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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2021-000053

SARAH SHARPER, ET AL., ...Appellants,

V.

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, COLEMAN-SNOW CONSULTANTS, LLC AND ICA ENGINEERING, INC. F/K/A FLORENCE & HUTCHESON, INC., ...Respondents.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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June 7, 2021
Charleston, South Carolina

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. THE LOWER COURT CORRECTLY GRANTED JUDGMENT IN FAVOR OF SCDOT BECAUSE SCDOT DOES NOT OWN OR MAINTAIN THE PALMETTO COMMERCE PARKWAY, NOR HAS IT EVER.
2. THE PARTIES HAD AMPLE OPPORTUNITY TO CONDUCT ANY DESIRED DISCOVERY.
3. APPELLANTS FAILED TO PRESENT ANY ADMISSIBLE EVIDENCE IN OPPOSITION TO SCDOT'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

In this consolidated action, 44 individual plaintiffs filed suit against the State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation (hereinafter "SCDOT"), and John Doe Engineering Firm on September 21, 2017. (ROA p.). Those parties agreed to consolidate the 44 individual actions for discovery, only, by Consent Order filed June 1, 2018. (ROA p.). Appellants filed an Amended Summons and Complaint on October 5, 2017 against the same parties. (ROA p.). Appellants subsequently filed their second, and most current, Amended Complaint on September 28, 2018 naming Banks Construction Company, United Contractors, Inc., Banks/United Joint Venture, and HLA, Inc. as additional parties. (ROA p.).

The consolidated Appellants are residents of the Pepperhill Subdivision in the City of North Charleston, South Carolina. (ROA p.). Appellants contend that the Respondents participated in the conception, planning, and construction of the Palmetto Commerce Parkway (hereinafter the "Parkway"), which runs between Ladson Road to the North and Ashly Phosphate Road to the South. (ROA p.). Appellants theorize that the construction of Parkway has restricted the flow of water from wetlands near the Pepperhill subdivision, thereby causing their respective homes to flood in certain, extreme weather events.

Respondent served Answers to Appellants' Complaint and Amended Complaints denying these allegations and asserting certain affirmative defenses. Respondent submitted the Affidavit of Arnold Blanding, SCDOT's Resident Maintenance Engineer, to Appellants on February 28, 2020. (ROA p.). Mr. Blanding's Affidavit made it clear that SCDOT was not involved in the construction or maintenance of the Parkway; the Parkway merely ties into two roads that SCDOT does own and maintain at the Parkway's terminations. (ROA p.).

SCDOT moved for Summary Judgement on July 27, 2020 on the grounds that SCDOT was not involved in the design, construction, or maintenance of the Parkway nor had it ever been. (ROA p.). Mr. Blanding's Affidavit was appended to said Motion. (ROA p.). After hearing the arguments now on appeal, the trial court granted SCDOT's Motion for Summary Judgment by Form 4 Order entered September 22, 2020. (ROA p.). Appellants filed a timely Motion for Reconsideration on October 2, 2020; the Court denied that Motion on December 18, 2020, after which this appeal ensued. (ROA p.).

ARGUMENTS

The issue on appeal is whether the trial court erred in granting summary judgment in favor of SCDOT before Appellants believe they had an adequate opportunity to conduct discovery. As is evident from the pleadings, Appellants commenced this action against SCDOT on September 21, 2017. The trial court granted SCDOT's Motion for Summary Judgment on September 22, 2020, almost exactly **three years after Appellants commenced this matter**.

As above, Appellants received the Affidavit of Arnold Blanding on February 28, 2020 but never noticed his deposition. (ROA p.). Further, Appellants were in receipt of SCDOT's discovery responses to other parties which confirmed that SCDOT had no involvement in the planning, construction, or maintenance of the Parkway and, accordingly, had no responsive documentation. (ROA p.).

