THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2016-1300
Opinion No. 5374 (S.C. Ct. App. filed Jan. 6, 2016)

David M. Repko,.....Respondent,

v.

County of Georgetown,.....Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Reply Argument 3

I. The "gross negligence exception" to immunity under the Tort Claims Act 3

II. The "duty" issue 5

III. The statute of limitations issue 7

IV. Plaintiff's Rule 242(b) argument 8

Conclusion 9

REPLY ARGUMENTS

I. The "gross negligence exception" to immunity under the Tort Claims Act.

As set forth in the Petition, this issue is not preserved for appeal, because Plaintiff did not make this argument to the trial court during the directed verdict proceedings. (Pet. at 17). Plaintiff summarily responds as follows: "Again, it is *clear from the Record* that [Plaintiff's] trial counsel argued that the County had acted in a grossly negligent manner and this argument was sufficient to apprise the trial court that the subsections (4) and (5) did not apply as a matter of law." (Ret. at 12-13) (emphasis added). Tellingly, Plaintiff cites nothing from the Record to support this assertion, because nothing in the Record supports it. Rather, "it is clear from the Record" that Plaintiff never argued to the trial court that there was any exception to immunity under the Tort Claims Act (TCA), and he never argued that the "gross negligence exception" in subsection (12) applied to subsections (4) and (5) under this Court's ruling in *Steinke v. S.C. Dep't of Labor, Licensing, and Reg.*, 520 S.E.2d 142 (S.C. 1999). (See R. 224-251, *passim*). Thus, the issue is not preserved for appeal, and the Court of Appeals erred in reversing the trial court on this basis.[1]

In a futile attempt to cure this fatal defect, Plaintiff argues that he raised this issue in his 59(e) motion (Ret. at 13), but it is axiomatic that an issue cannot be raised for the first time in a 59(e) motion. *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). Moreover, Plaintiff did not raise this issue in his 59(e) motion. (R. 381-382). Rather, he raised it for the first time in a memorandum that he handed up to the trial court at the 59(e) hearing held 71 days after he filed his 59(e) motion. (See R. 255, 265-267, 397-408). This manifestly was untimely, even if it were

[1] Plaintiff relies on cases setting forth the rule that a party need not use technical terms or "magic words" to preserve an issue for appeal, so long as the Record demonstrates the trial court understood what issue was being raised. (Ret. at 13). Again, however, Plaintiff cites nothing in the Record to demonstrate this. The reason is simple. Nothing in the Record demonstrates that Plaintiff made any argument to the trial court that there was a "gross negligence exception" to the immunity granted by the Tort Claims Act.

assumed that Plaintiff first raised this issue during the trial proceedings (which he did not). Thus, the issue remains unpreserved for appeal for failure to make a timely 59(e) motion on this issue.

As set forth in the Petition, the issue of a "gross negligence exception" to TCA immunity was not properly before the Court of Appeals because: (1) Plaintiff successfully argued to the trial court that subsection (12) did not apply and, having succeeded, he cannot argue on appeal that subsection (12) does apply; and (2) the trial court held that subsection (12) does not apply, and this ruling is the law of the case because neither party challenged it on appeal. (Pet. at 17-19). Plaintiff makes no specific response to these arguments. Plaintiff's only response is that County argued to the trial court that subsection (12) was applicable. The trial court, however, ruled that subsection (12) did not apply, no one appealed this ruling, and this ruling was correct. (See Pet. at 17-19).

Moreover, as also demonstrated in the Petition, the Court of Appeals' ruling that subsection (12) was applicable hinged on an argument never made to the trial court or the Court of Appeals and, therefore, the Court of Appeals erred in ruling on this basis under axiomatic principles of appellate practice law. (Pet. at 19-20). In addition, the Court of Appeals' "permit renewal" analysis and ruling was erroneous as a matter of law. (*Id.*). Plaintiff makes no response to these arguments.

