THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-10-4947
Appellate Case No.: 2019-001843

Dana and John Stortz,.....Appellants,

v.

The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), Coosaw Creek Owners' Association, Inc.,.... Defendants.

Of which State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, and Coosaw Creek Owners' Association, Inc. are the Respondents.

INITIAL BRIEF OF APPELLANT

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1. DID THE TRIAL COURT ERR IN DISMISSING THE PLAINTIFF'S CASE SUA SPONTE WHEN PLAINTIFF'S MOTION TO CONSOLIDATE WAS THE ONLY ISSUE BEFORE THE COURT

STATEMENT OF THE CASE

This appeal results from the dismissal of the Plaintiff's case (hereinafter "Stortz One") by the Honorable Edward W. Miller, on October 24, 2018, in the Charleston County Court of Common Pleas, Case No. 2017-CP-10-4947.

This action was initially filed on September 27, 2017 alleging five (5) causes of action for Negligent Misrepresentation, Negligence, Negligent Planning, Designing, Construction and Maintenance, Violation of S.C. Code §5-31-450, and Inverse Condemnation, based on the following underlying facts. The Coosaw Creek Subdivision was established in North Charleston, South Carolina in the 1980s. At all relevant times, the Plaintiffs owned the property located at 4169 Club Course Drive, North Charleston, Charleston County, South Carolina (within the Coosaw Creek Subdivision) and have lived there continuously since the time of purchase. The property consists of a house, a lot, and various outbuildings. At no time prior to the construction of the Palmetto Commerce Parkway did the Plaintiffs or their neighbors suffer flooding to their property, even during Hurricane Hugo which occurred in 1989. Prior to construction of the Palmetto Commerce Parkway, significant wetlands existed which captured water during storm or excess water situations and prevented water flowing onto developed land nearby.

Prior to the flooding events giving rise to this action, the Defendants conceived and began construction of a four-lane highway which is now known as the Palmetto Commerce Parkway (hereinafter "the Parkway"). The alleged purpose of the road was to alleviate traffic around the Boeing Plant and create attractive commercial space for business interests. A significant part of the Parkway was designed to run through the

above-mentioned wetlands behind the Coosaw Creek Subdivision where the Plaintiffs' home is located. At several public hearings, with representatives of the Defendants in attendance, the public expressed concern over the flooding that would take place in the neighborhoods adjacent to the Parkway and stated their objections to the Parkway being constructed. The Defendants ignored such objections despite having access to the pertinent information which showed the objections were justified. As part of the Defendants' due diligence, they were required to perform studies regarding what the project would do with the water being absorbed by the wetlands, including but not limited to how it would impact neighboring properties, how it would impact wetlands, and how the project would have a water-neutral impact. Defendants negligently constructed the Parkway by creating a berm through the wetlands which acts as a dam and prevents water from flowing from one of the dissected area of wetlands to the other and effectively funnels water toward adjacent neighborhoods, including the Coosaw Creek Subdivision. The Plaintiffs have alleged that the Defendants negligently constructed the Parkway by refusing to elevate the roadway or build appropriate culverts which would allow for free flow or drainage water throughout the dissected wetlands, which funnels water towards the Coosaw Creek Subdivision. The Defendants repeatedly assured residents that no such flooding would occur, and ignored the objections of the residents.

Defendants, through their various departments and subcontractors, commenced construction and eventually completed the Palmetto Commerce Parkway. Coinciding with the construction of the Parkway, the storm water drainage system of the Defendants Charleston County and City of North Charleston was allowed to fill with debris and were

otherwise not designed, constructed or maintained by the Defendants County of Charleston or City of North Charleston in a reasonable and adequate manner to facilitate adequate drainage thereby allowing flooding of the Plaintiffs' property. Residents of the Coosaw Creek Subdivision contacted Defendants Charleston County and City of North Charleston and requested maintenance to the storm water drainage in the neighborhood so that it would properly drain, to no avail. As a result of the Defendant's concerted actions, the Plaintiffs' property continually floods during water events – namely in October of 2015 and October of 2016. The flooding was so severe that the Plaintiffs have replaced their personal belongings and made extensive and costly repairs to their structures.

The Defendants were notified by the Plaintiffs pursuant to S.C. Code Ann. §5-31-450, requesting that the Defendants take corrective action to provide adequate and sufficient drainage to prevent flooding of their property and to restore the natural condition of the property which was destroyed by the actions of the Defendants. To date, the Defendants have failed to perform reasonable actions to repair the continued flooding and damage to the Plaintiffs' property.

