

RECEIVED

Oct 25 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Roger M. Young, Sr. Circuit Court Judge

Case No.: 2017-CP-18-00138

Appellate Case No.: 2023-000951

Mitch Randall Yawn and Juanita Mae Stanley
d/b/a Flowertown Bee Farm and Supplies, Appellants

v.

Dorchester County, Respondent.

RESPONDENT'S INITIAL REPLY BRIEF

MAYBANK LAW FIRM, LLC
Post Office Box 12579
Charleston, SC 29422
Phone: (843) 766-8101
Fax: (843) 766-8103
E-mail: roy@maybanklaw.com

/s/Amanda R. Maybank
Amanda R. Maybank SC Bar #69825
Roy P. Maybank SC Bar #69643
Attorneys for Respondent Dorchester County

October 25, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

COUNTER STATEMENTS OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS.....4

ARGUMENT.....24

 I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT'S
 MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS'
 NEGLIGENCE AND GROSS NEGLIGENCE CLAIMS AS RESPONDENT
 COMPLIED WITH STATE LAW NOTICE PROVISIONS PRIOR TO THE
 SPRAY.....24

 II. II.EVEN IF PRIOR COURTESY CALLS TO BEEKEEPERS BEFORE
 MOSQUITO TREATMENT CREATED A DUTY, THE CIRCUIT COURT
 PROPERLY HELD THAT APPELLANTS' CLAIM IS BARRED
 PURUSANT TO THE TORT CLAIMS ACT, S.C. CODE ANN.
 § 15-78-60(4).....27

 III. III.THE CIRCUIT COURT PROPERLY GRANTED SUMMARY
 JUDGMENT AS TO APPELLANTS' TRESSPASS CLAIM AS THERE WAS
 NO "INTENTIONAL ACT.".....32

CONCLUSION33

TABLE OF AUTHORITIES

Cases:

Cf. Lawson v. S.C. Dep't of Corrs., 2:20-cv-01527-DCC-MGB decided June 29, 202132

Graham v. Town of Latta, 417 S.C. 164, 184, 789 S.E.2d 71, 81 (Ct App. 2016)28

Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)24, 28

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650 (2006)31

Repko v. Cnty of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018)24, 28, 29, 30

Roundtree Villas v. 4701 Kins Corp., 282 S.C. 415 321 S.E.2d 46 (1984)30

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 388 (1991)31

Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991)32

Steinke v. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999)24, 29

Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006)31

Wright v. PRG Real Estate Mgmt., 426 S.C. 202, 826 S.E.2d 285 (2019)30

Yawn v. Dorchester Cnty, 1 4th 191, 196 (4th Cir. 2021)3, 33

Statutes:

S.C. Code Ann. § 15-78-10.....2, 27

S.C. Code Ann. § 15-78-20.....27, 28

S.C. Code Ann. § 15-78-60.....22, 24, 27, 28, 29, 30, 31, 32, 33

S.C. Code Ann. § 46-13-10.....24

S.C. Code Ann. § 46-13-20.....25

S.C. Code Ann. § 46-13-30.....25

Other:

Rule 56, SCRCP.....24

Section 27-1083(A)(4) of the Rules and Regulations for Enforcement of the South Carolina Pesticide Control Act.....26

COUNTER STATEMENTS OF ISSUES ON APPEAL

1. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' NEGLIGENCE AND GROSS NEGLIGENCE CLAIMS AS RESPONDENT COMPLIED WITH THE STATE LAW NOTICE PROVISIONS PRIOR TO THE SPRAY.
2. EVEN IF PRIOR PERSONAL CALLS TO BEE KEEPERS BEFORE MOSQUITO TREATMENT CREATED A DUTY ON BEHALF OF THE COUNTY, APPELLANTS' CLAIM IS BARRED PURUSANT TO THE TORT CLAIMS ACT, S.C. CODE ANN. § 15-78-60(4).
3. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANTS' TRESSPASS CLAIM AS THERE WAS NO "INTENTIONAL ACT."

STATEMENT OF THE CASE

This case stems from an aerial mosquito control spray conducted by Respondent, Dorchester County, (hereinafter “Dorchester County” or “the County”), to control mosquito-borne illness in August 2016. Appellants, Mitch Yawn and Jaunita Stanley, (hereinafter “Appellants” or “Yawn and Stanley”), claimed that the mosquito spray caused the death of the bees in 46 of their hives. On January 30, 2017, the Appellants filed suit in circuit court against Dorchester County, the Town of Summerville, Allen Aviation and Al Allen,¹ alleging claims for both United States and South Carolina Constitutional violations, as well as negligence, gross negligence and trespass claims pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*

Given the federal causes of action, Dorchester County removed the case to the District Court for the District of South Carolina on February 17, 2017. After extensive discovery was conducted, on December 16, 2019, the County filed a motion for summary judgment with regard to the federal causes of action. A hearing was held via telephone on February 26, 2020. Each party was represented by counsel at the hearing.

