NOTICE OF APPEAL IN A CIVIL CASE

The State of South Carolina
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED
Nov 30 2020
SC Court of Appeals

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-001205

Amanda Creel Godfrey, Appellant.
v.
City of Columbia, Richland County & AOS Contractors, Defendants,

of which Richland County and AOS Contractors, Inc. are the Respondents.

INITIAL BRIEF OF APPELLANT

Pope D. Johnson, III
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
pope@popejohnsonlaw.com

William James Johnson, Esquire
Smith Terry Johnson & Windle
21 Battery Park Ave, Suite 201
Asheville, NC 28801
wjjohnson@smithterrylaw.com

ATTORNEYS FOR APPELLANT

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2. THE COUNTY CONTROLLED USE OF THE PROPERTY AND THE PROJECT AND THEREFORE OWED A DUTY OF CARE TO THE PLAINTIFF, SUMMARY JUDGMENT MUST BE REVERSED AND DENIED.

3. GENUINE ISSUES OF MATERIAL FACTS EXIST AS TO WHETHER AOS VIOLATED THE STANDARD OF CARE FOR A CONTRACTOR ON THIS PROJECT AND WHETHER ITS CONSTRUCTION ACTIVITIES CAUSED DAMAGE TO MS. GODFREY'S PROPERTY, SUMMARY JUDGMENT MUST BE REVERSED AND DENIED.

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STATEMENT OF ISSUES ON APPEAL

4. Genuine issues of material facts exist as to whether the County had ownership, control, or maintenance responsibility for any real property interests.

5. Genuine issues of material facts exist as to whether AOS violated the standard of care for a contractor on this project and whether its construction activities caused damage to Ms. Godfrey's property.

6. Judge Hood erred in striking Bill Mathews' Affidavit and in failing to consider the Affidavit dated August 5, 2020 provided by Mr. Mathews explaining the inconsistencies from his deposition in his Affidavit.

7. Judge Hood appears to ignore evidence of genuine issues of fact based upon Ms. Godfrey's Affidavit.

8. Judge Hood erred in giving weight to opinion testimony from Ms. Godfrey, a lay witness.

9. Judge Hood erred in failing to give Ms. Godfrey ten (10) days notice of the hearing of the County and AOS's Motion to Strike the Affidavit of Bill Mathews.

10. Other good cause existed to carry the Motion hearing over.

STATEMENT OF THE CASE

Amanda Creel Godfrey ("Ms. Godfrey") commenced this action by the filing of a Summons and Complaint on November 17, 2016. Ms. Godfrey initially brought her action against the City of Columbia ("City") only. In Ms. Godfrey's original Complaint, she alleged the following:

1. "The plaintiff is a resident of the County of Richland, State of South Carolina.
2. Heretofore, the defendant undertook to convert a railroad bed running through the City of Columbia ("City") into a walking path for its citizens.
3. The railroad bed ran adjacent to the house and the lot of the plaintiff at 1715 Gadsden Street, Columbia, South Carolina where she lives.
4. The defendant engaged an engineering firm, GS2 Engineering & Environmental Consultants, Inc. ("GS2"), to conduct a study as to whether the City's plan for the conversion of the railroad bed to a walking path would affect the stability of the slope running along the plaintiff's property.
5. Attached hereto and incorporated herein by reference I a copy of the report of GS2 dated May 11, 2011.
6. Although GS2 found that the City's plan would undermine the ability of the embankment running along the plaintiff's property and although GS2 made recommendations which, if implemented, would protect the stability of the slope and the plaintiff's property, the defendant did not share the report with the plaintiff at the time it was issued and did not follow the recommendations of its consulting engineering firm.
7. The defendant instead took steps that have further undermined the stability of the embankment and caused damage to the plaintiff's home.
8. The defendant assured the plaintiff that it would take steps to insure that the plaintiff's home and lot would not be adversely affected, the City failed to do so and the plaintiff's home has suffered damages.
9. Upon information and belief, unless adequate steps are taken to secure the stability of the embankment in question, further damage will occur and the plaintiff's home will suffer further damage." (Ms. Godfrey's Complaint dated Nov. 17, 2016)

The City filed an Answer alleging as defenses: a general denial, failure to state facts sufficient to constitute a cause of action, immunities, defenses and limitations as set out in the South Carolina Tort Claims Act, the applicable Statutes of Limitations and Repose, the Public Duty Rule, failure to mitigate her damages, the defenses of estoppel, waiver of laches, and/or

acquiescence, the sole and intervening negligence of third parties, assumption of the risk and an act of God. (The City's Answer dated December 29, 2016).

