THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2021-00356

Sierra Doherty …….……Appellant

v.

Coastal Carolina University …….……..…...Respondents

INITIAL BRIEF OF RESPONDENT

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s/Joseph P. McLean

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STATEMENT OF ISSUES ON APPEAL

1. Does the Amended Complaint state facts sufficient to constitute a cause of action in light of S.C. Code Ann. 15-78-60(8) (2005)? (governmental entity is not liable for a loss resulting from snow and ice conditions or temporary natural conditions on any public place unless the snow or ice thereon is caused by a negligent act of an employee of the governmental entity).

2. Does the gross negligence of S.C Code Ann. 15-78-60 (25) (2005) apply? (governmental entity is not liable for a loss resulting from supervision, protection, or control of any student except when the responsibility or duty is exercised in a grossly negligent manner)

3. Should Appellant have been allowed to file an Amended Complaint under Rule 15(a) SCRCP?

STATEMENT OF THE CASE

In January 2018, Appellant was a student at Coastal Carolina University (hereinafter "Respondent" or "CCU") (Amended Complaint ¶2, R. p. _____). On or about Wednesday, January 3, 2018, Winter Storm Grayson brought freezing rain, ice, and snow to the CCU campus (Amended Complaint ¶5, R. p. _____). CCU canceled classes on January 3 and 4 and resumed on a delayed schedule at 11:00 a.m. on Friday, January 5, 2018. *Id.* On Monday, January 8, 2018, five days after the storm began and three days after classes resumed, Appellant was walking to class on campus when she slipped and fell on an icy sidewalk and was injured. (Amended Complaint ¶6, R. p. _____). Appellant subsequently commenced this negligence action against CCU for personal and bodily injury. CCU is a governmental entity, so its tort liability is governed by the S.C. Tort Claims Act.

CCU moved to dismiss under Rule 12 (b)(6) SCRCP (Motion to Dismiss, R. p. _____ and Memorandum of Law with Exhibit 1, R.p. _____) relying on S.C Code Ann. 15-78-60(8) (2005) of the Tort Claims Act which states:

A governmental entity is not liable for a loss resulting from:

> (8) snow or ice conditions or temporary natural 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.

Appellant filed a Response in Opposition to the Motion to Dismiss (R. p. _____). The motion was heard by the court on March 2, 2021 (Transcript of Record, R., p. _____) and taken under advisement with proposed orders requested from the parties. On March 4, 2021, the trial court judge granted the motion to dismiss (Order, March 4, 2021, R. p. _____). Appellant then made 2 motions: (1) Motion to Alter or Amend Judgment / Motion to Reconsider (R. p. _____) and (2)

Motion to Amend Complaint (R. p. _____)[1] . Both were denied (Form 4 Order, and this appeal followed.

[1] Appellant asked for leave of court to file a second amended complaint in (1) her opposition to defendant's motion to dismiss (R. p. _____, (2) at oral argument on that motion (R, p. _____), (3) in her motion to alter /amend/ reconsider which included the proposed amended complaint as an exhibit (R, p._____) and (4) by e-mailing an unfiled copy of a motion to amend which also included the proposed amended complaint as an exhibit to Judge Culberson on March 8, 2021. However, the motion to amend was not e-filed in the record until July 2, 2021, due to an error explained in a note attached to that motion.

STANDARD OF REVIEW

1. Rule 12(b)(6) - Motion to Dismiss

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. *Williams v. Condon,* 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct.App.2001). That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* at 233, 553 S.E.2d at 499. *See also, Rydde v Morris,* 381 S.C. 643, 675 S.E.2d 431 (2009).

2. Rule 15(a) - Amended Complaint

A motion to amend is within the sound discretion of the trial judge and, therefore, on review the court looks to see if there has been an abuse of that discretion. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry,* 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013).

ARGUMENT

1. Snow and Ice Immunity

The amended complaint in this action alleges that the ice on the sidewalk was due to a winter storm. *(*Amended Complaint ¶5, R, p. _____) . 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. (Amended Complaint ¶ 6, 12(a) and (b), and 18, R, p. _____). The Amended Complaint does not allege that a negligent *act* of CCU caused the ice to be on the sidewalk. It only alleges that a negligent *omission* of CCU caused the ice to be on the sidewalk.

S.C Code Ann. 15-78-60(8) will be referred to the snow and ice immunity statute. It states:

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 (emphasis added).

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

> The omission to do something that a reasonable and prudent man…would so…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, 573 (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 there had been a positive act of misfeasance by CCU that caused the ice to be on the sidewalk. However, at most, there was an omission to treat the sidewalk or failure to warn of the presence of ice, so the snow and ice immunity does apply.

