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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Roger M. Young, Sr., Circuit Court Judge

Appellate Court Case No. 2023-000951
Circuit Court Case No. 2017CP1800138

Mitch Randall Yawn and Juanita Mae Stanley,
d/b/a Flowertown Bee Farm and Supplies,.. Appellants,

v.

Dorchester County,..Respondent.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 3

Statement of Facts 4

Argument 10

I. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT DISMISSING THE PLAINTIFFS' NEGLIGENCE CLAIM BASED ON AN EXCEPTION TO THE TORT CLAIMS ACT'S WAIVER OF IMMUNITY UNDER S.C. CODE ANN. § 15-78-60(4) WHEN THE DEFENDANT'S DUTY AROSE NOT FROM LAW AS DEFINED IN THE STATUTE, BUT FROM A DUTY THAT AROSE FROM THE COUNTY'S CONDUCT 10

II. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFFS' TRESPASS CLAIM WHEN THE EVIDENCE CLEARLY SHOWS THE DEFENDANT INTENDED TO TRESPASS, THOUGH IT MAY NOT HAVE INTENDED OR FORSEEN THE CONSEQUENCES OF THE TRESPASS. 16

Conclusion 18

TABLE OF AUTHORITIES

CASES

Alabama Power Co. v. C. G. Thompson, 278 Ala. 367, 178 So. 2d 525 (1965) 17

Bass v. Gopal, Inc., 395 S.C. 129, 134, 716, S.E.2d 910, 912 (2011) 4

Beaufort Land v. New River Lumber, 86 S.C. 358, 68 S.E. 637 (1910) 17

Bovain v Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 3

George v. Fabri, 345 S.C. 440, 453, 548 S.E.2d 868, 874 (2001) 3

Hancock v. Mid-South Mgm't Co., 381 S.C. 326, 330, 673 S.E.2d 801,803 (2009) 4

Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) 3

Lane v. Mims, 221 S.C. 236, 70 S.E.2d 244 (1952) 16

Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940) 17

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006) 12

Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) 11

Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954) 17

Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000) 13

Repko v. Cnty of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018) 13, 14, 15, 16

Roundtree Villas Assoc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321, S.E. 2d 46, 50-51 (1984) 12

Russell v. City of Columbia, 305 S.C. 86, 89-90, 406 S.E.2d 338, 340 (1991) 12

Sabb v. S.C. State Univ., 350 S.C. 416, 429-30, 567 S.E.2d 231, 237-38 (2002) 10, 16

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E. 2d 161, 165 (2003) 4

Snakenberg v. Hartford Casualty Insurance Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989) 17

Snow v. Columbia, 305 S.C. 544, 552-53, 409 S.E.2d 797, 802 (Ct. App. 1991) 17, 18

Stratos v. King, 282 S.C. 501, 505, 319 S.E.2d 356 (Ct. App. 1984) 17

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) 15, 16

Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006) 11

Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999) 15

Wright v. PRG Real Estate Mgmt., 426 S.C. 202, 212-213, 826 S.E. 2d 285, 290-91 (2019) 11

STATUTES

S.C. Code Ann. § 15-78-60(1) (Supp. 2000) 15

S.C. Code Ann. § 15-78-60(4) (Supp. 2000) 1, 10, 12, 13, 14, 15

S.C. Code Ann. § 15-78-60(5) (Supp. 2000) 15

S.C. Code Ann. § 15-78-60(12) (Supp. 2000) 14

OTHER AUTHORITIES

Restatement (Second) of Torts Section 323 (1965) 11, 12, 13, 14, 15

Rule 56(c), SCRCP 3

Rules and Regulations for Enforcement of the South Carolina Pesticide Control Act, Section 27-1084(A)(4) (*sic*) 13

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT DISMISSING THE PLAINTIFFS' NEGLIGENCE CLAIM BASED ON AN EXCEPTION TO THE TORT CLAIMS ACT'S WAIVER OF IMMUNITY UNDER S.C. CODE ANN. § 15-78-60(4) WHEN THE DEFENDANT'S DUTY AROSE NOT FROM LAW AS DEFINED IN THE STATUTE, BUT FROM A DUTY THAT AROSE FROM THE COUNTY'S CONDUCT?