On February 8, 2017, Ms. Godfrey filed an Amended Complaint and joined Richland County, ("County"), Alta Planning & Design ("Alta") and AOS Contractors ("AOS") as parties to the suit. In Ms. Godfrey's Amended Complaint, she realleged the allegations of her Complaint and alleged in addition the following: (Ms. Godfrey's Amended Complaint dated Feb. 8, 2017)

> 10. "Upon information and belief, the County adopted Alta Planning + Design, Inc.'s design of the project and contracted with AOS Contractors, Inc. for the construction of the project.
>
> 11. Upon information and belief, the City, while denying any and all liability to the plaintiff, maintains that liability for the plaintiff's damages, if any, rests with Richland County and/or Alta Planning + Design, Inc. and/or AOS Contractors, Inc. and as a result thereof, Richland County, Alta Planning + Design. Inc. and AOS Contractors, Inc. are joined as parties to this action.
>
> **FOR A FIRST CAUSE OF ACTION**
>
> 12. The damage to the plaintiff's property was and is foreseeable and was and is the direct and proximate result of the negligence of one or more of the defendants, who are liable for the plaintiff's damages.
>
> **FOR A SECOND CAUSE OF ACTION**
>
> 13. Upon information and belief, one or more of the defendants have unreasonably interfered with the plaintiff's use and enjoyment of her property and their acts and omissions have permanently caused the plaintiff's damages.
>
> 14. As a result thereof, one or more of the defendants are liable to the plaintiff for the damages she has suffered.
>
> WHEREFORE, the plaintiff prays for a judgment against the defendants for the actual damages suffered as set forth above and for such other and further relief as may be just and proper."
> (Ms. Godfrey's Amended Complaint dated February 8, 2017).

The County served and filed an Answer on Ms. Godfrey and asserted as its defenses: failure to state facts upon which relief can be granted, general denial, comparative negligence, immunity, terms and conditions under the South Carolina Tort Claims Act, apportionment pursuant to §15-78-100(c), intervening negligence, defenses of estoppel, waiver, laches and/or acquiescence, Act of God, failure to mitigate damages. (The County's Answer)

AOS filed and served an Answer on Ms. Godfrey and asserted defenses of general denial, failure to state facts upon which relief can be granted, sole acts or omissions of third parties, negligence, comparative negligence, economic loss rule, Statute of Limitations and/or Statutes of Repose, spoliation of evidence, failure to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act and an Opportunity to Cure Non-Residential Construction Defects Act, failure to mitigate the damages, application of the South Carolina Contribution Tort Feasors Act, apportionment of any recovery by Ms. Godfrey, Doctrines of Laches, Waiver, and/or Estoppel, Act of God. (AOS's Answer)

Alta filed a timely Motion to Dismiss, asserting that the action should be dismissed, because Ms. Godfrey had failed to submit an Affidavit from an engineer, identifying the engineer's deviation from the standard of care. (Alta's Motion to Dismiss)

The amount in controversy in the action is $490,000.00. Ms. Godfrey's real estate appraiser, Philip Urso, testified that in his opinion no one would buy the Godfrey property given the problems with the slope failure, the loss was a total loss. (Deposition Transcript, Philip Urso, Pgs. 17 to 18).

Ms. Godfrey's real estate agent James "Jimmy" W. Derrick, Jr. has opined in his Affidavit dated July 6, 2020 as follows:

> "Since listing this property on March 19, 2020 I have only had one potential buyer look at the house. I have had only one other potential buyer make

inquiries about the house. Other than this, there has been no sales activity related to the property.

> The Godfrey home is well-maintained. The home is attractively decorated. It is well located in a neighborhood where properties generally sell quickly and for full price. Based upon my experience in the real estate business of some 40 years, it is my opinion that the litigation regarding the erosion of the embankment has adversely affected the sale and marketability of the Godfrey property and it is unlikely that any potential purchaser would pay full value or close to full value for the property. In my opinion, any potential purchaser would want a substantial discount in order to be enticed by the property." (Affidavit of James W. Derrick)

On September 12, 2017 Ms. Godfrey filed a Second Amended Complaint asserting causes of actions of negligence and interference of Ms. Godfrey's use and enjoyment of her property. (Second Amended Complaint, Sept. 11, 2017). The City, County, Alta and AOS timely served responsive pleadings. (The City's Answer, September 22, 2017, The County's Answer, Sept. 27, 2017, AOS's Answer, Sept. 21, 2017 and Alta's Motion to Dismiss dated April 7, 2017.

The action was dismissed pursuant to a Rule 40(j) Order dated July 30, 2018 and was restored by an Order dated March 8, 2019.

