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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM FLORENCE COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE MICHAEL G. NETTLES  
CIRCUIT COURT JUDGE

OCT 12 2023  
SC Court of Appeals

APPELLATE CASE NO. 2020-000614  
CIVIL ACTION NO. 2017-CP-21-01168

Opinion No. 6028 (S.C. Ct. App. filed September 27, 2023)

James Marlowe and Lori Marlowe,

APPELLANTS,

versus

South Carolina Department of Transportation,

RESPONDENT.

PETITION FOR REHEARING

The Respondent, South Carolina Department of Transportation (“SCDOT”), respectfully petitions the Court for a rehearing of its Opinion No. 6028 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

Procedural and Factual Background

The appeal in this matter stems from the flooding of the Marlowes’ home located in Pamplico, South Carolina during the historic and torrential rains which occurred in October 2015 and October 2016. The Marlowes brought an action against the SCDOT

alleging that construction to U.S. Highway 378 near their home caused the flooding of their home. The Marlowes alleged causes of action for inverse condemnation, conversion, due process violations, and negligence. The SCDOT filed a motion for summary judgment on the Marlowes' claims which the Trial Court granted based upon the immunities of the South Carolina Tort Claims Act, the Stormwater Management and Sediment Reduction Act (the "Stormwater Act"), and the failure of the Marlowes to prove that the construction to U.S. Highway 378 caused the flooding of the Marlowes' home.

The Marlowes appealed the Trial Court's grant of summary judgment to this Court. This Court heard the matter on June 7, 2023. On September 27, 2023, this Court issued its Opinion affirming in part, reversing in part, and remanding to the Trial Court. This Court affirmed the Trial Court's ruling that the immunities of the Tort Claims Act barred the Marlowes' tort claims. This Court, however, reversed the Trial Court's grant of summary judgment to the SCDOT on the inverse condemnation claim and also held the Stormwater Act did not provide a basis of immunity to the SCDOT. The SCDOT now petitions this Court for a rehearing of its holdings as to the inverse condemnation claim and the applicability of the Stormwater Act.

### **Argument**

- I. The Marlowes did not present evidence showing the existence of a genuine issue of material fact as to causation for their inverse condemnation claim; therefore, the Trial Court properly granted summary judgment to the SCDOT on this claim.**

In reversing the Trial Court's grant of summary judgment to the SCDOT on the Marlowes' inverse condemnation claim, this Court concluded that there was a genuine issue of material fact as to whether the highway construction amounted to an affirmative, positive, aggressive act which caused the Marlowes' flooding for the purposes of inverse

condemnation. This Court observed that for the Marlowes to prevail on their inverse condemnation claim, they had to prove an “affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff’s property.” This Court also recognized that an “affirmative act” can only amount to an “affirmative, positive, aggressive act” when it has been proven to have caused the damage in question. In this case, causation is the critical issue.

The Marlowes complained that the SCDOT’s failure to install an adequate culvert and its construction of an elevated highway caused the flooding to their property. This Court properly recognized that the failure to install an adequate culvert could not be an affirmative act giving rise to an inverse condemnation claim.

This Court, however, determined that there was evidence in the record suggesting that the construction of the elevated highway caused the flooding to the Marlowes’ home and concluded that the construction of the elevated highway could be an affirmative, positive, aggressive act for purposes of an inverse condemnation claim. In finding the existence of a genuine issue of material fact, the Court relied on testimony of the Marlowes’ expert witness, Jason Gregorie, P.E., and in particular the following testimony:

I can say to a reasonable degree of engineering certainty that the construction project contributed to the flooding. I believe that it increased the flood depth on the property, but I cannot say definitely that if the project had not existed that it would have completely prevented the flooding.

...

I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.

The SCDOT submits that this Court misapprehended the testimony and evidence in the Record on Appeal, as well as the applicable law regarding the legal standard for the

sufficiency of expert opinions.