On May 5, 2020, the Federal District Court for the District of South Carolina granted Dorchester County’s motion for summary judgment as to the United States Constitutional Claims and remanded the remaining state law claims to state court. (See amended order of District Court dated May 5, 2020)². Appellants appealed the ruling to the United States Court of Appeals for the Fourth Circuit. On May 6, 2021, oral arguments were held via WebEx before the Fourth Circuit Court of Appeals. On June 11, 2021, in a published opinion, the United States Court of Appeals for the Fourth Circuit affirmed the district court’s order granting summary judgement on all of the

¹ Only Dorchester County remains as a defendant in the case.

² The original order granting summary judgment was issued on March 17, 2020. The Court issued an amended order on May 5, 2020.

federal claims and remanding the remaining state law claims to circuit court. *Yawn v. Dorchester Cnty.*, 1 F. 4th 191 (4th Cir. 2021).

On August 30, 2022, Dorchester filed a motion for summary judgment in circuit court with regard to Appellants' remaining state law claims. (See Motion for Summary Judgment and accompanying Memorandum in Support of Summary Judgment). On March 28, 2023, a hearing was held before the Honorable Roger M. Young, Sr., via WebEx. Again, both parties were represented by counsel. After consideration of the memorandums with exhibits filed by both parties as well as oral arguments, Judge Young granted Dorchester County's motion for summary judgment on Appellants' remaining causes of action. The order was filed on May 30, 2023. The Appellants filed notice of Appeal with this Court on June 13, 2023. (See notice of Appeal dated June 13, 2023).

STATEMENT OF THE FACTS

As stated above, this case stems from an aerial mosquito spray conducted by Dorchester County in August 2016. There were many considerations leading up to Dorchester County's decision to conduct an aerial mosquito control spray, as well as numerous actions taken in preparation by the County as well as the company that conducted the aerial spray. Therefore, the facts are somewhat voluminous. For ease of reference the Statement of the Facts is divided into three sections, 1) circumstances existing in 2016 that led to the County's decision to utilize an aerial spray; 2) preparation for and the aerial spray itself; and 3) the time period following the spray in which Appellants reported bee die-off from their hives.

Existing Circumstances in 2016 - Citizen Complaints regarding the Mosquito Population and Concern as to Mosquito Borne Illness, Including the National Media Frenzy Regarding the Spread of Zika Virus and Its Effects On Unborn Babies

Zika is a mosquito borne virus that for most people causes mild symptoms such as fever, headache, joint pain, rash, red eyes, and muscle pain³. However, for pregnant women, exposure to the Zika virus can have grave consequences. Zika exposure during pregnancy can cause severe birth defects to the unborn baby's brain, as well as miscarriage, stillbirth, other birth defects.⁴ Microcephaly has been the primary birth defect associated with babies exposed to the Zika virus in utero. Microcephaly is a birth defect where a baby's head is smaller than expected when compared to babies of the same sex and age. Babies with microcephaly often have smaller brains that might not have developed properly.⁵

³ <https://www.cdc.gov/zika/about/overview.html>; Zika can also be transmitted person to person via sexual contact.
Id.

⁴ <https://www.cdc.gov/zika/about/overview.html>

⁵ <https://www.cdc.gov/ncbddd/birthdefects/microcephaly.html>

In 2016, Zika virus became a nationally notifiable condition⁶. The Zika virus was spreading rapidly in South America, so much so that ahead of the 2016 Summer Olympics, the Center for Disease Control, (“CDC”), issued a travel warning to travelers to Brazil as well as 44 other countries and territories where the Zika virus was circulating.⁷ At this time, there was national concern regarding the spread of Zika to the United States.⁸ Lowcountry residents were concerned regarding the spread of Zika in the area and local governments were also working with the state to ensure preparedness in the event of an outbreak. (Dorchester County’s memorandum in support of summary judgment Exhibits R and S).

Clayton “Scott” Gaskins is the Mosquito Abatement Coordinator for the Appellant, Dorchester County, (hereinafter “Dorchester County” or “the County”). Mr. Gaskins has been employed with Dorchester County since December 1993. (Dorchester County’s memorandum in support of summary judgment, Exhibit A, p.10, lines 1-7). The Dorchester County Mosquito Abatement Program has evolved a great deal since Mr. Gaskins began with the department.