By an Order dated June 15, 2018 Alta was dismissed as a party to the action. Ms. Godfrey took a 30(b)(6) deposition of the City. During the deposition, the City's attorney instructed the witness not to answer certain questions. The City's attorney moved for a protective order, which motion was pending on July 16, 2020 when Judge Hood heard the motions for summary judgment of the County and AOS. However, Judge Hood did not hear the motion for protective order. The remaining parties filed Motions for Summary Judgment which were heard on July 16, 2020 by the Honorable Robert E. Hood. Judge Hood granted the Motions of the County and AOS by Form 4 Orders dated July 28, 2020, with formal Orders to follow. Ms. Godfrey filed a Motion to Reconsider the Orders granting summary judgment in favor of the County and AOS, which

Motions were denied by Form 4 Orders dated August 18, 2020. Ms. Godfrey appealed these Orders by Notice of Intent to Appeal dated August 27, 2020.

The matter is now before this Court to determine whether the County's Order Granting Summary Judgment dated July 28, 2020, and the AOS's Order Granting Summary Judgment dated July 28, 2020 and the Orders dated August 18, 2020 and the Form 4 Orders summarily denying Ms. Godfrey's Motions to Reconsider should be reversed.

STANDARD OF REVIEW

Summary judgment is only appropriate when there is "no genuine issues as to any material fact and [...] the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. "The party moving for summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). "In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Additionally, "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Miller* at 200. "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Id.* In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the moving party. *Hancock v. Mid-*

South Management Co., 381 SC 326, 673 S.E.2d 801 (S.C. 2009). The Appellate Court, in reviewing an Order granting summary judgment, applies the same standard.

ARGUMENT

I.

APPEAL OF THE ORDER GRANTING SUMMARY JUDGMENT TO THE COUNTY

(a) Genuine issues of material facts exist as to whether the County had ownership, control, or maintenance responsibility for any real property interests.

The County moved for summary judgment on the following grounds:

1. "Defendant Richland County has no ownership, control, or maintenance responsibility for any real property or related property interests adjacent to the Plaintiffs' subject property as alleged in the Amended Complaint, and as such, is not a proper party to this action and should be dismissed.
2. The Plaintiff has failed to establish that Defendant Richland County owed the Plaintiff any duty of care as asserted in Plaintiff's Amended Complaint.
3. Alternatively, to the degree that evidence of a legal duty exists as to the Plaintiff's allegations in the Amended Complaint as to this Defendant, the Plaintiff's claims are barred by the Public Duty Rule as to Defendant Richland County.
4. Defendant Richland County is entitled to immunity as to the Plaintiff's claims pursuant to South Carolina Code Ann. § 15-78-60(1), (2), (4), (5), (8), (9), (13), (15), (16), and (20) of the South Carolina Tort claims Act.
5. Defendant Richland County would move to strike all claims for joint and several liability, as that is not the proper standard in this matter as to this Defendant pursuant to South Carolina Code Ann. § 15-78-100(c) of the South Carolina Tort claims Act.
   This Motion is based upon the pleadings filed in this case, Exhibits A through J filed herewith, the Rules of Court, and such other matters as may be properly presented to the Court at the time of the hearing." (The County's Motion for Summary Judgment)

Judge Hood, in granting the county's motion, made the following findings and conclusions of law:

> "In its Motion, Defendant Richland County sets forth several grounds for which it seeks the granting of summary judgment and dismissal as a party to this action as a matter of law. Foremost, the County asserts that it has no ownership, control or maintenance responsibility for the real property or property interests in controversy which are the subject of this lawsuit, and as such, the Plaintiff has failed to establish

that it owed the Plaintiff any duty of care as to the claims set forth in this matter. Alternatively, The County contends that to the degree that evidence of a legal duty exists as to the Plaintiff's claims, they would be barred pursuant to the Public Duty Rule.

"An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437, 451 (2005); *Charleston Dry Cleaners Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586, 588 (2003). "One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty." *Miller v. City of Camden*, 329, S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

In support of the position asserted by Richland County it was argued that the extensive submissions by the parties, including affidavits, exhibits and deposition transcript excerpts lacked evidence establishing a genuine issue of material fact with regard to Richland County's contention that no duty of care existed on its behalf to the Plaintiff for the subject claims. Having reviewed the aforementioned submissions, testimony and exhibits in this case, the Court agrees with Richland County's position and finds that the Plaintiff has not established that Defendant Richland County owed the Plaintiff a duty of care, or any proximate breach thereof, as it pertains to the claims in this action.

As such, as to Richland County the Plaintiff has not "set forth . . . specific facts in the record showing that there is a genuine issue of material fact." *Bravis*, 316 S.C. at 265, 449 S.E.2d at 496. Rather, there is a lack of evidence in this case to support the Plaintiff's claim as against this party, and Defendant Richland County is therefore properly entitled to summary judgment as a matter of law.

