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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2023-001808

James Respondent and Lori Respondent,

Respondents,

v.

South Carolina Department of Transportation,

Petitioner.

RESPONDENTS' RETURN TO THE PETITION FOR CERTIORARI

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INTRODUCTION

This Court should deny the Petition for a Writ of Certiorari as none of the factors exist from Rule 242, SCACR to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no constitutional issues, no conflict with the United States Supreme Court on any question of federal law, and contrary to Petitioner's assertion, there is no conflict with this Court's precedents.

In an attempt to make this matter appear worthy of certiorari, Petitioner asserts that the Court of Appeals has drastically departed from this Court's jurisprudence regarding expert testimony. Petitioner is incorrect. The Court of Appeals correctly reversed the lower court in ruling regarding evidence needed to survive a Rule 56, SCRCP, motion for summary judgment, and correctly determined the Stormwater Act is inapplicable in this case. This Court should deny the Petition for Certiorari.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals' opinion consistent with and did it correctly apply this Court's precedents regarding the evidence sufficient to create a genuine issue of material fact?

2. Does the Court of Appeals' opinion correctly interpret the Stormwater Act and its applicability in this case?

COUNTER-STATEMENT OF THE CASE

On May 3, 2017, Respondents brought this action against Petitioner (and other defendants) for claims of inverse condemnation, conversion, due process violations, and negligence. (R. p. 17). On November 7, 2019, Petitioner filed its motion for summary judgment, arguing Respondents failed to present evidence creating a genuine issue of material fact and that the Stormwater Act provided immunity. (R. p. 54).

On March 25, 2020, the trial court issued an Order granting summary judgment in favor of Petitioner. (R. p. 1). Thereafter, on April 3, 2020, Respondents filed a Rule 59(e), SCRCP, motion to alter or amend – commonly referred to as a motion for reconsideration. (R. p. 358). On April 6, 2020, the trial court denied Respondents' motion for reconsideration in a two sentence Form 4 Order. (R. p. 10). The next day, April 7, 2020, Respondents timely filed their Notice of Appeal.

The South Carolina Court of Appeals affirmed the Orders in part, and reversed and remanded the Orders in part, agreeing that Respondents had met their burden to survive summary judgment and that the Stormwater Act did not apply to this case. *Respondent v. South Carolina Department of Transportation*, Opinion No. 6028 (S.C. Ct. App. filed Sept. 27, 2023). Petitioner filed its Petition for Rehearing which the Court of Appeals denied, finding that no material fact or principle of law had been overlooked or disregarded to justify a rehearing. *See* Order Den. Pet. for Reh'g. Petitioner filed its Petition for a Writ of Certiorari on November 12, 2023.

STANDARD OF REVIEW

This Court reviews a Petition for a Writ of Certiorari under the standard established in Rule 242, SCACR. A Petition "will be granted only where there are special and important reasons" such as the five enumerated in the rule, *e.g.*, a novel question of law, a dissenting opinion at the Court of Appeals, where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, a substantial constitutional issue, or a conflict with the United States Supreme Court on any question of federal law. *See* Rule 242(b), SCACR. At the certiorari petition stage, the question before this Court is not whether the lower court erred but whether there is a "special and important reason" to

grant the petition. *See* Rule 242, SCACR; *see also* Jean H. Toal et al., *Appellate Practice in South Carolina*, 12 (2d ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

ARGUMENT

I. The Court of Appeals Properly Applied the Law in Reversing the Trial Court's Judgment.

a. South Carolina appellate courts have consistently held that the acts taken by Petitioner in this case amount to an affirmative, positive, and aggressive act.

Petitioner argues the Court of Appeals deviated from established precedent regarding expert opinions and causation. Petitioner misstates the Court of Appeals' opinion. The Court of Appeals determined it was the Petitioner's own testimony that created a genuine issue of a material fact. Petitioner's representative testified that, in 2017, it had information necessary in 2013 to determine that the existing culvert prior to the initiation of the project next to the Respondent's property could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on the Respondents' property. (R. p. 148, ¶¶1-5). PETITIONER admitted the existing culvert was undersized according to its own standard. (R. p. 123, ¶¶17-20) ("The existing culvert was undersized.")

