

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Trial Court Case No. 2019-CP-40-01358

Appellate Case No. 2020-001205

Amanda Creel Godfrey, Appellant,

v.

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

INITIAL BRIEF OF RESPONDENT RICHLAND COUNTY

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment as to Richland County by finding that Appellant failed to establish a requisite duty of care owed by Richland County to Appellant?
2. Did the trial court properly deny Appellant's motion for reconsideration on the basis that any issues raised by Appellant were, or could have been, presented to the trial court prior to the granting of summary judgment as to Richland County?
3. Was the granting of summary judgment as to Richland County by the trial court also supported by the additional sustaining ground that Appellant's claims would be barred by the Public Duty Rule?
4. Was the granting of summary judgment as to Richland County by the trial court also supported by the additional sustaining ground that Richland County would be entitled to immunity pursuant to applicable provisions of the South Carolina Tort Claims Act, South Carolina Code Ann. § 15-78-10, *et seq.*?

INTRODUCTION

The Circuit Court's granting of summary judgment as to Richland County should be affirmed. As set forth herein, the Appellant failed to establish a requisite duty of care owed by Richland County to Appellant, and further, the Appellant has not presented evidence to create a genuine question of material fact for the claims asserted in the underlying action as to Richland County.

STATEMENT OF THE CASE AND FACTS

This civil action involves the residential property of the Plaintiff-Appellant, Amanda Creel Godfrey ("Godfrey"), located at 1715 Gadsden Street, Columbia, South Carolina, for which she has alleged that an embankment adjacent to her property is unstable and has caused damages to her residence. The Plaintiff further alleged in her amended pleadings that the remaining Defendants identified, City of Columbia ("City"), Richland County ("County") and AOS Contractors, Inc. ("AOS"), are liable for the claimed damages with regard to a previously constructed pedestrian walking path known as Phase II of the Vista Greenway Project, in late 2015 and 2016. *See* Second Amended Compl. (R. ____). Phase II of the Vista Greenway Project is located in downtown Columbia, South Carolina, and in the vicinity of the aforementioned embankment and Godfrey's property.

The County contracted with the City and provided funding for Phase II of the Vista Greenway Project, and subsequently contracted with AOS as the awarded

bidder for construction of the project. The applicable Notice to Proceed for the project was issued on November 20, 2015, subsequent to the historic rainfall and flooding event which occurred in the Columbia, South Carolina, area in early October 2015.

The initial Complaint in this action was filed on November 17, 2016, naming only the City as a defendant. *See* Compl. (R. ____). An Amended Complaint was subsequently filed on February 8, 2017, additionally naming the County, AOS and Alta Planning & Design as defendants. *See* Amended Compl. (R. ____).

A Second Amended Complaint was thereafter filed on September 12, 2017, as to the same defendants and asserting a cause of action for negligence and an apparently related claim for nuisance. *See* Second Amended Compl. (R. ____). The County timely filed its Answers to the respective Complaints, wherein it denied the claims asserted by Godfrey and raised several affirmative defenses on its behalf. *See* Answers (R. ____).

Extensive discovery was undertaken by the parties in the underlying action, including the depositions of numerous lay and expert witnesses. Additionally, a consent order was filed by counsel for Defendant Alta Planning & Design and Godfrey on June 15, 2018, for the dismissal of Alta.

A Motion for Summary Judgment on behalf of the County, with supporting exhibits, was filed on March 27, 2020. *See* Mot. For Summary Judgment on Behalf of Richland County, with exhibits (R. ____). A hearing on the County's motion for summary judgment, along with motions for summary judgment on behalf of the City and AOS, was held before Circuit Court Judge Robert E. Hood in the Richland County Court of Common Pleas, via Webex video conference, on July 16, 2020. Appearances and arguments were made by counsel of record for all parties at the motions hearing.

By Form 4 Order filed on July 17, 2020, the Circuit Court granted the motions for summary judgment on behalf of the County and AOS, with formal orders to follow, and denied the motion for summary judgment on behalf of the City. *See* Order (R. ____). An Order Granting Defendant Richland County's Motion for Summary Judgment was filed on July 28, 2020. *See* Order (R. ____).

A Motion to Reconsider the Order Granting Richland County's Motion for Summary Judgment was filed by Godfrey on July 31, 2020, to which the County filed a Response in Opposition on August 14, 2020. *See* Mot. To Reconsider and Response in Opp. (R. ____). On August 18, 2020, the Circuit Court issued a Form 4 Order denying Godfrey's Motion to Reconsider. *See* Order (R. ____). A similar motion and order were filed as to AOS.