The Marlowes submitted evidence showing that during the October 2015 storm, the two Community Collaborative Rain, Hail & Snow Network (CoCoRaHS) stations closest to the Marlowes' home recorded four (4) day totals of rain corresponding to 200 to 500 year intervals. In the region, the greatest four (4) day precipitation recorded corresponded to a return interval of greater than 1000 years. [R.pp. 99-100.]

In October 2016, the station closest to the Marlowes' home with four (4) consecutive days of data available recorded a return interval between 100 to 200 years. In the region, the greatest four (4) day precipitation recorded corresponded to a return interval between 200-500 years. [R.pp. 99-100.]

Evidence in the record established that there was no design of a culvert large enough to have prevented the flooding on the Marlowes' property for the extraordinary amount of rainfall during the four (4) day events in October 2015 and October 2016 or anything that the SCDOT could have done with this road construction project to have prevented the flooding during these catastrophic events. [R.pp. 168, 316, 349-350.]

Additionally, the Marlowes' expert, Jason Gregorie, PE, could not render an opinion that the construction project on U.S. Highway 378, including the elevated highway, most probably caused the flooding of the Marlowes' home or that the flooding of the Marlowes' home would have been prevented altogether had the road construction, including the elevated highway, not existed:

What I'm going to testify about here today is what I state in my report, is that if the prior U.S. 378 existed and the new U.S. 378 had not been constructed. I can say – I do say to a reasonable degree of engineering certainty that the flood depth would have been less on the Marlowe property, and I believe the impact on the Marlowe property would have been less. I can say that it's **possible** that it would have been prevented.

I can say to a reasonable degree of engineering certainty that the construction project contributed to the flooding. I believe that it increased the flood depth on the property, but **I cannot say definitely that if the project had not existed that it would have completely prevented the flooding.**

A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a **possibility** it would have prevented the flooding inside the structure altogether.

Q: May have?

A: That's correct.

Q: So it still, you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?

A: It's possible, yes.

[R.pp. 4-5 (emphasis added).]

In his report, Mr. Gregorie also could only state that as a result of the new road at a higher elevation, “it is **possible** that runoff will now be temporarily impounded on the subject property for significant or historic storm events.” [R.p. 106 (emphasis added).]

An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. To establish an inverse condemnation, a plaintiff must show: “(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.” Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004) (internal citations omitted).

An inverse condemnation claims fails unless the plaintiff can establish that an affirmative, positive, aggressive act by the government **caused** the plaintiff's damage. Id. at 291-92, 594 S.E.2d at 562-63.

The Marlowes did not submit any evidence to the Trial Court establishing that the SCDOT's road construction project of U.S. Highway 378 caused the flooding to their home during the massive flooding events in October 2015 and October 2016. The testimony of Mr. Gregorie upon which this Court relies to create an issue of material fact on the question of causation fails to meet the competency for an expert opinion on causation, and as such, cannot create an issue of material fact on causation for an inverse condemnation claim.

This State's Supreme Court has held that an expert opinion "upon the question of the causal connection between plaintiff's injuries and the acts of the defendant" must satisfy the "most probably" rule. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). The Supreme Court observed: "[i]t is not sufficient for the expert ... to testify merely that the ailment might or could have resulted from the alleged cause." Id. (internal citation omitted). Rather, the expert "must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged." Id. (internal citation omitted).

In Baughman, the Supreme Court concluded that an expert's opinion did not rise to the "most probably" level and instead rendered an opinion which was "within the realm of *possibility* only, not the required standard of *probability*" and thus not reliable or admissible. Id. (emphasis in original).

Mr. Gregorie's opinion here does not ascend beyond the realm of possibility. He can only opine that it was **possible** the flooding might have been prevented without the road construction or a **possibility** that without the road construction that flooding might have been prevented inside the Marlowes' home. [R.pp. 4-5.] He could not "definitely" state that if the road construction project had not existed, the flooding would have been

prevented. [R.p. 4] Mr. Gregorie agreed that with the old unelevated highway and the two rain events of October 2015 and October 2016, the Marlowe home might have still flooded.