2. DID THE CIRCUIT COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFFS' TRESPASS CLAIM WHEN THE EVIDENCE CLEARLY SHOWS THE DEFENDANT INTENDED TO TRESPASS, THOUGH IT DID NOT INTEND OR FORSEE THE CONSEQUENCES OF THE TRESPASS?

STATEMENT OF THE CASE

On January 30, 2017, Mitch Randall Yawn and Juanita Mae Stanley, d/b/a Flowertown Bee Farm and Supplies, filed this action in the Court of Common Pleas in Dorchester County against Dorchester County, the Town of Summerville, Allen Aviation Company, and Al Allen. Summons and Complaint, January 30, 2017. The original complaint claimed, in part, that the destruction of Flowertown's bees violated the Fifth and Fourteenth Amendments, as enforced through 42 U.S.C. § 1983. Dorchester County removed the case to the District Court for the District of South Carolina on February 17, 2017.

Yawn and Stanley then filed an Amended Complaint, which serves as the operative complaint in this action (R. pp. 51-66). The Amended Complaint alleges that the County violated Plaintiffs' federal and state constitutional rights, including their right to be free from takings of property that occur without just compensation. The Amended Complaint also asserts that the County[1] violated state law tort principles and statutes, including the South Carolina Tort Claims Act and trespass. The

[1] The Town of Summerville was dismissed at the outset of the case, without filing an answer. Allen and Allen Aviation were dismissed from the suit with prejudice by stipulation filed on June 18, 2019.

Amended Complaint seeks declaratory, injunctive, and monetary relief.

On December 16, 2019, the County filed a motion for summary judgment, Yawn and Stanley filed a response, and a telephonic hearing was held on February 26, 2020. On March 17, 2020, the U.S. District Court issued an opinion and order granting the County's motion (R. pp. 18-26).

In its order, the district court initially ruled that "[t]he state's power of eminent domain is separate and distinct from the state's police power." (R. p. 22, lines 15-16). The court found that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking. The district court concluded that "[t]he loss of Plaintiff's bees was . . . an unfortunate consequence to a proper exercise of Defendant's police power. [But] [b]ecause Defendant was exercising its police power, and not its power of eminent domain, the Takings Clause is not implicated." (R. p. 25, lines 12-15). Based on this ruling of law, the district court granted the County's motion for judgment on the federal claims[2] and remanded the state law claims to state court (R. pp. 18-26).

Following an order clarifying that the district court had not made any fact findings and that its judgment on the takings claim was made as a matter of law, Yawn and Stanley then timely appealed to the Fourth Circuit Court of Appeals.

On June 11, 2021, the Fourth Circuit issued its order, affirming the District Court (R. pp. 36-50). The Fourth Circuit held that "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." (R. p. 44, lines 5-8). It stated the court must determine "the degree to which the invasion is intended or is the foreseeable result of authorized government action." (R. p. 44, lines 9-10). If the invasion is

[2] The Amended Complaint originally included federal due process and equal protection claims, as well as takings claims. However, Yawn and Stanley have voluntarily waived their federal, non-takings claims.

not intended or foreseeable, then it does not constitute a taking. The court found that though the County intended the spraying of Plaintiffs' property, the "death of Appellants' bees was plainly unintentional." (R. p. 44, line 17).

On August 25, 2022, this case was remitted from the United States Court of Appeals, Fourth Circuit, to the Dorchester County Court of Common Pleas.

On August 30, 2022, Dorchester County filed a Motion for Summary Judgment with accompanying exhibits seeking dismissal of the remaining state law claims in the Plaintiffs' complaint. (R. pp. 98-290). On March 13, 2023, the Plaintiffs filed their Memorandum in Opposition to Defendants' Motion for Summary judgment with exhibits in response (R. pp. 291-616). Oral arguments were held on March 28, 2023, before the Honorable Roger M. Young, Sr., Circuit Court Judge via WebEx (R. pp. 75-97). On May 30, 2023, the court issued its Order, granting summary judgment to Defendant on all remaining causes of action (R. pp. 2-17).

The Plaintiffs timely filed their Notice of Appeal on June 13, 2023.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that a circuit court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) *citing Bovain v Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (quoting Rule 56(c), SCRCP).