A Notice of Appeal, dated August 27, 2020, was thereafter filed by Godfrey on September 10, 2020. *See* Not. of Appeal (R. ____).

STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC. The Court, in considering a motion for summary judgment, must view the facts and reasonable inferences in the light most favorable to the nonmoving party. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

“The purpose of summary judgment is to expedite the 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 party opposing summary judgment may not rest on the mere allegations of the pleadings, but must set forth or point to specific facts in the record showing that there is a genuine issue of material fact. Rule 56(e), SCRPC; *see also Bravis v. Dunbar*, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994).

“When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO RICHLAND COUNTY BY FINDING THAT THE APPELLANT FAILED TO ESTABLISH A REQUISITE DUTY OF CARE OWED BY RICHLAND COUNTY TO APPELLANT.

The County set forth several grounds in its Motion for Summary Judgment for which it sought summary judgment and dismissal as a party to this action as a matter of law. The primary argument asserted by the County was premised upon the finding that it had no ownership, control or maintenance responsibility for Godfrey's real property or any alleged property interests in controversy, and as such, Godfrey failed to establish that the County owed her any duty of care as to her claims in the underlying case.

A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. *Dennis by Evans v. Timmons*, 313 S.C. 338, 437 S.E.2d 138 (Ct. App. 1993). Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977).

"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).

Further, the issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Murray v. Bank of America, N.A.*, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003).

In support of its position, and insofar as it could not otherwise prove a negative, the County summarily argued to the Circuit Court that Godfrey failed to establish that it owed her a duty of care, or any proximate breach thereof, in the underlying action. This argument was premised upon the extensive submissions by the parties, including affidavits, exhibits and deposition transcript excerpts, which were presented to the Circuit Court and collectively lacked evidence to establish a genuine issue of material fact with regard to the County’s contention that no duty of care existed on its behalf to Godfrey for her subject claims.

Notwithstanding, Appellant’s argument before this Court is that the County exercised control of the property by virtue of its contracting for the underlying project with the City and AOS. However, this is the same argument by Godfrey, as well as the same project agreement and construction contract exhibits submitted, which was previously considered by the Circuit Court at the hearing on the County’s motion for summary judgment on July 16, 2020. As with the argument

before the Circuit Court, this position simply fails to show how the County's involvement with contracting for the project establishes any control with respect to Godfrey's property or corresponding duty as to her claims in this action.

The Circuit Court therefore correctly ruled that there was a lack of evidence to support Godfrey's claims as to a legal duty owed to her by the County, and in that regard she had 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. As such, the Circuit Court's Order granting summary judgment for the County should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR RECONSIDERATION ON THE BASIS THAT ANY ISSUES RAISED BY APPELLANT WERE, OR COULD HAVE BEEN, PRESENTED TO THE TRIAL COURT PRIOR TO THE GRANTING OF SUMMARY JUDGMENT AS TO RICHLAND COUNTY.

Following the Circuit Court's Order granting the County's Motion for Summary Judgment, Godfrey filed a Motion to Reconsider the ruling in favor of the County pursuant to Rule 59(e), SCRCP. However, as previously noted with respect to Godfrey's position in the appeal before this Court, her motion to reconsider was based upon the same arguments made, or which otherwise could have been made, at the lengthy hearing on the Defendants' motions for summary judgment before the Circuit Court on July 16, 2020.

A Rule 59(e), SCRCP, motion provides a vehicle through which a party may request that the circuit court reconsider matters properly encompassed in a decision on the merits or "alter or amend" its judgment; or attempt to obtain a ruling on issues or arguments previously raised to the court. *See, Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 779 (2004). A party may file a Rule 59(e) motion when it believes the court "misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* 361 S.C. at 24, 602 S.E.2d at 780.

Quite simply, none of the aforementioned circumstances are applicable to the Motion to Reconsider previously filed by Godfrey, and the Circuit Court properly denied the Rule 59(e) motion on that ground alone.