In *Flynn, supra,* the North Carolina Supreme Court recognized just this. The statute in question allowed a claim for damages against the state if a negligent act of an employee of the state highway department proximately caused a defect in or on a highway that injured a member of the traveling public. The facts showed that the state highway department failed to repair a hole in the highway which had been caused by normal wear and tear, and the hole had caused an automobile accident. The court framed the issue as follows: "Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act?" *Id*. The court answered the question as follows:

> We think it was the intent of the Legislature to permit recovery only for the negligent acts of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts and omissions of State employees.

Id.

The court went on to observe:

> That the interpretation here given is correct, we think, is shown conclusively by subsequent legislative enactments. Chapter 400, Session Laws of 1955, ratified March 31, 1955, amended the Tort Claims Act by inserting after the words, 'negligent act,' the words, 'or omission.' By inserting the additional words the conclusion is inescapable the Legislature did not consider they were already included. However, on May 16, 1955, Chapter

> 1361, an amendment to Chapter 400, was passed, striking out the words, 'or omission.' By taking these words out, the conclusion is likewise inescapable that it was the legislative intent they should not be included.

Id.

Other state courts have interpreted their snow and ice immunity statutes which are almost verbatim to the South Carolina snow and ice immunity statute in a similar manner.

In *Porter v. Grant County Board of Education*, 219 W.Va. 282, 633 S.E.2d 38 (2006), the plaintiff slipped and fell on an icy sidewalk on school grounds while walking to a school-sponsored basketball game. She brought suit alleging that the school board was negligent in deciding to hold the game on the same day that classes were canceled due to inclement weather. The school board claimed immunity under a statute nearly identical to §15-78-60(8). [2] The Supreme Court of Appeals first rejected an argument that the statute as written produced an absurd result. A lower court had found just that – "the statute requiring an affirmative act on behalf of the Board of Education in creating the snow or ice conditions before liability can be established is bordering on the ridiculous…The legislature could not have meant that the Board of Education would have had to have made it snow, caused an ice storm, or otherwise "affirmatively" placed ice or snow on the sidewalk before it could be held liable." 633 S.E.2d at 42. The court observed "there are several possible ways in which a political subdivision could place ice or snow on a sidewalk. For example, an employee of the political subdivision could remove ice or snow from the roadway by throwing it onto the sidewalk. Also, an employee of a political subdivision could permit a broken pipe or hose to leak water onto a sidewalk where the eater subsequently freezes." *Id*.

[2] W. Va. Code §29-12A-5(a)(6) which states, "a political subdivision is immune from liability if a loss or claim results from…[s]now or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the political subdivision."

Next, the court rejected the argument that the decision to hold the basketball game despite the fact that classes were canceled is an affirmative act under the snow and ice statute because that decision did not cause the snow of ice conditions on which the plaintiff fell. 633 S.E.2d at 42. "Accordingly, we now hold that W. Va. Code S 29-12A-5(a)(6)(1986) clearly provides political subdivisions with immunity from liability for losses or claims resulting from snow or ice placed on public ways or other public places by the weather. However, political subdivisions are not immune from liability for losses or claims occurring from an affirmative negligent act of the political subdivision resulting in snow or ice on public ways or other public places." 633 S.E.2d at 42 -43.

In this case, Respondent argues that CCU acted affirmatively by closing and then re-opening campus. However, as in *Porter, supra*, these acts did not cause the ice to be on the sidewalk. A winter storm did. Moreover, if CCU can be liable in this case for closing and then re-opening campus, then SCDOT can be liable for every automobile accident which occurs due to winter weather conditions on a highway that was closed and then re-opened because of a winter storm. To avoid liability, SCDOT might decide not to close roads at all or decide to close them and keep them closed until the safety of motorists from winter weather road conditions is ensured, neither a reasonable choice.

In *Kluver v. City of Hinton*, 1996 OK CIV App 98, 924 P.2d 306 (1996), a voter went to city hall, her assigned polling place, to vote. When entering the building she noticed the sidewalk in front of the building was covered in ice and snow. She went into the building and notified a city employee of the condition of the sidewalk. She voted then left to return to her car. Despite being careful she slipped on the ice and was injured. She brought suit, alleging that the city had a duty to remove the ice and snow but negligently did not. The city claimed immunity under a statute

nearly identical to §15-78-60 (8). [3] The court rejected the plaintiff's argument that failure to remove the snow and ice was an affirmative act that caused the dangerous condition. "The failure to remove snow and ice (or, indeed, failure to do anything) is not an affirmative act causing the snow and ice." 924 P. 2d 307.