Given the ruling and findings as to the lack of a legal duty existing to the Plaintiff by Richland County in this civil action as referenced herein, the Court does not need to further address the additional arguments set forth by this Defendant in support of its motion for summary judgment, including application of the Public Duty Rule or the various immunities asserted pursuant to South Carolina Code Ann. § 15-78-60 of the South Carolina Tort Claims Act.

IT IS THEREFORE, ORDERED that the motion for summary judgment filed on behalf of Defendant Richland County is hereby GRANTED, and Defendant Richland County is therefore dismissed, with prejudice, as a party to this action.

IT IS SO ORDERED." (Order Granting Summary Judgment in Favor of the County).

The County argued and Judge Hood found that the County did not control the use of the property in the project and therefore, that the County owed no duty of care to the Plaintiff. However, this is simply wrong and constitutes reversible error. The record provides ample

evidence that the County did in fact have control over the use of the property at issue to construct, re-construct, alter or improve certain segments of the project by virtue of the development agreement with the City of Columbia pertaining to this project.

The record shows that the County entered into an agreement with the City as to the project at issue which agreement expressly provided the County discretionary and plenary control over the project. The project agreement between the City and County provided as follows:

> 5. The County shall conduct the procurement process for all aspects of the Project which shall provide for a base bid and bid alternates. Decisions made by the County regarding this process will be at the sole discretion of the County.
>
> 6. The County will provide $893,000 toward the cost of the Project from the Penny tax as reflected in the Project Budget. The County does not guarantee completion of the Project within the Project Budget. If actual construction costs as reflected in the low bid is over budget, the County will work with the City to revise the Project Plans as necessary to bring the cost within the Project Budget. Until the Project Plans have been revised such that bid for the Project Budget, a Notice of Proceed will not be issued.
>
> 7. If, during construction, circumstances arise or conditions are discovered which cause the Project Budget to be insufficient to complete the Project, the County shall not be responsible or obtaining and providing additional funding. In such case, the County will cooperate with the City in revising the Project Plans as necessary to complete the Project within the Project Budget. If the parties cannot agree on revisions to the Project Plans, the County may, in its sole discretion, approve revisions to the Project Plans as necessary to complete the Project within the Project Budget. In no event will the County provide any funds over and above the amount reflected in the Project Budget; however, the City may provide additional legally-available funds to be used as directed by the City.
>
> 8. The County may, in its sole discretion, authorize change orders that it deems necessary to complete the Project so long as such change order is within the scope of the Project and the Project Budget." ***See* Exhibit 4 to Mathews Affidavit.**

In addition, the County exercised control of the property and the project by contracting with AOS Specialty Contractors, Inc., the contractor for the project. ***See* Exhibit 5 to Mathews Affidavit.** Control over this project was in fact exercised by the County. Michael P. Sheu testified

that the City's authority was limited to suggestion to the County whereas the County had final decision -making authority regarding the construction of the project. Mr. Sheu testified as follows:

> "My role would've been – in this particular project was – was – I had a construction administrator assigned to keep track of it. This was not our contract. The construction contract was led by the – Richland County, and the contractor was hired by them. So I could advise the – my people could advise the County people, but we did not have direct control over the contractor.
>
> If we wanted something or had a question, we went to the County, and they asked the contractor. And this might be fact-to-face, but it was – I mean, it wasn't highly ritualized, but it was – but it was a matter of – they didn't actually work for us." **Deposition Transcript, Michael P. Sheu, Pg. 7 and 8.**

Clearly, and at a minimum, this evidence creates an inference that the County controlled the project involving the property at issue, and had discretion, authority and control over the use of the property in the project. Therefore, under the law cited by Judge Hood above, the County had a corresponding duty of care not to harm others by its use. Summary judgment in favor of the County must be reversed.

II.

APPEAL OF THE ORDER GRANTING
AOS'S MOTION FOR SUMMARY JUDGMENT

(a) Genuine issues of material facts exist as to whether AOS violated the standard of care for a contractor on this project and whether its construction activities caused damage to Ms. Godfrey's property.

AOS, in its Motion, argued it was entitled to summary judgment because it was undisputed that it did not violate the standard of care for a contractor on this project and its construction activities have not caused any damage to Plaintiff's property. Ms. Godfrey, in response thereto, submitted an Affidavit from her geotechnical engineer, Bill Mathews, which affidavit identified numerous questions of fact, including as to AOS:

- AOS is a sophisticated contractor which knew or should have known that removing vegetation from a slope will compromise the slope's stability (Aff. P 9);
- This is evidenced by AOS's unilateral decision to move off the slope below Ms. Godfrey, out of concern for the collapse of the slope and the safety of its employees; (AFF. P. 11); and
- That AOS deviated from the plans and specifications by clearing and removing vegetation above the limits of clearing shown on the plans (Aff. P. 12); and
- This removal accelerated the erosion on the slope, and caused damage to Ms. Godfrey's brick wall; and
- "In my opinion, and to a reasonable degree of engineering certainty, AOS was negligent in removing the kudzu and the vegetation on the slope adjacent to the plaintiff's property and in removing the kudzu and vegetation from the slope when there was no plan in place to protect the stability of the slope and in removing the vegetation outside the area that was supposed to be cleared under the terms of the contract." (Aff. P. 19)

