THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-11570

Tim Wilkes ..... Appellant,

v.

Horry County ..... Respondent,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. DOES THE SOUTH CAROLINA TORT CLAIMS ACT PRECLUDE THE PLAINTIFF'S CLAIMS BASED ON NEGLIGENT ENFORCEMENT OF AN ORDINANCE?

III. DID THE PLAINTIFF WAIVE THE OPPORTUNITY TO SUBMIT EVIDENCE BY FAILING TO OFFER IT BEFORE FINAL JUDGMENT?

STATEMENT OF THE CASE[1]

Tim Wilkes ("Plaintiff") commenced this action on December 14, 2010, against Horry County claiming that its code enforcement division negligently issued an abatement notice regarding an unsecured swimming pool at 1860 Arundal Road in Murrell's Inlet South Carolina, which was in the yard of a burned down house. The Plaintiff purchased the property on August 23, 2010. The Plaintiff raised claims of negligence and trespass. Horry County answered, and on November 3, 2011, Horry County moved for summary judgment dismissal of the action.

On April 9, 2012, the Honorable Benjamin Culbertson, Circuit Court Judge for the Fifteenth Judicial Circuit (hereinafter referred to as the "Trial Court") heard the motion. The Trial Court at the conclusion of the hearing issued a verbal order granting the motion for summary judgment and a Rule 4 Judgment was entered on April 10, 2012.

On May 29, 2012, the Trial Court issued a written Order granting summary judgment. On June 18, 2012, the Plaintiff filed a Motion to Amend, and on August 9, 2012, the Trial Court denied the motion without a hearing. This appeal followed.

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[1] The Plaintiff included disputed facts in the statement of the case section of his initial brief, and Horry County requests that the Court of Appeals adopts its Statement.

STATEMENT OF FACTS

On August 25, 2010, MTM International assigned its bid in a foreclosure sale of 1860 Arundal Road to the Plaintiff. (R. p. 21).[2] On August 23, 2010, the Master in Equity for Horry County issued and executed a deed conveying the property to the Plaintiff. (R. p. 22). The deed was recorded in the public records on August 23, 2010. (Id.). Until that date, the Plaintiff was not the owner of record and he did not have legal title. (R. pp. 21 and 22).[3] Pamela and Michael Dixon were the owners of record until August 23, 2010.

Three days earlier, on August 20, 2010, an Horry County Code Enforcement Inspector served a notice on Michael Dixon ("Dixon") to secure a swimming pool that was on the property and was not enclosed by a fence. (R. p. 19). The notice advised Dixon that he had to either fill the pool in or erect a fence. (Id.). The notice did not compel action and was only an opportunity to remedy a violation. (Id.). Dixon could have erected a fence, filled the pool in or done nothing.

Dixon decided to contract with Land Services of South Carolina, LLC to fill the pool in, which was done approximately five days later. (R. p. 20, lines 1-5).

The Plaintiff subsequently commenced this action against Horry County claiming negligence and trespass. (R. pp. 8-10). He did not raise any type of condemnation,

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2 The assignment was recorded on August 25, 2010 after the deed was executed and filed. MTM International was the successful bidder on August 5 and not the Plaintiff. (R. pp. 21 and 22).

3 The Plaintiff submitted no evidence asserting that he paid the purchase price before August 23, which for the purposes of the public record would not have mattered.

inverse condemnation, or due process violation claims. The Plaintiff attempts to hold Horry County responsible for Dixon's decision to fill the pool in. On November 3, 2011, Horry County moved for summary judgment, and on February 6, 2012, it filed and served a memorandum of law supporting the motion for summary judgment plus exhibits. The Trial Court held a hearing on April 9, 2012. The Plaintiff presented no evidence to support his claims. (R. p. 1).

On May 29, 2012, the Trial Court issued a written order granting summary judgment. (Id.). On June 18, 2012, the Plaintiff filed a motion to amend and included for the first time several exhibits. The Trial Court denied the motion to amend in a Form 4 Order.

ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

I. The Trial Court correctly held that the Plaintiff did not acquire legal title on the property until it was conveyed to him by a deed.

A successful purchaser at a foreclosure sale does not acquire legal title until the Master in Equity executes and delivers a deed to the purchaser. S.C. Code § 15-39-830. Moreover, a person's claim of an ownership interest on real property does not put the public on notice of the interest until it is filed in the office of the register of deeds for the subject county. S.C. Code § 30-7-10.

The Master in Equity executed, delivered, and recorded a deed conveying the property to the Plaintiff on August 23, 2010, which was after Horry County issued the

notice to Dixon. (R. p. 22).[4] Consequently, the Plaintiff was neither the legal title holder nor owner of record when the notice was issued. The Trial Court correctly held that Horry County was under no obligation to notify the Plaintiff of the ordinance violation.[5]

II. The South Carolina Tort Claims Act bars the Plaintiff's claims that Horry County negligently enforced its ordinance.

The following provisions of the South Carolina Tort Claims Act bars the Plaintiff's negligence and trespass claims.

A. S.C. Code § 15-78-60(13).

S.C. Code § 15-78-60(13) prohibits liability against a governmental entity for a loss resulting from:

> [R]egulatory inspection powers or functions including failure to make an inspection or making an inadequate or negligent inspection of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety.

The basis of the Plaintiff's complaint is that Horry County negligently performed its inspection of the property which resulted in damage to the swimming pool. The clear

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The South Carolina Supreme Court defines notice under the Tort Claims Act as actual notice. Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 64, 504 S.E.2d 117, 123 (1998). Therefore, the Plaintiff's attempt to impose a constructive notice requirement on Horry County is without merit.

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The Plaintiff cites South Carolina Ambulatory Surgery Center Assoc. v. South Carolina's Workers Compensation Commission for the proposition that Horry County violated his due process rights. 389 S.C. 380, 699 S.E.2d 146 (2010). The Plaintiff does not claim a due process violation and the Supreme Court in South Carolina Ambulatory Surgery Center Assoc. held that the plaintiff in that case was not entitled to notice. Id. at 393, 154. Moreover, Horry County issued a warning to Dixon personally which created no obligation against the Plaintiff. The Plaintiff's due process claim is without merit.

and unambiguous terms of code section 15-78-60(13) prohibits a loss arising from an alleged negligent inspection of property. Consequently, Horry County is entitled to immunity from the Plaintiff's claims.

B. S.C. Code § 15-78-60(4).

The South Carolina Tort Claims Act prohibits liability against a governmental entity for a loss resulting from either the enforcement or the failure to enforce an ordinance. S.C. Code §15-78-60(4). In Adkins v. Varn, the South Carolina Supreme Court held a County enjoyed immunity from the negligent failure to enforce its animal control ordinance. 312 S.C. 188, 191-192, 439 S.E.2d 822, 824 (1993).

The Plaintiff makes the same type of claims in this action. The loss alleged in the complaint results from his claim that Horry County negligently enforced an ordinance. Horry County is immune from the Plaintiff's claims.

C. S.C. Code § 15-78-60(9).

S.C. Code § 15-78-60(9) prohibits liability against a governmental entity for a loss resulting from the "entry of upon property where the entry is expressly or impliedly authorized by law." An inspector may enter property when necessary to enforce the provisions of the Horry County Code or when the inspector has reasonable cause to believe that a condition exists on property in violation of the code. Horry County Ordinance § R104.6. For unoccupied property, an inspector only needs to make a reasonable effort to locate the owner or person in charge or control of the property. Id.

The evidence establishes that the subject property contained a swimming pool that was not secured by a fence and was a hazard. (R. pp. 1 and 2). The ordinance does not

require an onerous and time consuming full title search before entering the property. Horry County Ordinance § R104.6. The ordinance does not even require that the inspector serve the actual owner; rather, the code requires an inspector only to make a reasonable effort to locate the owner or person in charge of the property. Id. Horry County's inspector was authorized to enter the property.[6]

Moreover, "trespass is any intentional invasion of the plaintiff's interests in the exclusive possession of his property" and "[t]o constitute actionable trespass . . . there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion." Hawkins v. City of Greenville, 358 S.C. 280, 296, 594 S.E.2d 557, 565 (Ct. App. 2004).

