

Apr 01 2021

SC Court of Appeals

ELECTRONICALLY FILED - 2021 Mar 04 11:49 AM - HORRY - COMMON PLEAS - CASE#2019CP2607922

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	C/A NO. 2019-CP-26-07922
Sierra Doherty,)	
)	
Plaintiff,)	
)	ORDER GRANTING MOTION TO
vs.)	DISMISS
)	
Coastal Carolina University,)	
)	
Defendant.)	
)	

This matter came before me via Web-Ex on March 2, 2021, for a hearing on defendant’s motion to dismiss pursuant to Rule 12(b)(6). Appearing were Patrick J. McLaughlin, attorney for plaintiff, and Joseph P. McLean, attorney for defendant. After hearing arguments of counsel, review of their respective memoranda of law, and review of the complaint in this action, the court grants the motion.

FACTS

This action arises out of an accident that occurred on January 8, 2018, on the campus of defendant Coastal Carolina University (CCU). Plaintiff was a student at CCU at that time. On or about Tuesday, January 3, 2018, winter storm Grayson blanketed the CCU campus with freezing rain, ice, and snow. CCU canceled classes and closed its campus on Wednesday, January 3, and Thursday, January 4. It re-opened on a delayed schedule on Friday, January 5. On Monday, January 8, five days after the storm began and three days

after classes resumed, plaintiff was walking to class when she slipped and fell on an icy sidewalk and was injured.

ALLEGATIONS

The complaint alleges that the ice on the sidewalk was due to a winter storm. *See*, Complaint paragraph 5. It also alleges that CCU treated some of the sidewalks on campus for ice after the winter storm but not the one on which she slipped and fell. *See*, Complaint paragraphs 6, 12(a) and (b), and 18. Finally, it alleges CCU failed to warn of the icy sidewalk. *See*, Complaint paragraph 12(c).

DISCUSSION

CCU is a governmental entity, so its liability in tort is controlled by the S.C. Tort Claims Act. Section 15-78-60(8) of the Tort Claims Act provides “[a] governmental entity is not liable for a loss resulting from:

- (8) snow or ice conditions ... on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee.”

The complaint does not allege that a negligent *act* of defendant caused the ice to be on the sidewalk.¹ It only alleges that a negligent *omission* of defendant caused the ice to be on the sidewalk.

Professors Hubbard and Felix instruct that in 1866 the South Carolina Supreme Court defined negligence as:

¹ Plaintiff argues that CCU acted affirmatively by closing and then re-opening campus. However, these acts did not affirmatively cause the ice to be on the sidewalk. A winter storm did.

The omission to do something that a reasonable and prudent man...would do...or doing something which a reasonable and prudent man would not do...

F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* (4th Ed., 2011) at 65, citing *Bridger v Asheville & Spartanburg R.R.*, 25 S.C. 24, 28 (1886).

“Negligence may consist of an act or an omission. Failure to act is not an act.” *Flynn v North Carolina State Highway and Public Works Commission*, 244 N.C. 617, 94 S.E.2d 571 (N.C. 1956). The distinction is one of passive inaction versus positive conduct, or nonfeasance versus misfeasance. They are different things and the SC. Tort Claims Act recognizes that. While the snow and ice immunity at 15-78-60(8) speaks only of “acts” other sections of the Tort Claims Act speak specifically in terms of “acts or omissions.” See, §15-78-60(20) (act or omission of a person other than an employee); §15-78-60(29) (acts or omissions of members of athletic commissions); §15-78-60(30) (acts or omissions of local foster care review boards); §15-78-60(31) (acts or omissions of employees and volunteers of the S.C. Protection and Advocacy System for the Handicapped); §15-78-60(36) (acts or omission of state constables). The snow and ice immunity in §15-78-60(8) would not apply if CCU caused the ice to be on the sidewalk by some positive act of misfeasance. At most, CCU failed to treat the sidewalk or warn of the presence of ice caused by the winter storm. In other words, plaintiff alleges that CCU failed to act. Therefore, the snow and ice immunity does apply.

The Tort Claims Act is to be construed liberally in favor of limiting the liability of the state. See, Tort Claims Act §15-78-20(f). *See also, Lightner v. Hampton Hall Club, Inc.*,

419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible), quoting *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015); *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599, 601 (1914) (the rule sustained by all the courts requires that every word, clause, and sentence must be given some meaning, force, and effect if it can be done by any reasonable construction.); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute)(where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning).

The court need not look to any other section of the Tort Claims Act, including §15-78-60(25) which provides immunity from liability for supervision, protection, control, confinement, or custody of any student except when the responsibility or duty is exercised in a grossly negligent manner. When the accident occurred, defendant was not supervising, protecting, or controlling the plaintiff /student who was merely walking to class on campus. See, *Gardner v. Biggart*, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) (inured plaintiff was merely a passenger on defendant's school bus, and the school bus driver was not exercising any duty involving supervision, custody, control or protection at the time of the accident).

Plaintiff has failed to state facts sufficient to constitute a cause of action because there is no affirmative, positive act of defendant which caused the ice to be on the sidewalk. At

most, there was an omission or inaction, but this does not defeat defendant's snow and ice immunity under §15-78-60(8) of the Tort Claims Act. Therefore, this action is hereby dismissed pursuant to Rule 12(b)(6), S.C. Rules of Civil Procedure.

AND IT IS SO ORDERED.

[E-SIGNATURE OF JUDGE TO FOLLOW]



Horry Common Pleas

Case Caption: Sierra Doherty VS Coastal Carolina University

Case Number: 2019CP2607922

Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2021-03-04 11:14:05 page 6 of 6