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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
THE HONORABLE MICHAEL G. NETTLES
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2023-001808
CIVIL ACTION NO. 2017-CP-21-01168

Opinion No. 6028 (S.C. Ct. App. filed September 27, 2023)

James Marlowe and Lori Marlowe,

RESPONDENTS,

versus

South Carolina Department of Transportation,

PETITIONER.

PETITIONER'S REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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ARGUMENT IN REPLY

In opposing the South Carolina Department of Transportation's Petition for Writ of Certiorari, Plaintiffs argue the record shows there is a genuine issue of material fact as to the inverse condemnation claim, but Plaintiffs erroneously rely upon acts which the Court of Appeals held cannot serve as the basis for an inverse condemnation claim. In its Opinion, the Court of Appeals held:

> The focus of the Marlowes' complaint is SCDOT's alleged failure to install an adequate culvert and its construction of an elevated highway. The failure to install an adequate culvert is, by its very nature, not an affirmative act.

Appx. 504. In challenging the Petition of South Carolina Department of Transportation (SCDOT), Plaintiffs focus on the adequacy of the existing culvert. But whether the culvert was adequate or inadequate for the 4-day storm events in October 2015 and October 2016 is no longer at issue in this case.

Because a plaintiff must show "an affirmative, positive, aggressive act on the part of the governmental entity" to prevail on an inverse condemnation claim, see Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 562 (Ct. App. 2004), Plaintiffs' allegations that SCDOT failed to install an adequate culvert cannot, as matter of law, establish an inverse condemnation claim because Plaintiffs did not appeal this holding. It is now the law of the case. Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (unappealed portion of Court of Appeals' opinion was law of the case); S.C. Dep't of Soc. Servs. v. M.R.C.L., 393 S.C. 387, 393-94, 712 S.E.2d 452, 456 (2011) (unchallenged rulings of the Court of Appeals are law of the case).

The question is now whether Plaintiffs can maintain an inverse condemnation claim based upon the construction of the elevated road when the causation opinion of their expert fails to meet

the legal requirements for competency as established by this Court. As explained in the Petition, Plaintiffs' expert could not opine with any certainty that had the road construction project not existed, the flooding would not have occurred. Furthermore, Plaintiffs' expert agreed the flooding might still have occurred during the 4-day rain events of October 2015 and October 2016 even with the existing unelevated highway. Appx. 4-5.

The case relied upon by Plaintiffs, King v. N. River Ins. Co., 278 S.C. 411, 297 S.E.2d 637 (1982), does not bear upon the competency of Plaintiffs' expert's causation opinion. In King, the plaintiff contracted with an insurance carrier for coverage on plaintiff's warehouse. The policy contained a provision insuring the property against damage caused by vandalism or malicious mischief. The roof of the warehouse collapsed following a heavy rainstorm. An inspection revealed that a beer can and two whiskey bottles lodged in the downspout completely blocked drainage from the roof. Id. at 412, 297 S.E.2d at 637. Plaintiff contended that the clogged downspout caused water to accumulate, leading to the collapse of the roof, and that the downspout had become clogged through acts of vandalism by persons throwing the bottles on the roof. Plaintiff's expert opined that normally the downspout, free from clogs, should have been more than adequate to drain the roof. Id. at 412-13, 297 S.E.2d at 637.

The carrier contested liability under the policy's vandalism provision, arguing that the throwing of the bottles on the roof did not constitute vandalism or malicious mischief as defined by the policy. The carrier further contended that, even if the act of throwing bottles on the roof did constitute vandalism, the vandalism was not the proximate cause of the loss. Id. at 413, 297 S.E.2d at 638. The trial court granted a directed verdict to the carrier. Id. at 412, 297 S.E.2d at 637.

In reversing the grant of directed verdict, this Court held that as to causation, it is sufficient

to prove the event insured against was the efficient cause of the loss even though it may not have been the sole cause. Thus, the Court found that where the plaintiff's expert testified that the accumulated water on the roof would not by itself have caused the roof to collapse, a factfinder could find that the clogging of the downspout was the efficient and proximate cause of the loss. Id. at 413-14, 297 S.E.2d at 638.

Notably, in King there was no issue with the sufficiency of the expert's opinion. The expert affirmatively testified that accumulated water on the roof from a heavy rainstorm would not have alone caused the roof to collapse: but for the vandalism, the roof would have held. In contrast, Plaintiffs' expert could not opine that Plaintiffs' home would not have flooded from the 4-day storm events but for the road construction. Plaintiffs' expert conceded the flooding of Plaintiffs' home could have still occurred from the storm events alone. Plaintiffs' expert's testimony is legally insufficient to establish that SCDOT"s construction of an elevated road was the efficient and proximate cause of the flooding. Without any competent proof of causation, Plaintiffs' inverse condemnation claim fails as a matter of law.

It has long been established that liability "may not be permitted to rest upon surmise, conjecture or speculation" and that "speculative, theoretical and hypothetical views" should not be submitted to a factfinder. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). Plaintiffs' inverse condemnation claim against SCDOT for the flooding that occurred to their home as a result of unprecedented storms violates this very legal principle. The Trial Court correctly granted summary judgment to SCDOT as a matter of law where Plaintiffs did not prove causation with competent evidence.

CONCLUSION

For the reasons set forth herein and in the previously filed Petition for Writ of Certiorari, SCDOT respectfully requests this Court to grant its Petition for Writ of Certiorari to review and reverse the Opinion of the Court of Appeals which vacated the Trial Court's grant of summary judgment and remanded the inverse condemnation claim for further proceedings.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

January 22, 2024.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, South Carolina Department of Transportation, do hereby certify that I have this date served the foregoing Reply to the Return to the Petition for Writ of Certiorari, dated January 22, 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):

J. Clay Hopkins
HOPKINS LAW FIRM
171 Church Street
Suite 160
Charleston, SC 29401
clay@hopkinsfirm.com

A copy of the sent email is enclosed with this Certificate of Service.

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

Dated: January 22, 2024.

From: Carmen Ganjehsani
To: clay@hopkinsfirm.com
Subject: 2023-001808 Marlowe v. SCDOT
Date: Monday, January 22, 2024 11:57:55 AM
Attachments: 2023-001808 Marlowe v. SCDOT (Reply to Rtn to Pet WOC) (3178477).pdf

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Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Reply to the Return to the Petition for Writ of Certiorari on behalf of Petitioner South Carolina Department of Transportation.

Thank you,
Carmen Ganjehsani

HOME VCARD LOCATION

Carmen V. Ganjehsani
Shareholder
Cganjehsani@RichardsonPlowden.com

Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201
Tel: 803.253.8692
Fax: 803.779.0016
www.RichardsonPlowden.com