

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

) IN THE COURT OF COMMON PLEAS
) THIRD JUDICIAL CIRCUIT
) C/A NO. 2016-CP-45-208

Jerry Pressley,

Plaintiff,

vs.

The South Carolina Department of
Transportation,

Defendant.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

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JUN 13 2018

SC Court of Appeals

This matter came before me as presiding judge for the Third Judicial Circuit on April 19, 2018 upon a motion for summary judgment filed by defendant South Carolina Department of Transportation (SCDOT). Present on behalf of plaintiff were his attorneys, Raymond C. Fischer and Jeffrey D. Morris. Present on behalf of SCDOT was its attorney, Joseph P. McLean. After review of the pleadings, SCDOT's motion for summary judgment and supporting affidavit, plaintiff's response to the motion and supporting affidavits, and after hearing argument of counsel the court concludes that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

FACTS

During the first week of October, 2015, Williamsburg County and many other counties in the state experienced an historic rain event. On October 6, 2015, at 5:30 a.m.,

plaintiff was travelling on Secondary Road 639 in Williamsburg County. He unexpectedly came upon a washout in the road that he could not see because of the darkness. He drove into the washout, and allegedly suffered bodily injury and property damage.

SCDOT owns and maintains Secondary Road 639. Plaintiff alleges that SCDOT was negligent because it had not taken steps to identify the washout and to erect warning signs or barricades to warn of the washout and to divert traffic away from it.

SCDOT moved for summary judgment based upon lack of actual or constructive notice of the washout and, in the alternative, immunity for presence of temporary or natural conditions on any public way due to weather conditions pursuant to S.C. Code of Laws §15-78-60(8).

In support of its motion, SCDOT filed an Affidavit of Richard A. Livingston, Jr., who was the resident maintenance engineer for SCDOT in Williamsburg County in October, 2015. Livingston states that during the historic rain event during the first week of October, 2015, Williamsburg County experienced record levels of rainfall and many creeks and rivers overflowed their banks causing flash flooding which washed away roads and bridges in many locations. He further states that at 7:44 a.m. on October 6, 2015, a call came in from the highway patrol advising SCDOT of the washout that plaintiff had driven into. He states that this was the first notice to SCDOT of this particular washout.

In response, plaintiff's submitted affidavits from Thomas Brown and Cathy Bennett, both of whom live in the vicinity of where the accident occurred. Both Brown

and Bennett state that on either October 4 or 5, they each called 911 to report water rushing over the road in the location where the washout occurred.

SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 568 S.E.2d 857 (2002). 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 non-moving party. *Sauner v. Public Service Authority of SC*, 354 S.C. 397, 581 S.E.2d 161 (2003). 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, 548 S.E.2d 868 (2001).

LAW / ANALYSIS

1. Notice

Plaintiff must prove SCDOT knew, or in the exercise of reasonable care should have known, of the washout. *Marsh v S.C. Dept. of Highways and Public Transportation*, 298 S.C. 420, 380 S.E. 2d 867 (Ct. App. 1989).

The only evidence of actual notice of the washout is the call to SCDOT from the highway patrol a little over 2 hour after the accident occurred. *See*, Affidavit of Richard a. Livingston, Jr. The affidavits of Thomas Brown and Cathy Bennett are evidence of actual notice to 911 only, which does not equate to notice to SCDOT. Thus, there is no competent evidence of actual notice.

As for constructive notice, SCDOT knew that roads in the county were being washed out by flood waters in many locations. *See*, Affidavit of Richard a. Livingston, Jr. Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice. *Fickling v City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). *See also*, *Major v City of Hartsville*, 410 S.C. 1, 763 S.E.2d 348 (S.C. 2014) (ruts in unpaved road repeatedly made by automobile tires in same location); *Henderson v. St. Francis Cmty Hosp.*, 303 S.C. 177, 399 S.E.2d 327 (Ct. App. 1992)(debris from trees created regular maintenance problem); *Pinckney v Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E. 2d 327 (Ct. App. 1992) (hazard created by recurring condition of fallen leaves). In this case, however, the historic rain and flood event was not a recurring condition and, therefore, does not create a jury issue as to constructive notice.

The court also notes that in his affidavit plaintiff states Brown told him the road had been washed out for over a day before the accident. However, this statement is hearsay and therefore is not competent evidence of constructive notice. Additionally, it conflicts with what Brown says in his Affidavit, which is that water was “rushing over the road.”

2. Presence of temporary or natural conditions on road due to weather conditions

The S.C. Tort Claims Act at S.C. Code of Laws §15-78-60(8) provides SCDOT is not liable for a loss resulting from:

snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee

(emphasis added).

While the statute specifically mentions snow and ice, it also contemplates other “temporary or natural conditions...due to weather conditions.” The Tort Claims Act must be construed liberally in favor of limiting the liability of the State S.C. Code of Laws §15-78-20(f). In this case, the water that caused the washout was a temporary natural condition due to weather. The court finds to logical reason to limit the limitations on and exceptions to liability of the state under §15-78-60(8) to snow and ice only.

CONCLUSION

There is no evidence of actual or constructive notice to SCDOT of the subject washout. Further SCDOT is immune from liability under §15-78-60(8) of the Tort Claims Act. Accordingly, SCDOT is entitled to summary judgment, **AND IT IS SO ORDERED.**

END OF DOCUMENT

E-SIGNATURE TO FOLLOW



Williamsburg Common Pleas

Case Caption: Jerry L Pressley VS South Carolina South Carolina Department Of
Transportation
Case Number: 2016CP4500208
Type: Order/Summary Judgment

So Ordered

S/George M. McFaddin, Jr., #2759

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