[R.p. 5.]

As the Supreme Court's directs in Baughman, this testimony is not enough to create a genuine issue of material fact on the issue of causation for the Marlowes' inverse condemnation claim. Mr. Gregorie did not opine that the road construction was a probable but for cause of the flooding of the Marlowes' home. His testimony is uncertain and concedes the home could have flooded without the road construction. As the Supreme Court of the United States has recognized:

[T]o hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no [action] of any kind. So to hold would far exceed even the "extremest" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private party owner for flood damages which it in no way caused.

United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

Accordingly, there is no sufficient evidence in the record that the SCDOT road construction caused the flooding of the Marlowes' home, and without causation, a claim for inverse condemnation cannot lie as a matter of law. The Trial Court's grant of summary judgment to the SCDOT on the inverse condemnation claim should be affirmed.

**II. The Trial Court correctly relied upon the Stormwater Act in granting the SCDOT's motion for summary judgment.**

The Stormwater Act requires those who intend to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity. See S.C. CODE ANN. § 48-14-

10 *et seq.* The Stormwater Act then explicitly provides “no liability for damages” on the part of any governmental body:

Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

- (1) to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees thereof for the recovery of damages caused by such action or failure to act [.]

S.C. CODE ANN. § 48-14-160.

The title of this statutory section and its provisions clearly establish that a governmental body will not be liable for damages for land disturbing activities. The Stormwater Act therefore does not impose any liability on the SCDOT and its agents and employees for the road construction near the Marlowes’ residence. The Trial Court’s grant of summary judgment on each of the Marlowes’ claims against the SCDOT should be affirmed on this basis as well.

**CONCLUSION**

For the reasons set forth herein, Respondent SCDOT respectfully requests that the Court grant its Petition for Rehearing, withdraw the Opinion of the Court, and affirm the Trial Court's Order granting summary judgment to the SCDOT in its entirety.

Respectfully submitted,

/s Carmen V. Ganjehsani  
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**ATTORNEYS FOR RESPONDENT  
SOUTH CAROLINA DEPARTMENT  
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October 12, 2023.

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, South Carolina Department of Transportation, do hereby certify that I have this date served the foregoing Petition for Rehearing, dated October 12, 2023, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

J. Clay Hopkins  
171 Church Street, Suite 150  
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**Attorneys for Appellants**

A copy of the sent e-mail is attached to this Certificate of Service.

/s Carmen V. Ganjehsani  
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TRANSPORTATION**

Dated: October 12, 2023.


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**From:** [Carmen Ganjehsani](#)  
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**Subject:** 2020-000614 Marlowe v. SCDOT  
**Date:** Thursday, October 12, 2023 1:10:00 PM  
**Attachments:** [2020-000614 Marlowe v. SCDOT \(Petition for Rehearing\) \(3091560\).pdf](#)

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Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Petition for Rehearing in the above-referenced appeal on behalf of the Respondent South Carolina Department of Transportation.

Carmen Ganjehsani

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October 12, 2023

**Filed via e-mail (ctappfilings@sccourts.org) and hand delivery**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**Re: James Marlowe v. SCDOT  
Appellate Case No. 2020-000614  
RPR File No.: 181-01065**

**RECEIVED**

**OCT 12 2023**

**SC Court of Appeals**

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing on behalf of Respondent South Carolina Department of Transportation in the above-referenced case, along with our Certificate of Service. We are also filing this Petition electronically with the Court of Appeals via e-mail at [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org) pursuant to Section (b)(2) of the Supreme Court's May 6, 2022 Order.

Also enclosed is our firm's check in the amount of \$50.00 for the filing fee in this matter.

We have served this Petition for Rehearing on counsel for Appellants upon their primary email addresses listed in the Attorney Information System.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

/s Carmen V. Ganjehsani

Carmen V. Ganjehsani

Encs.

cc: Joseph Clay Hopkins (via e-mail at [clay@hopkinsfirm.com](mailto:clay@hopkinsfirm.com))