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 453, 548 S.E.2d 868, 874 (2001).

"In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for

summary judgment." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716, S.E.2d 910, 912 (2011) (emphasis added) (citing *Hancock v. Mid-South Mgm't Co.*, 381 S.C. 326, 330, 673 S.E.2d 801,803 (2009)). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E. 2d 161, 165 (2003).

STATEMENT OF FACTS

In 2016, Juanita Mae Stanley and Mitch Yawn opened a bee farm and bee-related business called Flowertown Bee Farm and Supplies (R. pp. 503-504). The goal was to produce healthy honeybees to sell to others who needed bees for pollination, honey production, and other purposes. With daily care and maintenance, the couple produced 46 hives with several million healthy bees by late summer of 2016 (R. p. 510).

But, in one day, with one aerial spray of pesticides, the bees and Flowertown's business were destroyed. Without warning to Flowertown, the County of Dorchester ("County") sprayed a "highly toxic" pesticide (R. pp. 305-308), over its property on the evening of August 28, 2016, in an effort to kill mosquitos. The next morning, Stanley found "piles" of dead bees everywhere. The few left alive "were struggling to survive [and] trying to clean out the dead ones that were still in the hive boxes." (R. p. 509). Soon, all the bees were dead.

There is no question that the County's spraying pesticides on Stanley and Yawn's beehives resulted in the death of millions of bees they owned and the loss of their livelihood. There is also no question that the County had created a list of beekeepers, including the Plaintiffs, whom the County had promised to warn and had warned before spraying on their properties for over 3 years before this incident, thus creating a duty on the part of the County to warn the Plaintiffs before the aerial spraying on their property so that they could take action to cover their bees and prevent their loss. Prior to this aerial spraying in 2016, one other beekeeper was notified, acted, and avoided the loss of her hives.

The County "missed" notifying the Plaintiffs, so they were not notified and did not know to take protective action before the spray. Their bees were completely destroyed.

The County does not dispute that it caused the bees' deaths and that it had adopted a practice of notifying and had promised to notify area beekeepers on their list, including the Plaintiffs. They argue instead that the undertaking to notify was not a binding obligation and created no legal duty, so the County was not responsible for the bees' deaths. Based on the testimony, a fact finder could find that the County assumed a duty to warn on which the Plaintiffs relied and breached that duty to the Plaintiffs by admittedly failing to warn them.

Additionally, there is no question that the County intentionally trespassed on the property of the Plaintiffs and in so doing harmed them in poisoning and destroying their property. Based on the facts in this case, a jury could find a trespass and a resulting harm to the Plaintiff and award damages.

Based on these facts that far exceed "a mere scintilla of evidence" that support a breach of duty and a trespass and proximately resulting damage, the court erred in granting the County's motion for summary judgment.

The Flowertown Bee Business

Mitch Yawn and Juanita Mae Stanley own Flowertown Bee Farm and Supplies in Dorchester County, South Carolina ("Flowertown")(R. pp. 503, 517). They established and licensed the business with intent to "reproduce honeybees for sale and for lease [for pollination purposes] and to also sell any and all supplies needed . . . for other beekeepers," including "bee suits, hive boxes, [and] hive tools." (R. pp. 503-504).

Stanley acquired extensive knowledge about honeybees and beekeeping while participating in her family's traditional beekeeping practices (R. pp. 504, 540). In 2016, Yawn and Stanley decided to open their own bee-related business. Concluding that the natural environment around the Town of Summerville ("Town") was conducive to beekeeping, and "safe" for honeybees, the couple decided

to base their business on a 14-acre parcel of land which they own in the area (R. p. 503). They purchased some bees, acquired additional bees from Stanley's family, and bought "materials to make hive boxes." (R. p. 503). They also applied for a business license from the Town, which was approved (R. pp. 517-518).

When applying for the license, Yawn and Stanley asked Town Officials who to contact so that "everybody [in the government] would know where we were at and what we were doing, to protect our bees." (R. p. 508). The Town referred them to a Dorchester County official named Clayton "Scott" Gaskins ("Gaskins"), informing them that Mr. Gaskins maintains a list of people "that he would call and notify before spraying." (R. p. 508).

Yawn and Stanley contacted Gaskins and "got on his list." (R. pp. 355-356, 508, 586).

