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

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

David M. Repko, ... Respondent,

v.

County of Georgetown, ... Petitioner.

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

For the convenience of the Court, this Reply Brief follows the organizational format of Plaintiff's Brief of Respondent, with references to County's Brief of Petitioner. As shown below, Plaintiff's arguments have no merit and generally rest upon issues that are not preserved for appeal.

I. The Court of Appeals erred in holding that County owed a duty to Plaintiff. (Resp. Br. 15-29).

A. <u>The Court of Appeals erroneously reversed the trial court's construction of § 3-1</u>. (Resp. Br. 18-21).

As set forth in County's Brief of Petitioner, § 3-1 plainly expresses a controlling legislative intent to not create a private duty owed to Plaintiff, and the Court of Appeals erred procedurally, analytically, and substantively in ruling to the contrary. (Pet. Br., Arg. I(A)-I(B), pp. 7-14). Plaintiff's responsive argument consists primarily of a summary of the issues and a regurgitation of the Court of Appeals' analysis without any specific response to County's numerous arguments on how the Court of Appeals erred. (Resp. Br. 15-20). Plaintiff makes two "specific" points.

First, Plaintiff challenges County's assertion that the Court of Appeals held that the Tort Claims Act (TCA) preempted the legislative intent to not create a private duty:

> *Mischaracterizing* the Court of Appeals' decision, the County asserts that the "Court of Appeals held that the South Carolina Tort Claims Act . . . preempted the legislative intent to not create a duty in § 3-1. (Appx. 14-15)." (Pet. Br. 11-14; Arg. I(B)(2)). This is *simply incorrect* as the Court of Appeals plainly *did not express this holding.* (App. 8-10).

(Resp. Br. 20) (emphasis added). The only thing "incorrect" in the quote from County's Brief of Petitioner is the typographical error in citing to "Appx. 14-15"; the citation should have been to Appx. 8-9, where the Court of Appeals specifically stated the following:

> [*Plaintiff*] *argues* the trial court erred in relying on Article V, Section 3-1 to find the County did not owe him a duty *because that provision is* ***preempted*** *by the TCA* and is therefore unenforceable. Specifically [Plaintiff] asserts the TCA governs the County's tort liability and the County cannot override application of the TCA by enacting an ordinance that waives liability for its negligent conduct. *We agree.* [Appx. 8 (all emphasis added)].
>
> * * * **
>
> "Express **preemption** occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." [Appx. 9 (emphasis added) (citation omitted)].
>
> * * * **
>
> We find the County cannot avoid application of the TCA by disclaiming a duty through Article V, Section 3-1 for two reasons. First, *the TCA* ***preempts*** *Article V, Section 3-1*'s disclaimer of liability. [Appx. 9 (all emphasis added)].

Thus, the Court of Appeals expressly held that the TCA preempted the legislative intent to not create a private duty under § 3-1. As demonstrated in County's Brief of Petitioner, this was clear error, because the TCA is irrelevant to the question of whether a duty exists.[1]

Plaintiff's second "specific" point is that County and the trial court referred to "disclaiming a duty" and, therefore, County cannot complain that the Court of Appeals thusly analyzed the issue. (Resp. Br. 20-21). Plaintiff's argument has no merit.

First, it is clear that when County referred to § 3-1 as "disclaiming" a duty, it did so as shorthand for the assertion that § 3-1 did not create a duty:

> [Plaintiff's case] centers on this development regulation [§ 3-1] which on its face expressly *disclaims any duty* to Plaintiff ... [and] *tells you there is no duty.* ... It is a very rare thing for a statute to expressly *say on its face* that *there is no duty arising out of this statute.* ... [The court] cannot find a duty without writing that language completely out of the statute and it's improper to do so.

(R. 225, l.8 – 226, l.2) (emphasis added).

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[1] The Court of Appeals' second reason for reversal was based on a narrow interpretation of § 3-1. (Appx. 9-10). As shown by County, the Court of Appeals' ruling was riddled with procedural and substantive errors. (Pet. Br. 9-11, Arg. I(B)(1)). Notably, Plaintiff makes no response to any of County's arguments and never attempts to defend the Court of Appeals' "second reason" for reversing the trial court.

Second, and more importantly, it is equally clear that the trial court viewed and understood the issue as being whether the ordinance created a duty, even when it referred to the ordinance as disclaiming a duty:

> Okay, that same ordinance says though, "By enacting this ordinance [§ 3-1] we're *not creating* a private duty." [R. 241, ll. 1-2 (emphasis added)].
>
> * * * * *
>
> I think it's pretty clear that under this fact situation it [§ 3-1] *does not create a private cause of action* for the Plaintiff in this case .... [R. 250, ll. 11-13 (emphasis added)].