(Affidavit of Bill Mathews (paraphrased). The fact that AOS recognized the danger posed by its activities is independently supported in the record by the letter of AOS to the City dated ________ (record ________)

However, AOS argued that Judge Hood should not consider Mr. Mathews' affidavit because it was inconsistent with his prior deposition testimony. Judge Hood agreed with AOS and struck Mr. Mathews' Affidavit.

Under South Carolina law, and per the holdings of the South Carolina Supreme Court, a contractor may be liable for injury to a third party arising out of its construction contract. *Dorrell v. South Carolina Dept. of Transportation*, 361 SC 312 (2004). The liability exists independently of the contract and rests upon the tortfeasor's common law duty of due care. *Kennedy v. Columbia*

Lumber and Mfg. Co., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (finding a homebuilder owes a legal duty "to refrain from constructing housing that he knows or should know will pose serious risks of physical harm to foreseeable parties"); *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 133, 212 S.E.2d 925, 926 (1975) (finding that an independent contractor had a duty of care to leave the premises in a safe condition, free from any hazards to safety that he may have created); *Rogers v. Scyphers*, 251 S.C. 128, 133, 161 S.E.2d 81, 84 (1968) (finding a building contractor owed a duty of reasonable care that extended to homebuyers and members of the buyer's family); *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 345, 479 S.E.2d 67, 76 (Ct.App.1996) (stating that it was proper for the trial judge to charge the jury with the elements of common law negligence to determine whether a paving company negligently performed its work, indicating that the paving company owed a duty of care based in common law). The evidence supports the inference that (a) AOS knowingly created a dangerous condition on the property; and (b) cleared and grubbed closer to the Plaintiff's property than was called for on the Project plans, and in doing so, AOS has no basis to assert a defense that it was merely following plans.

(b) Judge Hood erred in striking Bill Mathews' Affidavit and in failing to consider the Affidavit dated August 5, 2020 provided by Mr. Mathews explaining the inconsistencies from his deposition in his Affidavit.

AOS deposed Mr. Mathews on May 10, 2018. AOS moved for summary Judgment on March 20, 2020. Ms. Godfrey filed the Affidavit of Mr. Mathews on July 9, 2020. On July 14, 2020, only two days before the hearing on motions for summary judgment. AOS and the County moved to strike the Affidavit of Mr. Mathews, arguing that his Affidavit was inconsistent with his deposition testimony on May 20, 2018. Judge Hood heard the motions for summary judgment on July 16, 2020. On July 28, 2020 Judge Hood announced his decision granting summary judgment in favor of the County and AOS on a Form 4 Order filed July 17, 2020 . On August 5, 2020, Ms.

Godfrey submitted the Motions to Re-Open and Reconsider the Orders Granting Summary Judgment. On August 18, 2020, Judge Hood issued Form 4 Orders denying Ms. Godfrey's Motions to Reconsider. There is no way to know whether Judge Hood ever reviewed Bill Mathews' Affidavit dated August 5, 2020.

There is no evidence in the record that Judge Hood ever read or considered Bill Mathews' Affidavit filed 2020, 2020. However, his Affidavit provided a clear explanation of the alleged inconsistencies between his deposition testimony and his Affidavit dated July 9, 2020.

In addition, Mr. Mathews dated August 4, 2020 stated the following:

> "1. I deny that my Affidavit is a sham affidavit. I was deposed over two years ago on May 10, 2018. I answered the questions based upon where I was in my work on the case at the time. The opinions I have expressed in my Affidavit dated July 7th, 2020 are based upon additional work that I have done since May 10th, 2018.
> 2. First of all, I have done substantially more work on the case since I was deposed. Attached are my billing records which demonstrate this. I affirm that I have done more work since my deposition than we have before any deposition.
> 3. As my Affidavit reflected, I was given the Affidavits of the Plaintiff and her husband and I was asked to accept what they said in their Affidavits as being true, which I did.
> 4. In addition, I was provided with the detailed history of the facts leading up to the lawsuit and I was asked to accept the history as being true, which I did.
> 5. Finally, I have made another site visit since my deposition and seen with my own eyes the deterioration in the slope adjacent to Plaintiff's property.
> 6. I have no objection to being redeposed on these matters." (Affidavit of William Mathews, PE dated August 4, 2020).