As demonstrated above, the Plaintiff did not have exclusive possession over the property until August 23. Dixon had a right to enter the property and authorize others to enter the property until the deed was executed. Consequently, the Plaintiff's trespass claim, which is based on entry by Dixon and Land Services of South Carolina, LLC, fails.

In addition, Horry County neither filled the pool in nor ordered the pool filled in. The notice provided options to Dixon to remedy the dangerous situation, and he decided to contract with Land Services of South Carolina, LLC to fill the pool in. The Plaintiff fails to present any evidence of an affirmative act or intentional invasion of the Plaintiff's property by Horry County. The Plaintiff's claims against Horry County are barred and without merit.

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6 The Plaintiff does not dispute that the inspector was authorized to enter the property.

III. The Plaintiff was not entitled to notice of a warning to Michael Dixon.

The abatement notice advised Dixon to correct a dangerous condition that existed on his property. (R. p. 19). The notice was not an action against the property. Rather, the notice provided the owner of record, Dixon, the opportunity to abate a hazard before a misdemeanor violation would be charged against him as the owner of the property. Horry County Ordinance § 1308.

Dixon was the legal owner of title, maintained the property, and was in charge of it when the inspector served him with the notice. (R. p. 27, lines 3-22). Dixon believed at the time he received the notice that he was the owner of the property. (Id.). Dixon was the proper person to receive notice and correct the hazard, which he did by contracting to fill in the pool.

The Plaintiff argues that he was the guilty party and that he should have been charged for the failure to secure the pool. However, this allegation does not provide the Plaintiff any rights under the ordinance and does not lead to the conclusion that Horry County caused any damage to the Plaintiff by failing to charge him. The Plaintiff's claims are without merit.

IV. The Plaintiff offered no evidence at the summary judgment hearing and he did not preserve evidence for appeal.

The Plaintiff first presented evidence in response to Horry County's motion for summary judgment with his Rule 59(e) motion. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge." Wilder Corp. v. Wilke, 330 S.C. 71, 75, 497 S.E.2d 731, 734 (1998). "A party

cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (App. 1990) and Eaddy v. Oliver, 345 S.C. 39, 43, 545 S.E.2d 830, 833 (Ct. App. 2001).

The Plaintiff waived the opportunity to present the exhibits he attached to the motion to amend by failing to present them prior to judgment. Horry County requests that the Court of Appeals disregard the exhibits submitted with the Plaintiff's Rule 59(e), motion.

V. The Plaintiff failed to properly respond at summary judgment requiring dismissal of the action.

Rule 56(e), SCRCP in pertinent part states as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"Once a moving party carries its initial burden, opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to material facts . . .'" Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Horry County offered deposition testimony, deeds, and notices to carry its burden for summary judgment. The Plaintiff offered no evidence in response. Consequently, pursuant to Rule 56(e), summary judgment was appropriate and required.

CONCLUSION

The Trial Court correctly granted Horry County summary judgment. Horry County requests that the Court affirm summary judgment based on the reasoning provided in the Trial Court's Order and in this brief.

March 8, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with the provisions set forth in Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent** on the Appellant, through his attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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RE: *Tim Wilkes v. Horry County*
C/A No. 2010-CP-26-11570
Case Tracking No. 2012-212994
Our File No. 10197.15356

Dear Ms. Kitchings:

Enclosed is the unbound original and sixteen copies of the Respondents' Final Brief, including the Certificate of Counsel and Proof of Service, in the above-referenced matter. Please return a file-stamped copy to me in the enclosed envelope, and file the original and remaining copies in your records.

By copy of this letter, we are hereby serving the Appellant with a copy of the same. Thank you for your assistance with this matter.

Yours very truly,

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WHW/ddb
Enclosures
cc: GENE M CONNELL JR ESQ