In short, County and the trial court viewed the issue as being whether § 3-1 created a duty owed to Plaintiff, not whether it disclaimed an already existing duty.

Third, unlike County and the trial court, the Court of Appeals never treated the issue as being whether § 3-1 expressed a legislative intent to not create a duty, rather than simply disclaiming an already existing duty. This was one of many analytical errors by the Court of Appeals in finding that the Tort Claims Act preempted § 3-1 and precluded County's legislative intent of not creating a private duty.

B. <u>The Court of Appeals erred in applying the "special duty test</u>." (Resp. Br. 21-27).

As Plaintiff notes, County argues that the "special duty test" is irrelevant here, but Plaintiff misperceives (ignores) the basis of this argument, which is the following:

1. The question of whether legislation creates a private duty is a question of legislative intent.

2. The cardinal rule of statutory construction, *to which all other rules are subservient*, is to determine and give effect to legislative intent.

3. If the plain and ordinary meaning of the language used in the legislation expresses that legislative intent, judicial inquiry ends and the courts must enforce the legislation as written.

4. Here, § 3-1 plainly expresses a legislative intent to not create a private duty.

5. Therefore, the "special duty test" (a statutory construction rule) is irrelevant, because the plain and ordinary meaning of the language used in § 3-1 plainly expresses a legislative intent to not create a private duty, thereby ending judicial inquiry.

(See Pet. Br. 7-11). Plaintiff's reliance on several cases applying the "special duty test" to find a duty is misplaced, because those cases did not involve a statute that plainly expressed a contrary legislative intent. (See Resp. Br. 21-22).

Plaintiff also complains that County used one statutory construction rule (the "public duty rule") but "incongruously argues" that the "special duty test" (another statutory construction rule) should not be used. (Resp. Br. 22-23). Again, Plaintiff misperceives (ignores) County's actual argument, which was the following:

1. The "public duty rule" further supports the conclusion (summarized above, re: expressed legislative intent) that § 3-1 did not create a private duty.

2. The "public duty rule" also mandates the same result because:

   a. the "public duty rule" precludes imposition of a private duty or private cause of action under a statute absent contrary legislative intent; and

   b. the "special duty test" applies to determine legislative intent, but only if the statute does not express that legislative intent.

3. Here, § 3-1 plainly expresses a legislative intent to not create a private duty and, therefore, the "special duty test" cannot be used to create that private duty.

(See Pet. Br. 8-9). As to the merits of the "special duty test," County incorporates its arguments in its Brief of Petitioner. (Pet. Br. 15-16) (see also n.2, *infra*).

C. <u>The Court of Appeals misread and misapplied this Court's opinion in *Brady*</u>. (Resp. Br. 27-29).

As set forth in County's Brief of Petitioner, the Court of Appeals misconstrued this Court's ruling in *Brady* and effectively overruled it or illogically limited it to hold that

expressly stated intent is not controlling but an implicit statement of that same intent is controlling, *i.e.*, one cannot do expressly what one can do implicitly. (Pet. Br. 16-18). Plaintiff responds by reading *Brady* differently. (Resp. Br. 27-29). Simply reading *Brady* reveals the correctness of County's argument.

An essential tenet of Plaintiff's argument is that the "public policy concerns" in *Brady* are not present here. This is incorrect and, in any event, this argument is not preserved for appeal, because Plaintiff did not make this argument to the trial court.[2]

II. The Court of Appeals erred in applying the "gross negligence exception" in subsection (12) of § 15-78-60 to the immunity granted by subsections (4) and (5). (Resp. Br. 29-32).

As set forth in County's Brief of Petitioner, the issue of the "gross negligence exception" in subsection (12) being applicable to subsections (4) and (5) is not preserved for appeal, because Plaintiff did not timely raise this issue to the trial court. (Pet. Br. 19-23). Plaintiff responds that: "It is clear from the record that [Plaintiff's] trial counsel argued 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." (Resp. Br. 30) (emphasis added). This argument fails for several reasons.

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[2] Plaintiff argues that persons involved in administering the ordinance believed that the purpose of the ordinance was to protect property owners. (Resp. Br. 26; 28). Their belief is irrelevant:

> Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "*a broader and more independent review is permitted when the issue concerns the construction of an ordinance.*" <u>The determination of legislative intent is a matter of law</u>.

Mikell v. County of Charleston, 687 S.E.2d 326, 329 (S.C. 2009) (all emphasis added). Thus, "[w]hen reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law." *Id.* at 330. Moreover, the plain language of the ordinance controls over any construction by persons involved in its administration. *Brown v. South Carolina Dept. of Health and Envtl. Control*, 560 S.E.2d 410, 415 (S.C. 2002) ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation."). Here, any "belief" that §3-1 imposed a duty to property owners is irrelevant, because the plain language of the § 3-1 demonstrates that there is no such duty. *Brown*, 560 S.E.2d at 415.