Finally, Appellants submitted no admissible evidence at the hearing on SCDOT's Motion for Summary Judgment. (ROA p.). Appellants contend that their untimely filing and submission of the Affidavit of their expert, Allan Abbatta, which merely states that further discovery may help him develop criticisms of SCDOT, should have been sufficient to defeat summary judgment.

For the reasons that follow, the trial court was correct to award summary judgment in favor of SCDOT.

THE TRIAL COURT CORRECTLY FOUND THAT SCDOT HAD NO RESPONSIBILITY FOR THE PARKWAY.

Summary Judgment may be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, NA., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Knox v. Greenville Hosp. Sys., 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270 S.E.2d 629, 631 (Ct..App.2004). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Vermeer Carolina's, Inc. v. Wood/ Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct.App.1999).

However, when a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." [1]

[1] "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." ABB, Inc. v. Integrated Recycling Grp. of SC, LLC, 432 S.C. 545, 551-52, 854 S.E.2d 171, 174-75 (Ct. App. 2021). "When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984)). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." NationsBank v. Scott Farm, 320 S.C. 299, 302-

Rule 56, SCRCP. To that end, Rule 56(c), SCRCP mandates that "the adverse party may serve opposing affidavits not later than two days before the hearing." Id.

The legislature determined the Department has a duty to construct and maintain the state highway system in a safe and serviceable condition. Cnty. of Charleston v. S.C. Dep't of Transp., 420 S.C. 405, 409, 803 S.E.2d 316, 318 (Ct. App. 2017) (citing S.C. Code Ann. § 57-5-10 (Supp. 2016)). The complete state highway system shall mean the system of state highways as now constituted, consisting of the roads, streets, and highways designated as state highways or designated for construction or maintenance by the department pursuant to law, together with the roads, streets, and highways added to the state highway system. S.C. Code Ann. § 57-5-10 (Supp. 2013). The minimum width of the right-of-way required for the construction, maintenance and safe operation of state highways is hereby fixed at sixty-six feet. S.C. Code Ann. § 57-5-330 (Supp. 1993).

All roads or highways that have been laid out or appointed by an order of the governing body of any county are declared to be public roads, and the county supervisor and the governing body of the county shall have the control and supervision thereof. S.C. Code Ann. § 57-17-10 (1962, as amended). The Parkway was conceptualized and created by the Charleston County Council. See Charleston, South Carolina, Code of Ordinances § 19-126.

Here, SCDOT submitted the Affidavit of Arnold Blanding contemporaneously with the filing of the at-issue Motion for Summary Judgment. (ROA p.). Blanding's Affidavit makes it perfectly clear that SCDOT bears no responsibility for the Parkway, nor has it ever. Rather,

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03, 465 S.E.2d 98, 100 (Ct. App. 1995); *see also* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

SCDOT is responsible for Ladson Road and Ashley Phosphate Road into which the Parkway terminates. (ROA p.). As miniscule portions of the Parkway fall within SCDOT's right of way on Ladson and Ashley Phosphate Roads, SCDOT is responsible for ensuring that those infinitesimal portions of the Parkway do not constitute a hazard to motorists on Ladson and Ashely Phosphate Roads. Otherwise, SCDOT has no interest in the Parkway. (ROA p.).

In opposition to SCDOT's Motion for Summary Judgment and supporting affidavit from Arnold Blanding, Appellants provided an untimely filed affidavit from their expert, Allan Abbata. (ROA p.). The late submission of the Abbata Affidavit made it a legal nullity that was not properly before the Court. Regardless, Abbata's Affidavit merely stated that he was Appellants' expert and understood that SCDOT was responsible for some areas of the Parkway. (ROA p.). Abbata additionally stated that it would "be helpful to have the benefit of depositions to see who did what before I could render more opinions." (ROA p.). Abbata did not dispute that SCDOT was not involved in the design of the Parkway; he did not dispute that SCDOT was not involved in the construction of the Parkway; and, finally, he did not dispute that SCDOT is not responsible for the maintenance of the Parkway.