Alternatively, and to the degree applicable to Godfrey's motion to reconsider and argument on appeal to this Court, a Rule 59(e) motion may not be used to present a new argument or new evidence to the court that could have been presented prior to entry of judgment. In *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993), the Supreme Court held that a party cannot use a Rule 59(e) motion to present to the court an issue the party could have raised prior to judgment but did not. Similarly, in *Kiawah Property Owners Group v. Public Service Commission*, 359 S.C. 105, 597 S.E.2d 145 (2004), the Supreme Court reaffirmed that "a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." 359 S.C. at 113, 597 S.E.2d at

149. *See also, McGee v. Bruce Hospital System*, 321 S.C. 340, 468 S.E.2d 633 (1996); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).

Godfrey's prior motion to reconsider and argument on appeal vaguely assert that the County "exercised control of the property." However, this is the same argument which was previously made by Godfrey and subsequently ruled upon by the Circuit Court in granting the County's motion for summary judgment. Similarly, the two exhibits relied upon by Godfrey in support of her prior motion to reconsider and this appeal, copies of the written agreements between the County, City and AOS for the underlying project, are the same documents which were previously submitted to the Circuit Court on her behalf, along with numerous other affidavits and exhibits, before the July 16, 2020, hearing on Defendants' motions for summary judgment.

Godfrey further contends, in both her prior motion to reconsider and in this appeal, that the County exercised discretion and control over the underlying project based upon limited portions of deposition testimony provided by Michael P. Sheu [sic], who is an employee of the City. Although Godfrey previously neglected to file excerpts of the deposition transcript for Michael F. Sheu, P.E., with the Circuit Court, before or after granting summary judgment on behalf of the County, it should be noted that the subject portions of deposition testimony relied upon by Godfrey are taken out of context and subsequently clarified by Mr. Sheu in cross

examination testimony, as well by the deposition testimony of the City's Rule 30(b)(6) designee, Dana Rogerson Higgins, to reflect that the City exercised control of the project, as opposed to the County. *See* Sheu Dep. pp. 71-79 (R. ____); 30(b)(6) City of Columbia (Higgins) Dep. pp. 99-101 (R. ____).

Regardless of the position set forth above, Godfrey's assertions and reference to the aforementioned deposition testimony of Mr. Sheu are exactly what the South Carolina Supreme Court referenced in opining that "a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." *See, Kiawah Property Owners Group v. Public Service Commission*, 359 S.C. at 113, 597 S.E.2d at 149 (2004) (internal citation omitted). As such, the Circuit Court's denial of the Appellant's Motion to Reconsider, and prior granting of summary judgment for the County, should be affirmed.

III. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT AS TO RICHLAND COUNTY IS ALSO SUPPORTED BY THE ADDITIONAL SUSTAINING GROUND THAT APPELLANT'S CLAIMS WOULD BE BARRED BY THE PUBLIC DUTY RULE.

The County asserts that this Court should affirm the granting of summary judgment by the Circuit Court on its behalf on the additional sustaining ground that the Appellant's claims are barred by the Public Duty Rule. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

The County alternatively contends that to the degree that evidence of a legal duty exists as to the claims asserted by Godfrey, they would be barred pursuant to the Public Duty Rule. This argument was asserted by the County in its Motion for Summary Judgment, but was not ruled upon given the Circuit Court's finding with regard to the lack of a legal duty existing to Godfrey by the County.

Generally, there is no common law duty to act; however, an affirmative legal duty may arise by statute, contractual relationship, status, property interest, or some other special circumstance. *See, Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct. App. 1998); *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). While a duty may arise by virtue of statutory law, courts in South Carolina recognize what is known as the "public duty" rule. *Rayfield*, 297 S.C. 95, 104, 374 S.E.2d 910, 915; *see also, Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940) (Supreme Court adopting the public duty rule as the law in South Carolina).

A statute establishing the specific "duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties." *Rayfield*, 297 S.C. 95, 105, 374 S.E.2d 910, 915-16; *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991) (Under the rule, public officials are not liable to individuals in negligence as a result of discharging duties as owed to the public at large rather than to anyone individually).

However, South Carolina law also recognizes the “special duty” exception to the rule which establishes that a statutorily created duty may be established on the part of a defendant. To prove a special duty, the plaintiff must demonstrate “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that [the plaintiff] is a member of the class of persons the statute is intended to protect.” *Rayfield*, 297 S.C. 95, 103, 374 S.E.2d 910, 914.

The allegations set forth in Godfrey’s Second Amended Complaint, and likewise asserted in this appeal, appear to indicate that the County owed Godfrey a duty of care, as opposed to the general public. The record before the Court, however, lacks any evidence which would support such a position or otherwise establish the finding of a special duty in this regard.