Furthermore, not only was Petitioner aware that the existing culvert was undersized when it began designing and construction on the Project, it knew or should have known that the existing roadway served as an outlet for water, even at 25-year rainfall levels. (R. p. 139, ¶¶15-19). Petitioner knew this was unsafe. (R. p. 140, ¶¶4-6) ("Q: And the standard should be a hundred-year rain event; is that correct? A: Right."). Despite its own models indicating overflow, Petitioner admitted that it took no steps to

speak to the Respondents or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (R. p. 147, ¶¶1-4; p. 165, ¶¶2-11). Petitioner admitted it did not even consider contacting the Respondents or adjacent property owners. (R. p. 165, ¶¶17-19).

The 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to the Respondents' property both showed rainfall events greater than 10-year but less than 25-years. (*See* R. p. 99). Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, the evidence established that Petitioner knew the existing culvert adjacent to the Respondents' property would likely affect their home.

Petitioner did not address this portion of the Court of Appeals' opinion, so it did not address how these facts created an issue of fact regarding causation, and it was only the question of how much damage could have been prevented absent Petitioner's actions that Respondents' expert's testimony was unclear. (Court of Appeals opinion, at 12) ("However, it is less clear if, and to what extent, the flooding on the property could have been averted had the new, elevated roadway not been built.")

In fact, this Court has specifically addressed the trial court's ruling concerning Gregorie's testimony that Respondents' property may have flooded absent Petitioner's actions or inactions. *King v. North River Ins. Co.*, 278 S.C. 411, 297 S.E.2d 637 (1982). In *King,* a case involving the collapse of the roof of a warehouse following a heavy rainstorm, the Supreme Court stated that "it is generally sufficient to prove the event insured against was the efficient cause of the loss, even though not the sole cause." *Id.* at 414. The *King* Court found that "[w]here an expert has testified that the accumulated water on the roof would not by itself have caused the roof to collapse, reasonable jury

could find that the clogging of the downspouts was the efficient and proximate cause." *Id.* The Court of Appeals appropriately adhered to the precedent set by this Court, and as a result, the petition for a writ should be rejected.

b. The Stormwater Act is inapplicable in this case.

Respondents did not allege any deficiency in regard to Petitioner's application or procurement of a permit under the Stormwater Act. The Stormwater Act is inapplicable to the facts and issues in this case, and the trial court's reliance on it in granting Petitioner's motion for summary judgment was a clear error of law that amounted to an abuse of discretion.

The Legislature's intent is plainly and unequivocally expressed in the applicable statute. The General Assembly enacted the Stormwater Act to specifically address stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167.

Put simply, the Stormwater Act does not in any way even remotely apply to the facts of this case, and there is no South Carolina authority determining a party was not liable to another for creating or worsening property flooding because of reliance on the Stormwater Act. In fact, there is no South Carolina case or other authority in support of the proposition that the Petitioner may make an end run around liability for its actions or inactions by relying on a permitting statute. To the contrary, South Carolina law states that where the language of a statute is plain and express (as it is here), the court has no right to impose another meaning. The trial court's order, like Petitioner's brief, glaringly

failed to cite to or rely on any South Carolina appellate case (or federal court analysis) interpreting the Stormwater Act to relieve a party from similar actions and inactions as the facts alleged here. However, as the Order – and statute – notes, the Stormwater Act expressly states that it does not relieve Petitioner from liability for actions or inactions in the land disturbing activities. (R. p. 4).

As the Court of Appeals determined, Section 48-14-160(1) is not a catch-all provision that provides unchecked immunity to governmental entities once a Stormwater Act permit has been obtained. Instead, a comprehensive reading of the provision reveals the opposite — that the Stormwater Act neither imposes nor relieves liability for actions or failures to act. For these reasons, the Court of Appeals correctly interpreted the Stormwater Act's applicability in this case.

CONCLUSION

This Court should deny the Petition for Certiorari. The Court of Appeals' opinion is consistent with existing law, and the Petition does meet any of the conditions upon which certiorari is to be granted by this Court. Respectfully submitted,

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January 11, 2024
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents, James Marlowe and Lori Marlowe, do hereby certify that I have this date served the foregoing Return to the Petition for Writ of Certiorari, dated January 11, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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