Although it would have required the trial court to consider untimely material that was not properly before it, Abbata's Affidavit fails to identify or create any genuine issue of fact. as to whether SCDOT was responsible for the construction of the Parkway. The trial court properly awarded summary judgment to SCDOT as the only evidence before the Court was that SCDOT had neither designed, nor built, nor maintained the Parkway and therefore could not be liable for the design, construction, and condition of the Parkway. Therefore, the Court should affirm the trial court's award of Summary Judgment to SCDOT.

SCDOT'S MOTION FOR SUMMARY JUDGMENT WAS RIPE FOR ADJUDICATION.

Appellants argue that the Court erred in granting SCDOT's Motion for Summary Judgment because discovery remains in its early stages. "Rule 56(f) of the South Carolina Rules of Civil Procedure provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment." Smith v. Jones (In re Estate of Smith), 419 S.C. 111, 120, 796 S.E.2d 158, 162-63 (Ct. App. 2016) (J. Few, concurring). "When a party seeks additional time but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request." Id.

Appellants belabor the point that SCDOT did not provide responses to Appellants' discovery requests and that Appellants had never deposed any witnesses. (ROA p.). Additionally, Appellants posit that they were not focused on the instant matter because some parties agreed to resolve the accompanying Stortz matter first. In cursory fashion, Appellants suppose that their failure to depose witnesses for three years was "either due to the COVID-19 pandemic or the conduct of the SCDOT and other defendants in failing to participate and cooperate in discovery efforts." (ROA, p.).

Appellants received a copy of SCDOT's responses to the Interrogatories and Requests for Production of co-defendant HLA, Inc. (ROA, p.). As shown therein, SCDOT had no participation in the project and, accordingly, has no knowledge of the issues alleged in Appellants' Complaint(s) and no related documents. SCDOT's responses to Appellants' discovery requests would have mirrored its responses to HLA had SCDOT remained in the case as indicated to Appellants before the hearing on the at-issue Motion for Summary Judgment. (ROA, p.). Further, Appellants were

in receipt of Blanding's Affidavit nearly seven months prior to the hearing on SCDOT's Motion for Summary Judgment. (ROA, p.).

SCDOT had no knowledge or documents related to the Palmetto Commerce Parkway because SCDOT was not and is not involved in the planning, construction, or maintenance of the Parkway. Further, this action had been pending for more than three years at the time the trial court heard SCDOT's Motion for Summary Judgment. During that time, Appellants did not file a Motions to Compel nor did they send notice of any depositions. Finally, to the extent SCDOT was required to respond to Appellants' discovery requests prior to its dismissal, Appellants were advised that SCDOT's responses would have been identical to the previously produced responses to HLA's discovery requests,[2] i.e., SCDOT was not involved in the planning, construction, or maintenance of the Parkway and, therefore, had no associated records. (ROA, p.). The pertinent material information available from SCDOT and sought by Appellants was provided to Appellants. Accordingly, the Court did not err or act prematurely in granting SCDOT's Motion for Summary Judgment.

Finally, in Appellants' brief, Appellants objects for the first time that SCDOT submitted evidence at the hearing that had not been previously produced. (ROA, p.). That "evidence" was limited to a "screen share" of satellite images from Google Maps of the Parkways terminations into Ladson and Ashley Phosphate roads. (ROA p.) As the Appellants did not object to the Court viewing satellite images, the objection is waived, and the argument is not preserved for review. "A contemporaneous objection is required to preserve issues for appellate review. Webb v. CSX

[2] On September 11, 2020, Respondent's paralegal e-mailed Appellants' paralegal requesting the date discovery had been served and advised that Respondent's responses would be the same as those provided to HLA.

Transp., Inc., 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005); See also Turner v. Med. Univ. of S.C., 430 S.C. 569, 590, 846 S.E.2d 1, 12 (Ct. App. 2020).[3]

APPELLANTS FAILED TO PRODUCE ANY ADMISSIBLE EVIDENCE IN OPPOSITION TO SCDOT'S MOTION FOR SUMMARY JUDGMENT.

