevent this Court from granting the Wrights’ petition to restore the proper application of section 15-78-60(15) that Wooten directs and the Court of Appeals’ opinion lacks.

2. SCDOT makes the discretionary immunity argument this Court rejected in Pike.

Discretionary immunity, under section 15-78-60(15) or S.C. Code Ann. § 15-78-60(5), is an affirmative defense for which SCDOT bears the burden of proof. Since SCDOT moved for summary judgment on this defense, it bore the burden to prove the record failed to create a question of fact as to whether the median selection for Highway 17A was a discretionary act. This Court has held that burden is not satisfied simply by offering “some evidence” SCDOT’s omission of a safety device was discretionary—i.e. the product of weighing competing considerations using accepted professional standards. Pike v. S.C. Dep’t of Transp., 343 S.C. 224, 232, 540 S.E.2d 87, 91 (2000). SCDOT must go a step further by showing any contrary evidence offered by the Wrights did not create a jury question as to whether the median selection met the definition of “discretionary” act.

SCDOT does not make that showing. SCDOT argues summary judgment on discretionary immunity is proper simply because SCDOT’s witnesses claim they used their discretion in selecting the median. (SCDOT Return at 10-11). This is precisely the “some evidence” argument Pike rejected. As for the Negotiations Letter showing the median selection was a business-influenced joint decision by SCDOT and Pilot/Speedway, SCDOT simply dismisses this evidence out of hand. (SCDOT Return at 11-12) (arguing that, despite the Negotiations Letter, “Colvin’s testimony . . . establishes . . . there were no negotiations”). SCDOT’s disagreement with the Negotiations Letter and SCDOT’s offering of evidence to rebut the Negotiations Letter’s contents do not support summary judgment because, instead of eliminating a question of fact on

discretionary immunity, it simply creates one. See Pike, 343 S.C. at 232, 540 S.E.2d at 91 (“Certainly a governmental entity should not be entitled to discretionary immunity as a matter of law merely by creating an issue of fact.”).

Given the holding of Pike and the evidence in the record, SCDOT’s path to summary judgment would require it to show that even the collaborative median selection outlined in the Negotiations Letter would have amounted to a discretionary act. But, SCDOT does not even attempt that argument, and the record would reject it anyway. (App. 397 at 39, lines 3-25; App. 441 at 213, lines 11-13). In sum, SCDOT’s return only reiterates the position that it is entitled to summary judgment on its discretionary immunity defense because the courts should choose SCDOT’s testimony over the Wrights’ contrary evidence. That argument cannot prevail in light of Pike’s analysis of discretionary immunity and this Court’s numerous precedents on the general summary judgment standard.

3. SCDOT continues the Court of Appeals’ error in applying the constructive notice standard to SCDOT’s failure to correct the highway dangers.

The Wrights’ petition challenges the Court of Appeals’ finding that SCDOT lacked “constructive notice” of Highway 17A’s dangers prior to the Wrights’ injuries because SCDOT had not in fact conducted an accident analysis of the area until one year after the collision. That ruling conflicts with long-standing precedent on the definition of “constructive” notice and the types of evidence that may be used to prove it. SCDOT’s return doubles down on the Court of Appeals’ error. SCDOT discounts accident reports showing a spate of nearby collisions arguing these reports are not competent evidence because they were “not . . . in the possession” of SCDOT prior to the Wrights’ collision. (SCDOT Return at 17). But, “constructive” notice is not about actual possession, it considers what “a reasonable person should know.” Staples v. Duell, 329 S.C. 503, 508, 642, 494 S.E.2d 639, 642 (Ct. App. 1997). Thus, the accident reports are pertinent

evidence because they were easily accessible to SCDOT prior to the collision at issue. (App. P. 445 at 229, line 20 – 230, line 8); see also Strother v. Lexington Cnty. Recreation Comm’n, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998) (noting that, for constructive notice, a person is “presumed to have actual knowledge of the undisclosed facts”).

SCDOT then argues the accident reports were properly overlooked by the Court of Appeals because they do not “have any bearing on whether SCDOT had notice.” (SCDOT Return at 16). SCDOT does not expound on how these previous accidents are materially different than the Wrights’ collision or explain why they are insufficient to provide notice that Highway 17A was dangerous. Even if it had attempted to distinguish reports of prior collisions, that would not render them incompetent evidence or support summary judgment on SCDOT’s affirmative defenses. Pike rejected SCDOT’s attempt to make the same argument. 343 S.C. at 233-34, 540 S.E.2d at 91-92 (finding no error in circuit court’s admission of prior accidents to show constructive notice despite SCDOT’s argument that 18 of the 19 prior accidents were different than the subject collision). Since constructive notice is “a quintessential matter for the jury,” the factfinder must determine whether the prior accidents were sufficiently similar and whether they provided SCDOT constructive notice of the dangerous highway conditions. Wooten v. S.C. Dep’t of Transp., 326 S.C. 516, 528, 485 S.E.2d 119, 125 (Ct. App. 1997) *aff’d as modified* 333 S.C. at 467-68, 511 S.E.2d at 357 (1999) (holding that determination of whether prior accidents provided constructive notice was “a quintessential matter for the jury”); see also Major v. City of Hartsville, 410 S.C. 1, 4, 763 S.E.2d 348, 350 (2014) (reversing Court of Appeals and finding jury question on constructive notice).

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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