The action should be remanded to Judge Hood with instructions that Judge Hood should consider the Affidavit of Bill Mathews dated August 4, 2020 and upon consideration reverse his Order granting summary judgment in favor of AOS and the County.

Judge Hood appears to ignore evidence of genuine issues of fact based upon Ms. Godfrey's Affidavit. Her Affidavit stated as follows:

1. Ms. Godfrey's Affidavit established that there were genuine issues of material fact. The slope in question that is adjacent to my property was stable from the time we moved into the property until flooding had occurred during the first part of October 2015. Since the flooding, the slope has continued to slough off and erode. The brick wall that my mother had built has been undermined and is no longer stable.

2. I communicated with Dianne Rushing, President of AOS Contractors, Inc., and her project manager for the Greenway Vista Project regarding what has occurred with the slope. Ms. Rushing or her project manager told me about the safety concerns regarding the stability of the slope. Ms. Rushing or her project manager also expressed concerns about damage to adjacent properties if the slope in question was not properly stabilized. AOS stopped working on the project as a result thereof in December 2015 because of these concerns about the stability of the slope.

3. The 2011 GS2 report expressed concerns about the stability of the slopes due to the close proximity of recently constructed structures. According to Ms. Rushing, the condition of the slope was worsened by the flooding in 2015. Ryan Macdonald of GS2 issued a second report on January 8, 2016 in which GS2 recommended that further measures should be taken to stabilize the slope due to its worsened condition.

4. On November 11th, 2015 the City Engineer sent me an email in which she acknowledged that there was an erosion problem affecting my property and she represented that repairs would be made during the development of the Vista Greenway Project.

5. In an email dated January 20th, 2016, Dana Higgins reported that the City advised the contractor to move forward in installing the new slope and slope stability measures. She reported that if they were not able to address the issues with the slope, the continuation of the erosion would create a significant problem for my property.

6. Notwithstanding the foregoing, the City did not implement any measures to address the slope stability issues. Instead, the City hired Terracon supposedly to get another opinion.

7. On February 4, 2016, Bobby McLeod with Terracon sent Kristen Puckett a narrative for the geotechnical services that Terracon proposed to provide on the project. ***See Exhibit 1.***

8. On February 8, 2016, Ms. Nash confirmed by email that the Plaintiff had requested a copy of the geotechnical findings and the details of the construction work to be done on her property. ***See Plaintiff's Exhibit 2.***

9. On March 18, 2016 Mr. Sheu represented the geotechnical report was being prepared. ***See Plaintiff's Exhibit 3.***

10. On March 22, 2016, Jeanne Lisowski, Sr. Assistant City Attorney sent the following email to the Plaintiff:

"Ms. Godfrey,
The City has not yet received the geotechnical report but will send it to you once received. Continued work on the erosion problem will be determined based on the geotechnical report. However, in order for the City to perform work on your property, we must have a fully executed Right of Entry agreement in place. If you decide to execute the Right of Entry agreement previously provided to you, please let us know and we can proceed accordingly."
See Plaintiff's Exhibit 4.

11. On April 5, 2016, Terracon Consultants, Inc. issued its report regarding slope stability considerations. Terracon's report included the following recommendations:
"Conclusions and Recommendations
Based on the available information and the assumptions discussed above, the calculated data indicates the current right-side slope configuration has a Factor of Safety (Fs) of 1.25. The typical standard of care typically required for permanent slopes on the order of 1.5 or greater. The calculated Fs is consistent with the observed conditions at the site since November 2015. Anecdotal information and design information by others indicates the existing slope has remained stable in its current, or very similar, geometry for a period of years. Our opinion is that the current slope is stable as currently evaluated.

We recommend that an erosion protection plan be developed and implemented as soon as possible to minimize changes in the slope geometry. The details and implementation of the erosion control measures are beyond the scope of our currently authorized services."
See Plaintiff' Exhibit 5.

12. On April 8, 2016 Plaintiff made a FOIA request for the records to the City. Mr. Sheu sent out the Terracon Report but did not send the GS2 report. As of May 2, 2016, the Plaintiff was still waiting for the GS2 report.

13. On May 19, 2016, Michael Sheu and Kristen Puckett of the City of Columbia wrote to Brian King with the Richland County PDT Office regarding Terracon's report, as follows:

Dearr Mr. King:

The City of Columbia retained Terracon to study the slope at the above referenced station located on the second phase of the Vista Greenway.

Please see attached report.

Based on Terracon's findings, the slope around the station is stable, and as such, the city would like to leave the areas located between Station 15 to Station 19 at the Laurel Street Bridge, as is. The city has determined that the existing kudzu located in the area will serve as erosion control.

AOS should start immediately on the rest of the Greenway.

Please let me know if you have any questions.

Thank you,
Michael Sheu & Kristen Puckett"
See Plaintiff's Exhibit 6.