The Defendants knew or should have known that their actions in negligently constructing the Palmetto Commerce Parkway would cause the Plaintiffs' property to flood. They were informed of this by the subdivision residents on numerous occasions prior to commencing construction on the road. The Defendants additionally knew or should have known that the Plaintiffs' property would flood due to their negligence in designing, constructing and maintaining the drainage ditches in the Coosaw Creek Subdivision. In order to speed the project to completion, despite the harm to the

Plaintiffs, the Defendants also subverted the permitting process, failed to perform the requisite studies, and bypassed normal permitting procedures. The County of Charleston and the City of North Charleston have assumed a duty and are under a responsibility under the law to design, maintain and construct adequate and reasonable storm drainage and flood control measures for the communities within their borders and particularly within the Coosaw Creek Subdivision. As a result of the construction of the Parkway and the insufficient drainage and flood control system for the community, the Plaintiffs' home and real property have, within the past four years, sustained damage and the Plaintiffs' right to the peaceful use and enjoyment of their property has been hampered. The flooding is continuing in nature. Plaintiffs have further alleged that each flooding event is a separate occurrence and injury.

Through their Complaint, the Plaintiffs aver that the Defendants negligently breached their duty to the Plaintiffs by constructing and maintaining the Parkway in such a manner as to cause flooding of the Plaintiffs' property. Plaintiffs also aver that the Defendants chose to promote their own interests over the interests of their residents and their city based on anticipated revenues and neighboring businesses. Plaintiffs have therefore alleged that the Defendants negligently breached their duty to the Plaintiffs by failing to construct and maintain adequate storm water drainage ditches in the Coosaw Creek Subdivision thereby causing continued flooding of the Plaintiffs' property.

FACTS

The present matter is tied very closely to the other similar [previously consolidated] Pepperhill matters.[1] The Pepperhill matters are comprised of forty-four (44) Plaintiffs who have made identical allegations to the ones contained in the present case,

[1] Sharper, et. al., v. State of South Carolina, et. al.; 2017-CP-10-4820.

involves all of the same parties (with the exception of the HOA), utilizes the same expert and essentially requires the same discovery and proof.

An initial Complaint in this matter was filed on September 27, 2017,[2] naming all Defendants except the Coosaw Creek Owners' Association, Inc. (hereinafter "HOA"); a First Amended Complaint was filed on December 18, 2017 naming the HOA,[3] a Second Amended Complaint naming additional parties was filed on September 28, 2018.[4] Then, a new case (hereinafter "Stortz Two") was filed on the same day, September 28, 2018.[5] The City of North Charleston, Department of Transportation (hereinafter "DOT"), the Department of Health and Environmental Control (hereinafter "DHEC") and the HOA filed Motions to Dismiss Stortz One and the Plaintiff filed a Motion to Consolidate. Those Motions were addressed at the hearing that occurred on October 24, 2018.

At the time of the hearing, counsel for the City of North Charleston requested a continuance and represented that their Motion was not to be before the Court in light of Plaintiff's Second Amended Complaint in Stortz One and Complaint in Stortz Two.[6] The DOT and DHEC requested their motions to be heard, and those motions were subsequently granted by the Court. This finding, if correct, would have the effect of

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[2] Dana Stortz and John Stortz v. The State of South Carolina, City of North, Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina, Department of Transportation, and John Doe (engineering firm/engineer), 2017-CP-10-4947.

[3] Dana Stortz and John Stortz v. The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), and Coosaw Creek Owners' Association, Inc., 2017-CP-10-4947.

[4] Dana Stortz and John Stortz v. The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, Banks Construction Company, United Contractors, Inc., Banks/United Joint Venture and HLA, Inc., 2017-CP-10-4947.

[5] Dana Stortz and John Stortz v. The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, Banks Construction Company, United Contractors, Inc., Banks/United Joint Venture and HLA, Inc., 2018-CP-10-4961.

[6] Transcript of proceedings, p. 3.

excluding the DOT and DHEC from the case, but not an outright dismissal. The Plaintiffs would still have maintained their right to proceed against the City, the State, the County, and all other parties. Later in the same hearing, Plaintiff's Motion to Consolidate[7] came before the court, which attempted to consolidate Stortz One and Two in with the existing Pepperhill matters. While the Court declined to consolidate the Stortz matters with the Pepperhill matters over the HOA's objection, there was never any objection made (by any party) to the consolidation of both Stortz One and Stortz Two.

Nevertheless, the Court, *sua sponte*, in an attempt to "clean up" the pleadings, dismissed Stortz One altogether. Because the Statute of Limitations against the government entities is two years pursuant to the S.C. Tort Claims Act, this dismissal in effect, precludes the Plaintiffs from claiming damages related to the October 2015 flood.[8] This very obviously unjustifiably prejudices the rights of the Plaintiffs.