In *Taylor v Reno County, Kansas*, 242 Kan. 307, 747 P.2d 100 (1987), there was a fatal accident on a county-owned and maintained and bridge that was iced-over due to a winter storm. Plaintiff contended that the accident arose from the county's failure to clear the bridge of ice after the county was aware of the ice on the bridge. The city claimed immunity under a statute nearly identical to §15-78-60 (8). [4] The Supreme Court of Kansas agreed with the city. "In the present case, we are not dealing with affirmative acts but with a failure to act." 747 P. 2d 102. "This case is a classic example of the type of case which falls within [the snow and ice statute]. There is no allegation that the icy condition of the Yoder Road bridge was caused by the affirmative negligent acts of either of the defendants. Rather, the sole basis for plaintiff's present cause of action is that the defendants failed to properly clear the bridge of ice after it had accumulated. The accident allegedly arose from ice accumulation on a public bridge due to weather conditions and, thus, the case falls squarely within the governmental immunity provisions of [the snow and ice statute]." 747 P. 2d 102.

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[3] 51 O.S. 1991 §155(8) provides "[t]he state or a political subdivision shall not be liable if a loss or claim results from…[s]now or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision…"

[4] K.S.A. 75-6104(k) provides: "A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from "snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity"

Words in statutes mean things, and 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).

2. Failure to warn

The Amended Complaint also alleges that CCU failed to warn of the icy sidewalk (Amended Complaint ¶12(c), R, p. _____). This is still an omission, not an act, and even if true did not cause the ice to be on the sidewalk. A winter storm did. Further, "[g]enerally there is no duty to warn of natural weather-related conditions (*e.g.* rain or mud) that are open-and-obvious hazards affecting walking surfaces." D. Denton, *The Law of Slip and Fall In South Carolina* (S.C. Bar 2014), at p.62. *See also, Meadows v Heritage Village Church & Missionary Fellowship,* 305 S.C. 375, 409 S.E.2d 349 (1991) (no duty to warn an invitee of wet grass because it was a natural condition caused by rain, the peril of which was obvious); *Pryor v Northwest Apartments, Ltd.,* 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996) (no duty to warn of mud which was a naturally occurring condition);

Richardson v Piggly Wiggly Central, Inc. 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013) (no duty to warn that sidewalk was wet from rain).

3. Gross Negligence

Appellant seeks to create a jury issue by arguing that the snow and ice statute does not apply if CCU was grossly negligent. She points to S.C. Code Ann. 15-78-60(25) (2005), which states that "the governmental entity is not liable for a loss resulting from… responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student…except when the responsibility or duty is exercised in a grossly negligent manner." She argues that since she was a student on her way to class when the slip and fall on the icy sidewalk occurred, the gross negligence standard should be read into the snow and ice immunity statute such that CCU can be liable if it was grossly negligent. See, *Steinke v South Carolina Department of Labor, Licensing, and Regulation* 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999); *Etheredge v. Richland School Dist. 1*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998) *rev'd on other grounds*, 341 S.C. 307, 534 S.E.2d 275 (2000) (when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception).

However, S.C. Code Ann. 15-78-60(25) and gross negligence do not apply and were not pled as a defense by CCU. When the accident occurred, CCU was not supervising, protecting, or controlling the Appellant who was a student merely walking to class on campus. See, *Gardner v. Biggart*, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) in which the inured plaintiff was merely a passenger on the defendant's school bus. The school bus driver was not exercising any duty involving supervision, custody, control, or protection at the time of the accident. Therefore, simple negligence, not gross negligence, was the proper standard applied to the bus driver's duty of care in the operation of the school bus.

Further, even if gross negligence should be read into the snow and ice immunity statute, there must still be a grossly negligent act that caused the ice to be on the sidewalk and none are pled in this case, not even in the proposed second amended complaint discussed next.

4. Motion to Amend Complaint

Appellant contends that before this action is dismissed, she should be allowed to amend her complaint. She filed a proposed Second Amended Complaint[5] (R., p. _____) as an exhibit to her Motion to Alter or Amend Judgment/ Motion to Reconsider (R., p._____) and as an exhibit to her Motion to Amend Complaint (R., p._____)[6]. An examination of the proposed Second Amended Complaint reveals that it would be futile and, therefore, the trial court correctly denied Appellant leave of court to file it.