Yawn and Stanley then went about building their business. The primary goal was to produce enough honeybees so that the business would be ready to sell and lease hives in the Spring of 2017 (R. pp. 547, 554). Stanley inspected and cared for the hives at their Summerville property every day (R. p. 516). By mid-summer, Flowertown had 46 healthy hives in a field (R. p. 510), each containing tens of thousands of bees. By the late summer, there were several million honeybees in the hives, so many that the "whole sky" above the sunny field was "covered with bees." (R. p. 509).

Creation and notification of list of beekeepers by Dorchester County and reliance on that notification by the Plaintiffs.

Clayton "Scott" Gaskins, an employee of Dorchester County, was in charge of the mosquito abatement program for the County. As part of those responsibilities, he compiled a list of beekeepers in the County that he undertook to notify so that those beekeepers could take steps to cover their hives and protect their bees from harm when the insecticides to kill mosquitos were sprayed by the County by hand or by truck.

Gaskins initially kept a list of 14-15 beekeepers with their addresses and phone numbers, organized by the zones by which the County is sprayed (R. p. 355, lines 15-22). Gaskins started this

practice in 2013 with 14-15 beekeepers and by 2019, Gaskins had 60 beekeepers on that list (R. pp. 355-356).

Yawn and Stanley were on that list in 2016 and Gaskins estimated that he has contacted them over 50 times, every time that the County was going to truck spray for mosquitoes so that they could take steps to protect their bees (R. pp. 356-357). In fact, even after the onetime aerial spraying and resulting bee deaths that occurred in August 2016, Gaskins has continued to call Yawn to notify him when the County was scheduled to conduct truck spraying in his zone (R. pp. 358-359).

When Gaskins notified Yawn and Stanley prior to truck spraying, they were able to place tarps over the hives and water them with sprinklers to keep the toxic pesticides away from the hives (R. p. 507, 569).

Yawn and Stanley relied on the County, through Gaskins, to contact them when there would be spraying nearby, so that they could take steps to protect their bees (R. p. 587).

The aerial spray, failure to notify Stanley and Yawn, and the resulting bee death.

As spring turned to summer in 2016, the County became concerned with the local mosquito population and media reports about the Zika virus. There were no known cases of mosquito-borne Zika in the County or state at the time,[3] (R. p. 361), and the record shows no evidence of a formal state-declared or county-declared emergency. Nevertheless, the County claims that its usual concern with mosquito abatement was heightened by Zika publicity. The mosquito abatement issue was the particular concern of the County's Mosquito Abatement Program, run by Gaskins (R. p. 323, lines 1-4).

Consistent with past practice, Gaskin's initial move to reduce the 2016 mosquito population was to periodically send trucks to spray chemicals in mosquito-prone areas (R. pp. 363-364). Before

[3] County officials assert that state officials informed them that three people within the County's jurisdiction had travel contracted Zika virus. Gaskins, p. 45.

any trucks went to Flowertown's region, Gaskin called Yawn and Stanley to notify them (R. pp. 355-357). Stanley would then "close up all the entrances to the bees . . . take bed sheets and dampen them and lay them across the hives, in case anything was blowing from the wind from the fog trucks . . . and [] keep them covered" until the day after the spraying (R. p. 507).

In July 2016, the County moved to add aerial spraying to its Mosquito abatement arsenal (R. pp. 371-372). Although the County had no prior experience with aerial spraying (R. p. 389, lines 16-18), it quickly entered into a contract with Allen Aviation for "targeted" aerial spraying over property in the County, at the County's direction (R. pp. 67-74). The County later decided to conduct its first (and only) aerial spray on August 28, 2016, between 6:00 and 8:00 am (R. pp. 381-382).

Prior to the scheduled spray, the County sent a press release to some local publications.

Gaskins, as he had done many times before truck and hand sprays, began to contact the beekeepers in the zones to be affected by phone. In this case, those included two in Zone 41, Ms. Hoover and Yawn and Stanley (R. p. 392, lines 18-25). He recalled talking to Ms. Hoover and told her that there was going to be an aerial spray, that she was in the spray zone, that she needed to cover her hives, spray them with water and uncover them later that morning at 10 am. She agreed to do so (R. p. 393, lines 1-15).