14. Notwithstanding the aforesaid, the City did not undertake to have its contractor implement any of the measures suggested by GS2. I made a Freedom of Information request for the City's file. The GS2 report was not included in the response. I learned of the work from GS2 from Ms. Rushing.

Judge Hood also ignored the evidence from Ms. Godfrey's husband as set forth in his Affidavit as follows:

1. "I am Terry E. Godfrey. I make this affidavit based upon personal knowledge.
2. I am married to Amanda Creel Godfrey. She and I were married on December 22, 1996. Amanda and I have lived at the house her mother gave her, the address of which is 1715 Gadsden Street, since May of 2011.
3. The slope that ran along our property and along the Vista Greenway Trail was stable when we moved in. It was in a natural condition, covered by kudzu and a few volunteer trees and other vegetation.
4. We were out of town the first week of October 2015. However, during that period of time, Columbia experienced hard rains and flooding which caused the slope to begin to slough off. My wife immediately got in touch with officials of the City to report that the slope had begun to slough off.
5. To the best of my recollection, the City's contractor, AOS, began work on the project at the end of 2015. AOS grubbed the slope and cleared it of kudzu, volunteer trees and other vegetation. The slope was cleared off to almost the top of the slope. Attached is a photograph that shows the amount of work the contractors did to the slope. ***See Plaintiff's Exhibit 4.*** Attached hereto marked ***Plaintiff's Exhibits 1 and 2,*** respectively show the slope covered in vegetation in 2012 and a photograph showing the slope on 2016 after AOS had removed most of the vegetation.
6. The slope has continued to erode and slough off since October, 2015. The only thing that has been done to stabilize the slope is hydroseeding, which has occurred twice. Erosion matting was placed in other areas along the

walkway, but not at my wife's property. Attached as ***Plaintiff's Exhibit 3*** is a photograph that shows the hydroseeding.

8. The erosion and undermining of the slope has continued since the flooding between October 1st and 5th of 2015. AOS brought in a roller to tamp the soil and asphalt, a contractor brought in some equipment to tamp the soil. When that occurred, I saw portions of the slope slough off."

Judge Hood also ignored evidence from Jeremy Ray, a professional engineer and an expert witness for Ms. Godfrey in this matter. In his Affidavit Mr. Ray stated as follows:

> "In my summary conclusion and recommendation in my attached report dated April 19, 2017, I state the following:
> Removal of vegetation and cutting of the slope in November 2015 in preparation for the greenway construction worsened this undesirable condition and should have been accompanied by the construction of a retainage structure as indicated in the GS2 geotechnical report dated May 11, 2011. Failure to stabilize the slope to meet the minimum standard of care specified in the GS2 report was negligent.
>
> In my opinion and to a reasonable degree of engineering certainty, Alta's failure to draft plans and specifications to stabilize the slope in question to meet the minimum of standard of care specified in the GS2 report was negligent and Alta's negligence caused damage to the plaintiff as set forth in my report.
>
> In addition thereto, I have assumed that Alta's plans and specifications required AOS to remove the vegetation from the slope which vegetation had helped stabilize the slope. This was required without Alta's plans and specifications including provisions to stabilize the slope. In my opinion, Alta was negligent in this regard and when AOS removed the vegetation, the removal of the vegetation undermined the stability of the slope. This in my opinion caused damage to the plaintiff.
>
> In my opinion, Alta was negligent in failing to revise its plans and specifications or in failing to withdraw them when flooding occurred and it became apparent that drastically changed conditions had occurred, which placed the slope in danger of suffering further failure, which is confirmed in a letter from AOS dated December 18, 2015, a letter dated January 21, 2016 and a letter dated February 15, 2016, which letters are attached and marked Exhibits C, D and E respectively."

This evidence is sufficient to create an inference that AOS was negligent and that its negligence caused Ms. Godfrey to suffer damages.

Judge Hood erred in giving weight to opinion testimony from Ms. Godfrey, a lay witness. When Ms. Godfrey was deposed, she was asked what she "believed" about whether there needed to be a permanent fix to the embankment behind the house is irrelevant and therefore inadmissible. She testified as follows:

> "Q: And if the embankment behind your house had been just totally untouched, nothing had been done to it al all, is it fair to say you would still be sitting here today because you believe there needs to be a permanent fix to the embankment behind the house?
>
> A. After the flood, yes. That is why we notified the City. (Godfrey Dep. At 101:5-11)

Rule 56(e) SCRCP provides that summary judgement is to be made based upon such facts as would be admissible into evidence. Rule 56(e) SCRCP. In essence, having Ms. Godfrey testify about what she believed would be asking her to give an opinion, which she is not qualified to give.