In an apparent attempt to avoid the fact and unappealed ruling that subsection (12) does not apply here, Plaintiff argues that merely pleading or asserting subsection (12) made its "gross negligence exception" applicable to the other immunity provisions. (Ret. at 14). Again, Plaintiff never made this argument to the trial court and, therefore, it is not preserved for appeal. Moreover, as this Court's opinions demonstrate, the subsection with a "gross negligence exception" must be applicable, not merely pleaded. (Pet. at 18-19). Thus, Plaintiff's argument has no merit and, in any event, his argument was never properly before the Court of Appeals, and the Court of Appeals erred in reversing on a basis never argued to the trial court or to the Court of Appeals.

II. The "duty" issue.

As set forth in the Petition, the Court of Appeals' ruling on the "duty" issue is riddled with procedural, analytical, and substantive errors that violated its duty to follow this Court's precedent. (Pet. at 3-4, 6-15). In his Return (Ret. at 5-12), Plaintiff simply parrots the Court of Appeals' rulings without addressing the myriad errors argued in the Petition, which include but are not limited to the errors summarized below.

First, the Court of Appeals conflated the separate concepts of duty, liability, and immunity to conclude that Section 3-1 was a disclaimer of *liability* that was preempted by the Tort Claims Act (TCA). The question, however, is whether Section 3-1 establishes a legislative intent to create a private *duty* owed to Plaintiff, and it plainly establishes a legislative intent to not do so. The TCA is irrelevant to this question of duty – the TCA does not create any duty – rather, a duty exists only if imposed by other law, and there can be no liability absent a duty.

Second, the Court of Appeals held that the disclaimer of "obligation" in Section 3-1 meant only that "the County is not required to pay to the property owners the money made available through the letter of credit . . . and the County is allowed to complete the infrastructure and ignore the preferences of the property owners in doing so." This was error for numerous reasons, including the following: (a) Plaintiff never made this argument to the trial court (R. 224-251, *passim*); (b) Plaintiff never made this argument to the Court of Appeals (App. Br., *passim*); and (c) nothing in Section 3-1, or the regulations generally, supports the Court of Appeals' narrow construction of "obligation."

Third, the Court of Appeals held that County's regulations created a private duty owed to Plaintiff under the "special duty" test. The fundamental flaw in the Court of Appeals' ruling is its treatment of the "special duty" test as a substantive rule of law. This test, however, is a rule of

statutory construction for determining legislative intent on the question of creating a private duty. Like all statutory construction rules, it is subservient to the overriding question of legislative intent, and it is irrelevant if the legislative intent is stated plainly in the legislation itself. Section 3-1 plainly states a legislative intent to not create a private duty owed to Plaintiff, and the Court of Appeals erred in using a statutory construction rule to override this plainly stated intent.

Fourth, the Court of Appeals misconstrued this Court's ruling in *Brady Dev. Co. v. Town of Hilton Head Island*, 439 S.E.2d 266 (S.C. 1993) and, as a result, erroneously distinguished it and effectively overruled it. The operative facts, regulations, claims, and question of duty in *Brady* were virtually identical to those in the present case, except that the *Brady* regulations did not include an express statement of legislative intent like that found here in Section 3-1. This Court nevertheless held that the *Brady* regulations did not create a private duty owed to the plaintiff, because the preamble to those regulations demonstrated a legislative intent that the regulations were for a public purpose, *i.e.*, the preamble implicitly demonstrated there was no legislative intent to create a private duty owed to the plaintiff. Here, the regulations do not include a *Brady*-type preamble that implicitly established legislative intent. Seizing upon this "distinction," the Court of Appeals limited this Court's ruling in *Brady* to situations involving a preamble of public purpose, leading to the absurd result that a legislative body can disclaim a duty implicitly, but it cannot do so expressly.

As to the *Brady* issue, Plaintiff argues that *Brady* is "materially distinguishable" and "quite different" and from the present case. (Ret. at 2; 11-12). But here again, Plaintiff simply parrots the Court of Appeals' ruling without specifically addressing the arguments made in the Petition.