He proceeded to call the rest of his list, but tragically, although Flowertown was on the call list, Gaskins did not call Yawn or Stanley to inform them of the spray (R. pp. 394-395, 507). Looking back on it, Gaskins mistakenly called someone named Abbott above them on the list, rather than Yawn and Stanley (R. p. 394, lines 1-7).

On August 28, 2016, Allen Aviation flew a plane over the Summerville area, including the Flowertown property, and released the toxic chemical Naled (brand name, "Trumpet") (R. pp. 509; 378: lines 17-20). According to the manufacturer, Naled "[c]auses irreversible eye and skin damage" "skin burns" and "[may] be fatal." (R. p. 306). Humans must avoid "breath[ing] vapor or spray mist."

Id. The chemical is "highly toxic" to "bees exposed to direct treatment on blooming crops or weeds," as well as "toxic to fish, aquatic invertebrates, and wildlife." (R. pp. 307-308).

The morning after the spray, Stanley went to check on Flowertown's bees and noticed "no bees flying around," contrary to what was normal. She testified that as she "got closer down to the hive boxes, you could just see piles of bees just lying there. And some of them weren't dead yet, and they were . . . struggling to survive [and] trying to clean out the dead ones that were still in the hive boxes." (R. pp. 509, 512). "[T]here was just like mounds of dead bees piled everywhere." (R. p. 509).

Yawn called Gaskins to find out what had happened and why they had not been contacted as they expected to be and had every other time (R. p. 394, lines 21-25).

Gaskins admitted to Yawn that he had intended to call him but had mistakenly called the name above him on the list instead of him (Abbott) (R. p. 395, lines 1-5).

Gaskins also called Ms. Hoover, who was in the flight path of the aerial spray, and she had done what he suggested by covering her hives and had no bee deaths as a result of the spray (R. p. 394, lines 7-11).

After the spraying that caused the death of the bees, Gaskins called Stanley and apologized for his mistake, telling her how badly he felt about it. The conversation left them both in tears (R. pp. 397, lines 9-18; 589).

The morning after the aerial spray, with mounds of dead bees surrounding their hives, Stanley and Yawn contacted Clemson University, Department of Pesticide Regulation ("Clemson DPR"), the entity responsible for regulating and investigating pesticide use and complaints pursuant to state law. The Clemson DPR investigated and found "bees with behaviors consistent with pesticide exposure." (R. p. 312). The investigation included collecting and testing representative samples of dead bees and soil from around the hives, which the Clemson DPR discovered did not contain pesticide residue. However, the report indicated the lack of pesticide residue "likely occurred due to the time which

elapsed between the application and when the samples were obtained, combined with [the pesticide]'s ability to rapidly degrade under typical environmental conditions." (R. p. 314). Thus, although the investigation "found no [regulatory] violations occurred" during the August 28 aerial spray, it also did not rule out the aerial spray "as a cause for the loss of the bees." (R. pp. 314-315).

Flowertown lost millions of bees, all its hive boxes, and the "baby bees" and honey therein, due to the spray (R. pp. 510-511). A neighbor also lost bees (R. p. 509). A distraught Stanley and Yawn and others soon spoke to County officials about the bee death and its connection to the spray. Mr. Gaskins subsequently admitted that he failed to call Yawn and Stanley prior to the spray (R. pp. 394-395, 512). The County has not paid the couple any compensation for the destruction of their bees and the business (R. p. 519).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT DISMISSING THE PLAINTIFFS' NEGLIGENCE CLAIM BASED ON AN EXCEPTION TO THE TORT CLAIMS ACT'S WAIVER OF IMMUNITY UNDER S.C. CODE ANN. § 15-78-60(4) WHEN THE DEFENDANT'S DUTY AROSE NOT FROM LAW AS DEFINED IN THE STATUTE, BUT FROM A DUTY THAT AROSE FROM THE COUNTY'S CONDUCT.

A. The record before the Circuit Court presented more than a mere scintilla of evidence that the County had assumed a legal duty to the Plaintiffs through the County's actions.

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 429-30, 567 S.E.2d 231, 237-38 (2002).