First, Plaintiff candidly admitted at the 59(e) hearing that the issue of the "gross negligence exception" being applicable to subsections (4) and (5) "was not touched upon ... in the argument against directed verdict." (R. 265). A review of the directed verdict arguments confirms this admission. (R. 224-251, *passim*). Thus, the issue is not preserved for appeal. Plaintiff attempted to raise this issue at the 59(e) hearing, but this came too late to preserve the issue for appeal – it is axiomatic that an issue cannot be raised for the first time in a 59(e) motion. (See Pet. Br. 20, n.9).

Second, as set forth in County's Brief of Petitioner: (1) the trial court ruled that subsection (12) did not apply to this case; (2) Plaintiff did not challenge this ruling on appeal; and (3) therefore, it is the law of this case. (Pet. Br. 20). Plaintiff never responds to this argument, which is not surprising, because the trial court's ruling was based on its acceptance of Plaintiff's own argument at trial, and Plaintiff cannot make one argument at trial and then the opposite argument on appeal.

Third, Plaintiff cites three criminal case for the general proposition that "magic words" are not necessary to preserve an issue for appeal if it is "clear from the argument made in the record." (Resp. Br. 30). This is true, but Plaintiff misses the critical point. The record must demonstrate that Plaintiff's argument was actually made, and that the trial court understood that Plaintiff was raising the issue. Nothing in this record does so. Plaintiff never argued to the trial court that the immunity granted in subsections (4) and (5), which do not have a "gross negligence exception," were nevertheless subject to that exception, because it appears in subsection (12) and was imported into subsections (4) and (5) under the *Steinke* rule. (R. 224-251, *passim*) (see also Pet. Br. 21-22).

Fourth, the Court of Appeals reached this issue by holding that subsection (12) in fact applied here, because the reductions in the letter of credit amounted to a "permit renewal" under subsection (12). This was error for numerous reasons, including the fact that Plaintiff never made this argument to the trial court or the Court of Appeals. (Pet. Br. 22-23). Notably, Plaintiff never attempts to defend the Court of Appeals "permit renewal" ruling, which was the cornerstone of the Court of Appeals' ruling on the "gross negligence exception" issue.

Finally, Plaintiff argues that County's mere assertion of subsection (12) as a defense made its "gross negligence exception" applicable to subsections (4) and (5). (Resp. Br. 29, 31-32). This argument is not preserved for appeal, because Plaintiff did not make it to the trial court. In any event, this argument has no merit for the following reasons:

1. The *Steinke* rule is based upon the same conduct being protected by more than one subsection, when at least one of those subsections contains a "gross negligence exception."

2. In this scenario, it would make no sense to allow the governmental entity to escape "gross negligence" liability under one subsection, when that same conduct is subjected to a "gross negligence exception" under a different subsection.

Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 520 S.E.2d 142, 154 (S.C. 1999). Here, it is the law of this case, based on Plaintiff's own trial arguments, that the conduct at issue is not protected by subsection (12). Thus, the *Steinke* rule does not apply here. Moreover, the Court of Appeals' attempt to resurrect subsection (12) and make it applicable here under its "permit renewal" analysis is based on an argument and analysis that Plaintiff never raised to the trial court or the Court of Appeals, and it has no merit. (See Pet. Br. 22-23).

III. The Court of Appeals erred in not affirming the trial court's judgment upon the additional sustaining ground that Plaintiff's action is barred by the statute of limitations. (Resp. Br. 32-37).

As set forth in County's Brief of Petitioner, based on Plaintiff's own testimony, the judgment for County should be affirmed upon the additional sustaining ground that Plaintiff's claim is barred by the statute of limitations. (Pet. Br. 26-28). Plaintiff's response is based solely upon his erroneous assertion that the relevant "loss" is the reduction of the letter of credit. (Resp. Br. 32-37, *passim*). The relevant "loss," however, is damage to the value of Plaintiff's property as a result of there being no infrastructure for his undeveloped, residential lots. The undisputed facts, taken from Plaintiff's own testimony, would have alerted a reasonable person that some claim might exist for the absence of the infrastructure and resulting damage, and that he should make an inquiry about the matter. Thus, Plaintiff's action is barred by the two-year statute of limitations.

CONCLUSION

For the foregoing reasons and for the reasons argued in County's Brief of Petitioner, this Court should reverse the Court of Appeals and reinstate the appealed judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Reply Brief of Petitioner on the 20th day of November, 2017, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to the parties listed below at the following addresses:

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