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Mar 22 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-001205

Amanda Creel GodfreyAppellant.

v.

Richland County & AOS ContractorsRespondents.

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. JUDGE HOOD’S CONCLUSION THAT THE APPELLANT HAD NOT ESTABLISHED THAT AOS HAD CAUSED DAMAGE TO THE APPELLANT’S PROPERTY IS SIMPLY WRONG. 1

- II. JUDGE HOOD FAILED TO GIVE APPELLANT TEN (10) DAYS NOTICE OF THE HEARING ON THE MOTION TO STRIKE THE AFFIDAVIT OF BILL MATHEWS 3

- III. JUDGE HOOD ERRED IN FINDING THAT RICHLAND COUNTY HAD NO OWNERSHIP, CONTROL OR MAINTENANCE RESPONSIBILITY FOR THE PROJECT PROPERTY, AND AS A RESULT, THE COUNTY OWED APPELLANT NO DUTY OF CARE WITH RESPECT TO HER CLAIMS IN THE UNDERLYING CASE. 4

APPELLANT'S REPLY BRIEF

Having reviewed the Initial Briefs of the Respondents, brief replies are necessary as to the each.

APPELLANT'S REPLY TO AOS'S INITIAL BRIEF

I. JUDGE HOOD'S CONCLUSION THAT THE APPELLANT HAD NOT ESTABLISHED THAT AOS HAD CAUSED DAMAGE TO THE APPELLANT'S PROPERTY IS SIMPLY WRONG.

AOS moved for summary judgment, "on the grounds that there is no genuine issue of material fact that AOS's activities as the contractor for the Vista Greenway project did not cause any damage to Plaintiff's property." [*DEF AOS Contractors, Inc.'s Motion for Summary Judgment*] Judge Hood agreed with AOS, finding that there was no genuine issue as to material fact with respect to why AOS had, "caused damage to Plaintiff's property." [*Order Granting AOS Contractors, Inc. Motion for Summary Judgment*] However, the record clearly indicates there are genuine issues of material fact relating to the damage to Appellant's property by the acts and/or omissions of AOS. Specifically, the evidence shows that acts or omissions of AOS caused damage to Appellant's property by additional sloughing and erosion of Plaintiff's property, and the sloughing and erosion has undermined the Plaintiff's brick fence, which is no longer stable.

The evidence showing the genuine issues of material fact is as follows:

1. The Appellant's Affidavit states that since the flood of October 2015 the slope continued to slough off and erode and that the brick wall has been undermined and was no longer stable. [*APPELLANT'S AFFIDAVIT*]
2. Appellant's Affidavit refers to communication with the President of AOS and with the AOS Project Manager. They expressed safety concerns regarding the stability of the

slope and concerns about damage to adjacent properties if the slope in question was not properly stabilized. *[APPELLANT'S AFFIDAVIT]*

3. AOS stopped working on the project as a result of its own firsthand recognition of the stability of the slope. *[APPELLANT'S AFFIDAVIT]*
4. The City engineer emailed the Appellant and acknowledged there was an erosion problem effecting the Appellant's property and represented that repairs would be made during the development of the project. *[APPELLANT'S AFFIDAVIT]*
5. In an email dated January 20, 2016, Dana Higgins of the City reported that if they were not able to address the conditions of the slope continuation of the erosion would create a significant problem on Appellant's property.
6. The Appellant's husband, in his Affidavit, also raised genuine issues of material fact. His Affidavit includes a statement that he had seen some of the slope slough off when AOS brought in a roller to tamp the soil and asphalt. His Affidavit states the following:
 6. 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.* *[AFFIDAVIT OF MR. GODFREY]*

These affidavits provide direct evidence that acts and omissions of AOS caused damage to the slope, and the City has admitted that damage to the Appellant's property will occur in the future.

II. JUDGE HOOD FAILED TO GIVE APPELLANT TEN (10) DAYS' NOTICE OF THE HEARING ON THE MOTION TO STRIKE THE AFFIDAVIT OF BILL MATHEWS

Judge Hood failed to give Appellant ten (10) days' notice for the hearing on the Motion to Strike the Affidavit of Bill Mathews. The Rules of Civil Procedure require that a Motion be made in writing unless made during a hearing or trial in court.

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, and 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.”

Rule 6(d) *SCRCP* provides a party is entitled to ten (10) days' notice of a hearing on a Motion unless a different period is fixed by the Rules of Civil Procedure or by an Order of the Court. If the Motion is to be supported by an Affidavit, the Affidavit shall be served with the Motion.

There is no evidence that Judge Hood considered the Affidavit of Mr. Mathews wherein Mr. Mathews addressed the latest inconsistencies. Judge Hood ruled on the inconsistency issue without giving Appellant an opportunity to respond and without addressing the reasons why the Court decided to rule on the issue without giving Appellant an opportunity to respond. Upon information and belief, Judge Hood abused his discretion by ruling on this issue and without first giving Appellant an opportunity to respond, and failing to state why Appellant was not given time to respond.

**APPELLANT’S REPLY TO THE INITIAL BRIEF OF
THE COUNTY OF RICHLAND**

**III. JUDGE HOOD ERRED IN FINDING THAT RICHLAND COUNTY
HAD NO OWNERSHIP, CONTROL OR MAINTENANCE
RESPONSIBILITY FOR THE PROJECT PROPERTY, AND AS A
RESULT, THE COUNTY OWED APPELLANT NO DUTY OF CARE
WITH RESPECT TO HER CLAIMS IN THE UNDERLYING CASE.**

Richland County asserted that its primary argument, “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.” [*RICHLAND COUNTY INITIAL BRIEF*, Pg. ___] Judge Hood agreed with the County. This was error.

Judge Hood, in his Order Granting the County’s Motion for Summary Judgment set forth applicable law as follows:

A legal duty is that which the law requires to be done or forbore 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 (1997).

Given this accurate statement of the law, it is more than surprising that Judge Hood would find that there was no duty of care. The County entered into a written agreement with the City which expressly provided the County discretionary and plenary control of the project. Mr. Shue, the City's engineer, testified on deposition that the County had decision-making authority regarding the construction of the project. Since the County controlled the use of the project property, it owed a duty of care to others including the Appellant not to harm the Appellant by the County's use of its property.

CONCLUSION

Given the foregoing evidence, a further inquiry into the facts is warranted. Judge Hood's Order granting Summary Judgment in favor of AOS and the County should be reversed.

s/Pope D. Johnson, III

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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 *Reply Brief of Appellant* on the City of Columbia, Richland County and AOS Contractors by emailing a copy of on March 22, 2021, addressed to their attorneys Joshua D. Shaw, Esquire at (jshaw@hedrickgardner.com), and Michael B. Wren, Esquire at (mwren@DML-LAW.com), and Peter M. Balthazor, Esquire, at (peteb@rplfirm.com).

March 22, 2020

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March 22, 2021

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Amanda Creel Godfrey v. City of Columbia, Richland County, and
AOS Contractors, Inc.
Appellate Case No. 2020-001205

Dear Ms. Kitchings:

Please find enclosed for filing in your office, the REPLY BRIEF OF APPELLANT in connection with the above matter.

By copy of this letter to all counsel of record via email, I am herewith serving by mail a copy of the REPLY BRIEF OF APPELLANT upon all counsel of record.

Sincerely,


Pope D. Johnson, III

PDJ/tb

Enclosures

cc: W. James Johnson, Esquire
Peter M. Balthazor, Esquire
Joshua D. Shaw, Esquire
Michael B. Wren, Esquire
Amanda Creel Godfrey