THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
WILLIAMSBURG COUNTY

Honorable George M. McFaddin, Jr., Circuit Court Judge

Case No. 2018-1093

JERRY L. PRESSLEY, **APPELLANT,**

vs.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, **RESPONDENT.**

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules of Court

STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE COURT ERRED IN FINDING DEFENDANT DID NOT HAVE ACTUAL NOTICE OF THE WASHOUT PRIOR TO PLAINTIFF'S ACCIDENT.**

2. **WHETHER THE COURT ERRED IN FINDING DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WASHOUT PRIOR TO PLAINTIFF'S ACCIDENT.**

3. **WHETHER THE COURT ERRED IN FINDING DEFENDANT ENTITLED TO IMMUNITY PURSUANT TO §15-78-60(8) UNDER THE FACTS OF THIS CASE.**

STANDARD OF REVIEW

Summary judgment, pursuant to Rule 56, S.C. Rules of Civil Procedure, 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). "In an appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *Joseph v. South Carolina Department of Labor, Licensing and Regulation,* 417 S.C. 436 (2016)

STATEMENT OF THE CASE

This case comes to the Court on an appeal from the Court of Common Pleas for Williamsburg County, the Honorable George M. McFaddin, Jr., presiding. Plaintiff filed his complaint against SCDOT for injuries in a motor vehicle accident occurring at the cite of a culvert washout. Defendant answered denying liability. After limited discovery, Defendant filed a motion for summary judgment. Plaintiff responded and submitted three affidavits, which were marked as Exhibits A, B, and C to Plaintiff's Response Memorandum. Exhibit C, the affidavit of Jerry Pressley, was not effectively e-filed but was reviewed and admitted by the Court at the hearing. (ROA p. 23, *ll.* 11-25). After hearing argument of counsel, the Court instructed defense counsel to prepare an order granting summary judgment in favor of the Defendant. The Court granted summary judgment on lack of actual and/or constructive notice and on immunity pursuant to §15-78-60(8) of the S.C. Torts Claims Act. Plaintiff/ Appellant filed this appeal.

ARGUMENTS

1. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING DEFENDANT DID NOT HAVE ACTUAL NOTICE OF THE WASHOUT PRIOR TO PLAINTIFF'S ACCIDENT.

In support of its judgment, the Court relied on the affidavit of Richard A. Livingston, Jr. In his affidavit Mr. Livingston identifies himself as an employee of Defendant SCDOT, as Resident Maintenance Engineer. In his affidavit he says, in essence, that SCDOT had no actual or constructive notice of the washout on of Birch Creek across Pepper Hill Road on the morning of October 6, 2015, prior to the accident involving Plaintiff. However, two persons who live in the vicinity of the washout have

given affidavits that they observed the washout prior to the accident and had called 911 to report the washout prior to plaintiff's accident. (Affidavit of Thomas Brown, ROA pp. 27-29 and (Affidavit of Cathy Bennett, ROA pp. 30-32). Both affirmed that they had called 911 to report the dangerous condition. The affidavits of Bennett and Brown create a question of fact as to whether Defendant received actual notice of the hazard which caused Plaintiff's accident and injuries. The Court relied on the statement of Defendant's counsel that notice to 911 was not notice to Defendant, SCDOT. (ROA p. 24, *ll.* 22). Neither the Defendant nor the Court cite any authority to that premise. Plaintiff contends that the 911 system is designed to allow citizens a pathway to alert emergency governmental services.

2. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WASHOUT PRIOR TO PLAINTIFF'S ACCIDENT.

"Constructive notice is a legal inference which substitutes for actual notice." *Major v. City of Hartsville*, 410 S.C. 1, (2014). Here, Thomas Brown and Cathy Bennett, both gave affidavits that they called 911 at least 24 hours before the Plaintiff's accident. (See argument 1, above). Further, Plaintiff himself gave an affidavit that parts of his usual route between Kingstree and Georgetown had been barricaded because of the heavy rains and flooding. He then took a nearby alternate route that was not barricaded. It was on the alternate route that Plaintiff had the accident. (ROA pp. 33-35, Affidavit of Jerry Pressley). Plaintiff contends that Defendant had constructive notice of the washout because it had taken precautions to erect barricades on nearby roads, leaving Pepper Hill Road as an alternate (detour) route, without investigating its suitability. Defendant knew or should have known that the flood hazard most likely affected more than just Highway 527 and extended to nearby secondary roads.

3. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING DEFENDANT IS ENTITLED TO IMMUNITY PURSUANT TO §15-78-60(8), UNDER THE FACTS OF THIS CASE.

The exception, §15-78-60(8), relied upon by the Court must be read giving the words their plain meaning. "The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *Hodges v. Rainey*, 341 S.C. 79, 85 (2000). As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 569 (2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85. " 'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.' " *Id.* The exception in question specifically addresses snow and ice conditions, not present at the time of plaintiff's accident.[1] Plaintiff contends that this exception does not even apply to the washout he encountered on Pepper Hill Road. The exception relied upon by the Court specifies "ice or snow." It should not be read to expand the intended meaning of the legislature. The burden is on the Defendant to establish immunity. "The governmental entity claiming an exception to the waiver of immunity under the Tort

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1 In fact, the exception uses the words "snow" and "ice" twice. "(8) 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:" §15-78-60(8). (Emphasis added).

Claims Act has the burden of establishing any limitation on liability." *Strange v. S.C. Dep't of Highways & Pub. Transp.,* 314 S.C. 427, 445 S.E.2d 439 (1994).

In a 1997 case, our Court of Appeals had occasion to address immunity under §15-78-60. There, the Court said: "Governmental entity asserting a limitation upon liability, or exception to waiver of immunity under Tort Claims Act, must prove exception or limitation as affirmative defense." *Wooten by Wooten v. SCDOT*, 326 S.C. 516, 521(Ct. App. 1997). "Further, statutes waiving sovereign immunity must be strictly construed." *Id* at 52. Here, the Defendant has not proved immunity as an affirmative defense.

CONCLUSION

The Court of Appeals should find the Circuit Judge committed error when he granted summary judgment in favor of the Defendant. The Court's errors encompassed both actual and constructive notice to the Defendant, as well as granting immunity under §15-78-60(8). This Court should reverse the judgment of the Circuit Court.

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