Here the County's duty to warn arose (1) from its promise to notify and its practice of notifying registered beekeepers, including the Plaintiffs, prior to spraying by the County, and (2) from its designation of the person in charge of the Mosquito Abatement Program, Scott Gaskins, as the person who beekeepers should contact and to whom they should provide their location and contact

information so they could be contacted by the County before a mosquito abatement spray.

The Plaintiffs did exactly that, immediately upon starting their business in 2016, and thereafter was contacted by Gaskins prior to the occasions when the County truck or hand sprayed pesticides near their bees. Every time Gaskins contacted them, Yawn and Stanley covered their bees and prevented any harm to the bees as a result of the spraying.

The only time Gaskins failed to contact them, at the time of the aerial spraying by the County, Yawn and Stanley could not act to cover their bees, and all of their hives were destroyed as a result. A neighboring beekeeper who Gaskins did warn, though, was able to cover and protect her bees and they were saved from harm (R. p. 394, lines 7-11).

In South Carolina, while there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken. *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006).

"The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." *Id.* at 446-47, 635 S.E.2d at 637 (quoting *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)).

The case of *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 212-213, 826 S.E. 2d 285, 290-91 (2019) recognized this voluntarily assumed duty in South Carolina jurisprudence as rooted in section 323 of the Restatement (Second) of Torts (1965), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if,
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

In *Roundtree Villas Assoc. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321, S.E. 2d 46, 50-51 (1984) the Supreme Court held that, when the Lender, in effect, took over the project and undertook to market residential units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose, citing Restatement (Second) of Torts § 323.

For similar cases where our courts recognized the assumption of duty under Section 323, see *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006) (recognizing a duty may arise under section 323) and *Russell v. City of Columbia*, 305 S.C. 86, 89-90, 406 S.E.2d 338, 340 (1991) (relying in part on section 323 to find duty may exist between volunteer defendant and plaintiff).

In this case, there is much more than a mere scintilla of evidence to support the County's assumption of a duty to warn Yawn and Stanley, which the County breached by admittedly failing to warn of an aerial spray of pesticides on their beehives which directly led to a destruction of their bees and hives.

Since the existence of an assumed duty is a mixed question of law and fact and more than sufficient evidence exists to create a factual issue, the Circuit Court erred in failing to recognize that there was at least a question of fact for trial whether the County had through its actions assumed a legal duty to notify the Plaintiffs.

B. § 15-78-60(4) of the Tort Claims Act does not apply to the facts of this case where the County's legal duty arose from the County's assumed duties rather than through law, regulation, or the adoption of policy.

The Circuit Court found that the County fulfilled its legal duty to notify the Plaintiffs by following the provisions of the Rules and Regulations for Enforcement of the South Carolina Pesticide

Control Act, Section 27-1084(A)(4) (*sic*).[4] (R. p. 14). The Court then went further to find that even if the County's actions had created a duty to inform the Plaintiffs through the County's actions in setting up the process for identifying and notifying beekeepers prior to spraying, the County was immune from actions for breach of that duty under § 15-78-60(4) of the Tort Claims Act (R. p. 14). In support of this conclusion, the Court relied on the case of *Repko v. Cnty of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018). The Court's reliance on § 15-78-60(4) and *Repko*, however, was error, since neither applies to the facts of this case in which the Defendant's legal duty to the Plaintiffs arises from assumed duties as outlined in the cases cited in I(A) above, following Section 323 of the Restatement (Second) of Torts.

The Tort Claims Act waives immunity for torts committed by the state, its political subdivisions, and governmental employees acting within the scope of their official duties. *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000). There are several exceptions to this waiver of immunity, including the provision relied on here by the Court in granting summary judgment.

S.C. Code Ann. § 15-78-60(4) (Supp. 2000) provides that a governmental entity is not liable for a loss resulting from:

> (4) adoption, enforcement, or compliance **with any law** or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, **any charter, provision, ordinance, resolution, rule, regulation, or written policies**; … (emphasis added).