ARGUMENTS

SUA SPONTE DISMISSAL OF THIS ACTION WAS NOT AN APPROPRIATE REMEDY AND IS TOO HARSH UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

The decision to dismiss a case is within the purview of the trial court and will not be disturbed absent an abuse of discretion. In re Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id. (quoting Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). In general, an action is subject to dismissal *sua sponte* for want of

[7] Transcript of proceedings, p. 6.

[8] The 2017 case was filed prior to the two (2) year deadline to incorporate damages related to the 2015 flood. The dismissal of Stortz One only leaves Stortz Two, which was filed in 2018 and therefore is outside of the two years statute of limitations for the first occurrence.

prosecution, lack of or failure to comply with the rules of civil procedure or a court's orders.[9] However, none of these circumstances apply in the instant case. The decision of the trial court to dismiss Stortz One resulted in an error of law as a result of a simple misunderstanding of the facts and procedure in this matter.

The policy in South Carolina has always been to decide cases on the merits. *See generally* Wright & Miller, Federal Practice and Procedure: Civil §§ 2369, 2370 (1971); Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386); Dailey v. Payne, 539 F.2d 705 (Ct. App. 1976).

As the Supreme Court held in Link v. Wabash R.R., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the trial court can dismiss action on its own motion. But courts interpreting this rule uniformly hold that it cannot be automatically or mechanically applied. Consequently, dismissal "must be tempered by a careful exercise of judicial discretion." Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967). While the propriety of dismissal ultimately turns on the facts of each case, criteria for judging whether the discretion of the trial court has been soundly exercised have been stated frequently. Edsall v. Penn Central Transportation Co., 479 F.2d 33, 35 (6th Cir. 1973). While dismissal is a discretionary matter, Courts have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th Cir. 1967). Further, prejudice to the parties is a factor that must be considered in determining whether the trial court exercised sound discretion. Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965).

Other cases emphasize the importance, "except in the most flagrant circumstance, of resorting to sanctions that do not deprive a litigant of his day in court" are Woodham

[9] S.C.R.C.P. 41(b).

v. American Cycstoscope Company of Pelham, 335 F.2d 551 (Ct. App. 1964); Council of Federated Organizations v. Mize, 5 Cir., 339 F.2d 898 (1964). "Dismissal of an action... is a drastic remedy, which should be used only in extreme situations, as the court has a wide range of lesser sanctions." Flaska v. Little River Marine Construction Co., 389 F.2d 885 (Ct. App. 1968).

Here, there was absolutely no misconduct by the Plaintiffs. They did not fail to prosecute their case, nor did they fail to follow a court rule or order. Further, there is extreme prejudice to the Plaintiffs as a result of the dismissal - they have lost their right to adjudicate the first incident (2015 flood) on the merits, leaving them to only seek remedies for the subsequent floods. It is well established that dismissal is an extreme measure and should only be ordered on the Court's own initiative in the most extreme circumstances. Dismissal of Plaintiffs' case is therefore improper. Based on the fact that this is a clear error resulting in the trial judge's misunderstanding of the case and facts, dismissal of Stortz One should be reversed.

CONCLUSION

It is clear that the Plaintiff's case should not have been dismissed, as the Judge, without justification, erred in *sua sponte* ordering said dismissal. For the reasons set forth above, and for the Judge's error in dismissing this matter, this case should be reversed and remanded.

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Respectfully submitted,

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January 6, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-10-4947
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Dana and John Stortz,... ... ... Appellants,

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The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), Coosaw Creek Owners' Association, Inc.,.... Defendants.

Of which State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, and Coosaw Creek Owners' Association, Inc. are the Respondents.

PROOF OF SERVICE

I certify that I have served one copy of the Initial Brief and Designation of Matter to be Included in the Record on Appeal on Counsel for the Appellants, by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2019, addressed to I. Keith McCarty located at 1212 Wappoo Road Charleston, South Carolina 29407.

January 6, 2019

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January 6, 2020

The Honorable Jenny Abbott Kitchings
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RE: Dana and John Stortz, Appellants, v. The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), Coosaw Creek Owners' Association, Inc., Defendants.

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Trial Court Case No: 2017CP1004947
Appellate Case No. 2019-001843

Dear Ms. Kitchings:

Enclosed please find the originals and two copies each of the Appellant's Initial Brief, Proof of Service and Designation of Matter to be Included in the Record on Appeal in the above referenced matter. Please return a clocked copy of the Brief, Proof of Service and Designation to me in the envelope I have enclosed for your convenience.

By copy of this letter I have provided same to counsel for the Respondents.

Sincerely,

Jarrel L. Wigger, Esquire

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