Judge Hood erred in failing to give Ms. Godfrey ten (10) days notice of the hearing of the County and AOS's Motion to Strike the Affidavit of Bill Mathews. Ms. Godfrey had only two (2) days notice and was prejudiced by such lack of notice, in that she had insufficient time to gather counter-affidavits and other evidence in opposition to the Motion.

Rule 7(b)(1) SCRCP provides as follows:

> "Motions and Other Papers.
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, ad shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

Although the County and AOS did not refer to their request to strike the Affidavit of Bill Mathews, their application to the Court for an Order must be made by Motion.

Rule 6(d) SCRCP provides as follows:

> "**For Motions – Affidavits.** A written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may be for cause shown be made on ex parte application. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences. In all cases where a motion shall be granted on payment of costs or on the performance of any condition, or where an order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have 20 days for that purpose, unless otherwise directed in the order."

There is no different time period fixed by the Rules by an Order of the Court. Therefore, Ms. Godfrey was entitled to ten (10) days notice and it was error on the part of Judge Hood to fail to give her ten (10) days notice.

(c) Other good cause existed to carry the Motion hearing over.

Ms. Godfrey took the deposition of two Rule 30(b)(6) witnesses who were instructed not to answer certain questions. The City's attorney moved for a protective order and that motion, which may have led to further discovery, was not addressed by Judge Hood.

Judge Hood should have delayed ruling on AOS's Motion for Summary Judgment to give the Plaintiff time to gather facts to explain the alleged differences in Mr. Matthews' Affidavit and his deposition;

The issue of the alleged inconsistencies between Mr. Mathews' deposition and Affidavit arose two (2) days before the hearing on AOS's Motion for Summary Judgment. Ms. Godfrey did

not have time to obtain an Affidavit from her expert addressing factors that a Court is required to consider if there is an inconsistency between deposition testimony and the expert's affidavit. Ms. Godfrey's expert was not asked to address these factors as it was not perceived that there was any inconsistency to be addressed.

Striking an expert's affidavit is more than a harsh remedy. At a minimum, the parties should be permitted to address the factors that a Court must consider when deciding whether an Affidavit is inconsistent with a witness' sworn deposition. There was no need for an immediate ruling on the inconsistency issue. Given the backlog created by the virus issue, it is unlikely that this case will be on the trial roster for several months.

Judge Hood ruled on the inconsistency issue without giving Ms. Godfrey an opportunity to respond and without addressing the reasons why the Court decided to rule on the issue without giving Ms. Godfrey an opportunity to respond. Upon information and belief, Judge Hood abused his discretion by ruling on this issue and without first giving Ms. Godfrey an opportunity to respond, and failing to state why Ms. Godfrey was not given time to respond.

CONCLUSION

South Carolina Juris prudence teaches that our Courts are slow to grant motions for summary judgment and that her courts have a strong preference that litigation be determined on the merits

Clearly, this evidence standing alone creates an inference that the County and AOS have liability. The Orders granting summary judgment and the Orders denying reconsideration should be reversed and the case should be remanded for a trial on the merits.

Attorney's Signature on Following Page

s/Pope D. Johnson, III
Pope D. Johnson, III
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
pope@popejohnsonlaw.com

William James Johnson, Esquire
Smith Terry Johnson & Windle
21 Battery Park Ave, Suite 201
Asheville, NC 28801
wjjohnson@smithterrylaw.com

November 30, 2020.

ATTORNEYS FOR APPELLANT

NOTICE OF APPEAL IN A CIVIL CASE

The State of South Carolina
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

RECEIVED
Nov 30 2020
SC Court of Appeals

Appellate Case No. 2020-001205

Amanda Creel Godfrey, Appellant.
v.
City of Columbia, Richland County & AOS Contractors, Defendants,

Of which City of Columbia, Richland County, and AOS Contractors, Inc. are the Respondents.

PROOF OF SERVICE

I certify that I have served the *Initial Brief of Appellant* on the City of Columbia, Richland County and AOS Contractors by emailing a copy of on November 30, 2020, addressed to their attorneys, Peter M. Balthazor, Esquire, at (peteb@rplfirm.com), Joshua D. Shaw, Esquire at (jshaw@hedrickgardner.com), and Michael B. Wren, Esquire at (mwren@DML-LAW.com).

November 30, 2020

s/*Pope D. Johnson, III*
Pope D. Johnson, III
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
pope@popejohnsonlaw.com

William James Johnson, Esquire
Smith Terry Johnson & Windle
21 Battery Park Ave, Suite 201
Asheville, NC 28801

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Peter M. Balthazor, Esquire
Riley Pope & Laney, LLC
2838 Devine Street
Columbia, SC 29205

Joshua D. Shaw, Esquire
Hedrick Gardner Kincheloe & Garofalo, LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Michael B. Wren, Esquire
Davis & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202-8568