Although Rule 15(a) SCRCP provides that leave to amend should be "freely given," it is not without limits. One situation where leave should be denied is when the proposed amendment would be futile. *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997); *Health Promotion Specialists, LLC v S.C. Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). A proposed amendment is futile when it fails to state a claim. In other words, even the proposed Second Amended Complaint would not survive a motion to dismiss.

The proposed Second Amended Complaint, like its predecessors, still does not allege any affirmative act on the part of CCU which caused the ice or snow to be present on the sidewalk. It alleges certain acts not previously pled, specifically activating and deactivating an emergency operation plan. It also makes allegations about the insufficiency of the emergency operation plan,

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[5] This would be a Second Amended Complaint because the initial Summons and Complaint were filed on December 11, 2019 and amended the next day via an Amended Complaint to correct numbering errors within the paragraphs of the initial Complaint.

[6] See footnote 1 for an explanation of a filing error made with respect to the Motion to Amend Complaint.

deviations from it by CCU, as well as notice to CCU of the hazardous conditions on its campus. However, paragraph 40 of the proposed Second Amended Complaint re-confirms that the gravamen of the plaintiff's claims remains the failure to treat and remedy the ice-covered sidewalk before re-opening campus despite notice of the hazard, failure to warn despite notice of the hazard, and failure to inspect despite notice of the hazard. These are all omissions. Moreover, even if they could be construed as acts, they did not cause the ice to be on the sidewalk. A winter did.

The proposed Second Amended Complaint alleges a second cause of action of negligence *per se* and alleges that CCU failed to comply with The International Property Maintenance Code (IPMC) which is a municipal ordinance adopted by the City of Conway. Even if the IPMC speaks to hazardous conditions on sidewalks caused by snow and ice, the Tort Claims Act exclusively governs tort liability of a governmental entity, and it directly speaks to hazardous conditions on any public property caused by snow and ice. Further, failure to comply with the IMPC is an omission, not an act, and even if it is an act it did not cause the snow or ice to be on the sidewalk, A winter storm did.

The proposed Second Amended Complaint pleads a third cause of action which alleges certain negligent voluntary undertakings by CCU including restricting access to campus and not keeping it closed until it had been inspected and ice hazards had been identified and treated. See, proposed Second Amended Complaint, paragraph 52. There are the same affirmative acts of closing and re-opening campus alleged in the Complaint (R, p. _____) Amended Complaint (R, p. _____), and first case of action of the proposed Second Amended Complaint (R, p. _____) that did not cause the ice to be on the sidewalk. Further, paragraph 53 reveals that the negligence complained of is failure to use due care in the voluntary undertakings. Failure to acts is not an act.

CONCLUSION

An omission is not an act. The S.C. ice and snow immunity statute is clear that a governmental entity is not liable for an accident caused by ice or snow on its property unless the ice or snow thereon is caused by an affirmative act of an employee of the governmental entity. The only affirmative acts pled in the Amended Complaint are closing and re-opening campus, but those acts did not cause the ice to be on the sidewalk. A winter storm did.

The General Assembly could have included the phrase "act or omission" in the snow and ice immunity statute as it did in other sections of the Tort Claims Act, but it did not in apparent recognition that natural conditions as a result of weather should be and are treated differently than man-made foreign substances or hazardous conditions under South Carolina premises liability law. The courts of this state have already so ruled in premises liability cases involving accidents caused by water and mud as the result of natural weather conditions, and this court should extend that same rule to snow and ice.

There was no duty to warn Appellant of the presence of ice, but assuming there was failure to warn is an omission, and if it is an act, it did not cause the ice to be on the sidewalk. A winter storm did.

Gross negligence should not be read into the snow and ice immunity statute because CCU was not controlling or supervising Appellant when she was injured. She was merely walking to class.

A Second Amended Complaint would be futile because it would not survive a Rule 12(b)(6) motion to dismiss. The additional affirmative acts alleged regarding the implementation of the emergency operation plan and voluntary undertakings were at best omissions. Even if they were

acts, they are a different way of pleadings the same acts of closing and re-opening campus pled in in the Complaint and the amended Complaint which did not cause the ice to be on the sidewalk. Finally, the Tort Claims Act trumps the municipal property maintenance ordinance, and even if the municipal ordinance applies failure to follow it is an omission, not an act.

The trial judge was correct that the Complaint (and Amended Complaint and proposed Second Amended Complaint) all fail to state facts sufficient to constitute a cause of action and properly dismissed this action pursuant to Rule 12(b)(6), SCRCP. The judgment should be affirmed.

s/Joseph P. McLean

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