There is no evidence in the record, and none was argued before the court, indicating that the practice of notification of spraying by Scott Gaskins on behalf of the County, upon which the Plaintiffs justifiably relied, was ever codified as a law, or as a written policy or provision having the force of law, as described in the "including, but not limited to..." provision of the statute. There is no way to read

[4] This citation in the Order does not seem to match the content for which it is cited. As Plaintiffs are not contesting that the steps taken by the County to advertise in the media satisfied the bare minimum regulations, this discrepancy is not significant.

the County's practice of notification of the beekeepers into this exception, which applies only to laws or provisions having the force of law. This provision was clearly meant to grant immunity to government bodies for claims that they failed to adopt, enforce, or comply with "any law." This provision was not written to excuse government from breaching a Restatement Section 323 assumption of duty through voluntary acts. The sources of those legal duties are very different and there is no provision in the waiver of immunity section statute, S.C. Code Ann. § 15-78-60, including subsection (4), that would provide immunity from any legal duty created by the voluntary assumption of a duty. The Court erred in finding that subsection (4) bars the Plaintiffs from recovery in this case on that basis.

The extent of this error is shown clearly in the Court's mistaken application of the *Repko* decision to this case. In *Repko*, the owner of two lots in a subdivision commenced an action against the County alleging that the County negligently and grossly negligently failed to comply with or enforce its rules, regulations, and written policies governing its handling of a letter of credit (LOC) that should have secured the installation of infrastructure for the neighborhood but did not because the LOC was not administered properly. The County alleged it did not owe a private duty of care to the plaintiff, Repko, and even if it did, S.C. Code Ann. § 15-78-60 provided immunity to the County and barred recovery. *Repko*, 818 S.E.2d at 746.

The Supreme Court in the *Repko* decision accepted that § 15-78-60 (4) applied to the claim by the plaintiff, since Repko was suing based on the County's failure to follow its own regulations. The question in *Repko* was whether the gross negligence standard found in one section of the Tort Claims Act's waiver of immunity provision could be read into other sections in which it was not explicitly mentioned. The court ultimately found that Repko could not read the gross negligence standard of § 15-78-60 (12) into (4) simply because the County originally pled subsection (12) as a defense. Subsection (4), standing alone, provided immunity to the County, so the Court found that the trial

court correctly directed a verdict for the County. *Repko*, 818 S.E.2d at 750-751.

The *Repko* decision has no applicability to this case and does not support the Circuit Court's grant of summary judgment. As outlined above, the Plaintiffs did not cite and do not rely on any law or regulation that the County failed to "adopt, enforce, or comply with." Specifically, the Plaintiffs do not maintain that the County did not provide whatever notice is required by the Pesticide Act.

Rather, the Plaintiffs assert that the County had a duty to notify the Plaintiffs that arose through its voluntary assumption of that duty as described in the Restatement 323 line of cases outlined above. Neither § 15-78-60 (4) as relied on by the court, or (1) or (5), have any applicability to voluntary assumption of duty and do not bar recovery under a cause of action finding the source of its legal duty under voluntary assumption. [5]

Though the Circuit Court in its order did not rely on (5), if this court chooses to examine other bases for upholding the order below, (5) likewise does not provide immunity. As the Plaintiffs argued in opposition to the summary judgment motion, S.C. Code Ann. § 15-78-60(5) (Supp. 2000) stating that a governmental entity is not liable for a loss resulting from: the exercise of discretion or judgment by the governmental entity does not apply to the facts of this case.

Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations, and made a conscious choice using accepted professional standards. *Wooten ex rel. Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 511 S.E.2d 355 (1999). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. *Summer v.*

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[5] In fact, the Circuit Court's confusion on this point is shown by the anachronistic inclusion of the *Repko* discussion of the gross negligence standard which applied to *Repko* but was never an issue in this case. Order, p. 13. The Plaintiffs here did not rely on the gross negligence standard to counteract an immunity waiver; the immunity waivers here simply do not apply.

Carpenter, supra.

In the case of *Sabb v. S.C. State Univ.*, 350 S.C. 416, 428-29, 567 S.E.2d 231, 237 (2002), the Supreme Court found that the burden was on the Defendant to show that it not only actually weighed competing considerations and alternatives but that, in doing so, it utilized accepted professional standards appropriate to resolve this issue. Here, as in *Sabb*, there is no evidence that the County weighed competing considerations and alternatives and exercised discretion in failing to notify the Plaintiffs: it simply made a mistake and failed to notify them, notifying someone else on the list instead.