III. The statute of limitations issue.

Plaintiff's principal argument is based on "when he first determined that he potentially had a claim against the County." (Ret. at 16). Plaintiff's "determination" is not the question, however, because the notice/discovery issue is decided under an objective test, not a subjective test of when "[Plaintiff] determined that he potentially had a claim." (See Pet. at 22-24).

To the extent that Plaintiff addresses the actual notice/discovery issue, he misperceives the test as being the receipt of notice that the letter of credit was no longer adequate to build the infrastructure. (Ret. at 18). The test, however, is whether a reasonable person under the same circumstances would have made inquiry about the completion of the infrastructure and the letter of credit. As set forth in the Petition, the undisputed facts from Plaintiff's *own testimony* put Plaintiff on notice to make this inquiry and, had he done so, he would have discovered the alleged problems of which he now complains long before April 19, 2010. (Pet. at 22-24). Thus, Plaintiff's commencement of this action on April 20, 2012, is outside of and barred by the two year statute of limitations in § 15-78-110.

Finally, Plaintiff argues that the automatic stay imposed by the developer's bankruptcy filing precluded any notice to him, because a reasonable person would have concluded that the letter of credit was "frozen" by the automatic stay as part of the bankruptcy estate. (Ret. at 18-19). Plaintiff never made this argument to the trial court or the Court of Appeals. More importantly, Plaintiff cites no authority for his contention that the letter of credit was part of the bankruptcy estate and therefore "frozen" by the automatic stay. The reason is simple. There is no authority for this contention, which is why the bankruptcy court and trustee never attempted to exercise any authority or jurisdiction over the letter of credit.

IV. Plaintiff's Rule 242(b) argument.

Plaintiff argues that County's Petition does not meet the requirements of Rule 242(b), SCACR, for granting certiorari petitions, because it does not assert any of the five grounds specified in Rule 242(b). (Ret. at 4-5). This argument fails for numerous reasons.

First, as Rule 242(b) specifically provides, the five enumerated grounds do not control or fully measure this Court's discretion or power to grant certiorari. Indeed, as this Court knows, the most common ground for granting certiorari is that the Court of Appeals misapplied the law to the case, and County's Petition is replete with examples of the Court of Appeals doing so.

Second, Rule 242(b)(3) provides that certiorari is proper when the Court of Appeals' opinion is in "conflict with a prior decision" of this Court. County's Petition demonstrates that the Court of Appeals' opinion conflicts with numerous decisions of this Court. As Plaintiff concedes, County argues that the Court of Appeals opinion conflicts with this Court's decision in *Brady*, *supra*. (Ret. at 11-12). More importantly, Plaintiff misperceives the breadth and depth of County's arguments, made throughout the Petition, that the Court of Appeals' opinion conflicts with this Court's precedents. For example, the Court of Appeals reversed the trial court based on arguments never made to the trial court, and arguments never even made to the Court of Appeals, all of which violate and conflict with this Court's long-standing and well-established decisions on error preservation and error presentation. In addition, the Court of Appeals' analysis of and ruling on the "duty" issue conflicts with numerous decisions by this Court, including the Court of Appeals' mistaken view that the "special duty test" is a substantive rule of law rather than a statutory construction rule for determining legislative intent.

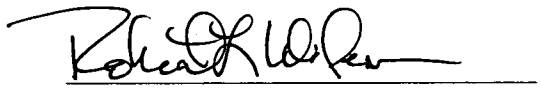
Third, Plaintiff argues that there is no need for certiorari, because the Court of Appeals' opinion "does not end this litigation" but "simply reverses and remands" for a trial where the

parties will "have the opportunity to argue their case." (Ret. at 4). This is a nonsensical argument that would preclude certiorari any time the Court of Appeals' decision remands for a trial. Plaintiff also argues that "granting certiorari only delays a final adjudication." (Ret. at 4). To the contrary, granting certiorari and reversing the Court of Appeals on any one of numerous grounds ends this litigation with the trial court's final adjudication.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and reinstate the judgment of the trial court.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Petitioner's Reply to Return to Petition for Writ of Certiorari, via email and by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to Appellant's counsel at the addresses shown below, on September 13, 2016:

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