Rule 56(c) of the South Carolina Rules of Civil Procedure specifies the time limits for filing papers in response to motions for summary judgment. Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 59, 488 S.E.2d 327, 329 (1997). "To warrant consideration, an affidavit must be served on the opposing party no later than the day before the start of the hearing." Folkens v. Hunt, 290 S.C. 194, 206, 348 S.E.2d 839, 846 (Ct. App. 1986). To that end, Abbata's untimely Affidavit would not even be subject to the Court of Appeals review. See McQuaig v. Brown, 270 S.C. 512, 516, 242 S.E.2d 688, 690 (1978).

In Black, the trial court refused to consider the plaintiff's affidavit offered in opposition to a government agency's Motion for Summary Judgment and, accordingly, granted the agency's Motion. Black, 327 S.C. at 58, 488 S.E.2d at 329. There, the excluded affidavit was submitted three hours before the hearing on the respondent's Motion for Summary Judgment[4]. Id. On appeal, the plaintiff argued that the trial court abused its discretion in failing to consider the untimely affidavit. Id. There, the Court of Appeals recognized longstanding precedent that the trial court acts within its discretion where it refuses to consider materials that were not timely served upon the opposing party. Id., 327 S.C. at 60, 488 S.E. 2d at 329. Accordingly, the Court of Appeals upheld the trial court's award of summary judgment.

[3] "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002) as authoritative).

[4] Appellants filed Abbata's Affidavit around two and a half hours before the hearing on the at-issue Motion.

It is, or should be, undisputed that Appellants did not provide Abbata's affidavit until a few hours before the hearing on SCDOT's Motion for Summary Judgment. (ROA, p.). Abbata's untimely, and thus inadmissible, affidavit was the only factual submission offered in opposition to SCDOT's Motion for Summary Judgment. Accordingly, Appellants are unable to show any dispute of material fact. Accordingly, the Court should uphold the trial court's award of Summary Judgment to SCDOT.

CONCLUSION

SCDOT presented uncontested evidence that SCDOT was not involved in the design, construction, or maintenance of the Parkway, which is a Charleston County roadway under the control and supervision of Charleston County under S.C. Code Ann. § 57-17-10 (1962, as amended). Appellants presented no evidence to dispute those facts. Based upon the above argument the Order granting SCDOT's Motion for Summary Judgment was properly issued by the trial court and should be affirmed.

Respectfully submitted,

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Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Bentley D. Price, Circuit Court Judge

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V.

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RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S PROOF OF SERVICE OF INITIAL REPLY BRIEF

I hereby certify that on June 7, 2021, I served a copy of Respondent South Carolina Department of Transportation's Initial Brief and Designation of Matter on the following:

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by placing a copy of said documents in the United States mail with sufficient postage thereon.

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June 7, 2021

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RE: SARAH SHARPER, ET AL V. CITY OF NORTH CHARLESTON, COUNTY OF CHARLESTON, DEPARTMENTOF HEALTH AND ENVIRONMENTAL CONTROL, SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, BANKS CONSTRUCTION COMPANY, UNITED CONTRACTORS, INC, BANKS/UNITED JOINT VENTURE AND HLA, INC, COLEMAN-SNOW CONSULTANTS, LLC AND ICA ENGINEERING, INC. F/K/A FLORENCE & HUTCHESON, INC
Consolidated Case No.: 2017-CP-10-4820
Appellate Case Number: 2021-000053

Dear South Carolina Court of Appeals,

Please find enclosed the originals and one (1) copy each of the following:

1) Respondent South Carolina Department of Transportation's Initial Reply Brief;
2) Respondent South Carolina Department of Transportation's Designation of Matter; and
3) Proof of Service of Respondent's Initial Reply Brief and Designation of Matter.

Please contact me if you require additional information at this time. I am

Sincerely yours,

W. Coleman Lawrimore

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WCL/fjm
Enclosures