As such, the County requests that the Court find as an additional sustaining ground that the Appellant’s claims are barred by the Public Duty Rule in affirming the Circuit Court’s granting of summary judgment on its behalf.

IV. THE TRIAL COURT’S GRANTING OF SUMMARY JUDGMENT AS TO RICHLAND COUNTY IS ALSO SUPPORTED BY THE ADDITIONAL SUSTAINING GROUND THAT RICHLAND COUNTY WOULD BE ENTITLED TO IMMUNITY PURSUANT TO APPLICABLE PROVISIONS OF THE SOUTH CAROLINA TORT CLAIMS ACT, SOUTH CAROLINA CODE ANN. § 15-78-10, *ET SEQ.*

The County further asserts that this Court should affirm the granting of summary judgment by the Circuit Court on its behalf on the additional sustaining ground that the County is entitled to immunity pursuant to the applicable provisions of the South Carolina Tort Claims Act, South Carolina Code Ann. § 15-

78-10, *et seq.* See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

The County alternatively contends that to the degree that evidence of a legal duty exists as to the claims asserted by Godfrey, the County would be entitled to immunity pursuant to the applicable provisions of the South Carolina Tort Claims Act. This argument was likewise asserted by the County in its Motion for Summary Judgment, but was not ruled upon given the Circuit Court’s finding with regard to the lack of a legal duty existing to Godfrey by the County.

The existence of a duty, as well as other elements of negligence, must be shown before reaching immunities under the Tort Claims Act. *Arthurs v. Aiken County*, 346 S.C. 97, 551 S.E.2d 579 (2001). Further, the Act “must be liberally construed in favor of limiting the liability of the State.” South Carolina Code Ann. § 15-78-20(f).

In support of the immunity provisions asserted on its behalf, the County would foremost contend that South Carolina Code Ann. § 15-78-60(4), which provides that a governmental entity is not liable for a loss resulting from the failure to adopt, enforce or comply with any law, including rules, regulations, or written policies, is applicable. Specifically, the Appellant’s reliance on the written agreements and related rules, regulations and policies for the underlying project would support a finding of immunity as to the claims asserted against the County.

Additionally, pursuant to South Carolina Code Ann. § 15-78-60(5), the County is not liable for a loss resulting from “the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.” *See also, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (noting the exercise of discretion includes the right to be wrong). Insofar as the Appellant specifically asserts in her brief that the County had discretion with regard to the underlying project, the County would contend that any such exercise of discretion would be entitled to immunity.

Insofar as Godfrey’s claims are premised upon damages to her property as a result of the historic October 2015 flood, the County asserts that it is entitled to immunity pursuant to South Carolina Code Ann. § 15-78-60(8), which provides that a “governmental entity is not liable for a loss resulting from: . . . temporary or natural conditions on any public way or other public place due to weather conditions”

Additionally, with regard to Godfrey’s claims that one or more other parties caused the alleged damages to her property, the County would assert that it is entitled to immunity on the basis that “[a] governmental entity is not liable for loss resulting from an act or omission of a person other than an employee” South Carolina Code Ann. § 15-78-60(20).

Finally, to the extent Godfrey has asserted a cause of action for nuisance, the County is entitled to immunity. The Tort Claims Act clearly and succinctly sets forth that a “governmental entity is not liable for a loss resulting from: . . . a nuisance[.]” South Carolina Code Ann. § 15-78-60(7).

The County therefore requests that the Court find as an additional sustaining ground that it is entitled to immunity pursuant to the aforementioned provisions of the South Carolina Tort Claims Act in affirming the Circuit Court’s granting of summary judgment on its behalf.

CONCLUSION

For the foregoing reasons, Respondent Richland County respectfully requests this Court affirm the trial court’s Order granting summary judgment and dismissing this action as to Richland County.

[Signature page to follow]

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March 1, 2021

RECEIVED

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Amanda Creel Godfrey, Appellant,

v.

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

PROOF OF SERVICE

The undersigned employee of Davidson, Wren & DeMasters, P.A., attorneys for Respondent Richland County, does hereby certify that service of the **Initial Brief of Respondent Richland County** in the above-captioned action was made upon all parties and counsel of record via email at the below listed email address on this 1st day of March, 2021.

Proof of Service

Appellate Case Number: 2020-001205

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