All the exceptions to the waiver of immunity under the Tort Claims Act are inapplicable here. The Circuit Court erred in relying on these waivers of immunity and the *Repko* case in granting the motion for summary judgment that that decision must be reversed.

II. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFFS' TRESPASS CLAIM WHEN THE EVIDENCE CLEARLY SHOWS THE DEFENDANT INTENDED TO TRESPASS, THOUGH IT MAY NOT HAVE INTENDED OR FORSEEN THE CONSEQUENCES OF THE TRESPASS.

The Circuit Court, both in its short text discussion (R. p. 15) and footnote ruling (R. p. 14, fn. 13), describes the action taken by the County in locating and executing its aerial spray and quotes the Fourth Circuit's conclusion that "the death of [Plaintiffs'] bees was neither intended nor foreseeable." (R. p. 15).

That is not the question, however. The law does not require that a plaintiff demonstrate that the harm caused by a trespass be intentional. The law only requires that the plaintiff prove the defendant's act of trespass be intentional. There is abundant evidence of the County's intentional trespass in the record, and the Circuit Court erred in applying the law and in granting summary judgment on this mistaken application of the legal test to determine trespass.

One in peaceable possession may maintain an action for trespass against another who interferes with his quiet and exclusive enjoyment of the property. *Lane v. Mims*, 221 S.C. 236, 70 S.E.2d 244

(1952). "The plaintiff need only show a prior peaceable possession as against the defendant, in order to sue for trespass." *Stratos v. King*, 282 S.C. 501, 505, 319 S.E.2d 356 (Ct. App. 1984) (citing *Beaufort Land v. New River Lumber*, 86 S.C. 358, 68 S.E. 637 (1910)).

To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion. *Alabama Power Co. v. C. G. Thompson*, 278 Ala. 367, 178 So. 2d 525 (1965). Trespass does not lie for nonfeasance or failure to perform a duty. *Id.*

Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. *Snakenberg v. Hartford Casualty Insurance Co.,* 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989).

Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. *Id.*

Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. See *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249 (1954); *Lee v. Stewart*, 218 N.C. 287, 10 S.E.2d 804 (1940) (it is immaterial whether defendant in committing she trespass actually contemplated the resulting damage to plaintiff).

In this case, there is no question that the County intended to trespass on the property of the Plaintiffs by having an airplane fly over it and drop toxic pesticides on their property. If there had been no damage to the property, there would not have been an actionable trespass. Tragically, there was catastrophic damage to the Plaintiffs' property, and whether the County intended that damage is irrelevant.

As described in the case of *Snow v. Columbia*, 305 S.C. 544, 552-53, 409 S.E.2d 797, 802 (Ct. App. 1991), what is relevant is the intent related to the trespass, not the intent related to the resulting harm.

> The cases relied upon by the Snows are in accord with the rule stated. In each of those cases, the defendant physically entered and conducted activity on land to which the plaintiff claimed title. In each case the entry was manifestly an intentional act. … Taken in context, the Court used "unintentional" to draw a contrast to "wilful."(sic) It said only that the plaintiff need not prove the defendant was wilful (sic)or negligent to recover damages. As used by the Court, "unintentional" meant the defendant did not intend the damage flowing from the entry on the land, not that the entry itself was an unintentional act. (internal citations omitted).

There is more than a mere scintilla of evidence supporting the Plaintiffs' claim that the County intended to come on to Plaintiffs' property and while there, the County caused damage, whether or not the infliction of the damage was itself intentional. The Circuit Court's grant of the County's motion for summary judgment on the cause of action of trespass was error and must also, therefore, be reversed.

CONCLUSION

Appellants respectfully request an order reversing the decision of the Circuit Court. The Tort Claims Act does not provide immunity to the County where the County's legal duty to the Plaintiffs arose not from an adopted law or policy of the County, but from duties voluntarily assumed through its actions. Further, the Circuit Court erred in dismissing the trespass cause of action of the Plaintiffs where the County clearly intended to trespass on the Plaintiffs' property by flying over and spraying toxic chemicals on its property even though the County may not have intended the consequences: the death of the Plaintiffs' bees. The Circuit Court's order granting the Defendant's Motion for Summary Judgement should be reversed and the case remanded for trial.

Respectfully submitted,

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