Sometime in the year 2000, Mr. Gaskins began overseeing the County’s Mosquito Abatement Program. (Dorchester County’s memorandum in support of summary judgment, Exhibit A, p.18, lines 14-21). Originally, no special training was necessary. In 2006, the State of South Carolina began requiring any person who oversees mosquito spraying to undergo training and receive a Public Health Category 8 license. (Exhibit A, p.22, lines 6-21). In order to receive the license, Mr. Gaskins had to take and pass the Core exam given by Clemson University which tests general knowledge of pesticide use. Once the Core exam is passed, the applicant, then must take and pass the Public Health Exam. (Dorchester County’s memorandum in support of summary

⁶ <https://www.cdc.gov/zika/reporting/2016-case-counts.html>

⁷ <https://www.nytimes.com/2016/07/24/health/travel-zika-virus-faq.html>

⁸ https://www.washingtonpost.com/national/health-science/why-the-united-states-is-vulnerable-to-spread-of-zika-virus/2016/01/26/a8c6a9b4-c440-11e5-8965-0607e0e265ce_story.html

judgment, Exhibit A, p.22, line 22-p.23, line 12). Mr. Gaskins took the course, passed the exams, and received his license in 2006. However, every year, he renews his license and every five years he must complete ten hours of continuing education. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.24, line 7-p.25, line 3).

In addition to the licensing requirements, Mr. Gaskins' duties as Mosquito Abatement Coordinator also expanded since he was originally hired. Initially, Mr. Gaskins was responsible for supervising one driver with one mosquito spraying truck and ensuring the driver knew how to operate the spraying machine safely and correctly. He also ensured that the driver was familiar with the area to be sprayed based on the mosquito complaints the county had received. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.10, lines 1-24; p.25, lines 9-25).

However, by 2015, due to the population growth, the County expanded the Mosquito Abatement Program to two trucks and two sprayers. (Exhibit A, p.26, lines 20-25). At this time, in an effort to improve the process, Mr. Gaskins consulted with Charleston County regarding a spraying method it was using in which mosquito spraying was done in zones rather than just at locations for which the County received complaints. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.27, lines 1-7). Utilizing this information, Mr. Gaskins split Dorchester County into 50 zones and made individual maps of each zone. He also made a priority sheet that he would distribute to the workers who were spraying for him. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.27, lines 7-17).

In addition to coordinating and supervising the truck mosquito spraying that occurred at night, Mr. Gaskins was and still is responsible for taking phone calls regarding mosquito complaints, scheduling night spraying, entering the information into the computer, treating low-

lying swampy areas with briquettes to control mosquito larvae, and responding to people's homes who have mosquito complaints. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.34, line 7-p.36, line 10).

Mr. Gaskins testified that he has the authority to choose the type of pesticide used for mosquito abatement, and that he does this with the guidance and consultation of Trey English, the representative from Adapco, the pesticide company from which the County purchases the pesticides. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.37, line 20-p.38, line 5). When asked about whether any information regarding pollinators such as bees, butterflies or birds pollinating habitats, is taught in either the licensing or continuing education classes, Mr. Gaskins testified in the affirmative. Mr. Gaskins stated that the primary emphasis in his classes regarding pesticide use and pollinators is to always follow label instructions. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.39, lines 3-22). Mr. Gaskins testified that the label instructions contain the best times to spray so as to not affect the pollinators. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.40, lines 4-14).

In 2016, Mr. Gaskins stated that he personally had a list of residents that lived in the County that kept bees. He estimated that there were approximately 14 to 15 people on the list, and that he kept their names, addresses, and zone on a map. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.40, lines 19-25). Mr. Gaskins stated that there is no requirement for personal notification to individual beekeepers, however, as a courtesy, he took it upon himself to contact them when the truck would be out at night doing mosquito spraying. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.41, lines 1-5;

p.80, lines 5-10). He stated that at the time, the Plaintiffs were on his list. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.41, lines 18-20).

Mr. Gaskins testified that in 2016 the Zika virus "was a big issue" and that 2016 was a "very scary time" because of the effect that the virus could have on an unborn baby's brain size. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.44, line 210p.45, line 9). Mr. Gaskins stated that West Nile Virus and other mosquito borne illnesses are always a concern, but in 2016, the number one topic at any conferences was Zika. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.45, lines 10-14). In 2016, there were three cases of travel related Zika virus in Dorchester County. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.45, lines 18-25).

Mr. Gaskins testified that in 2016, Chris Evans, an entomologist with the South Carolina Department of Health and Environmental Control, ("DHEC"), contacted him to tell him about the Zika cases in Dorchester County and to provide the individuals' addresses. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.46, line 18 -p.47, line 5). Mr. Gaskins was told by DHEC that these specific addresses including a certain radius around the specific addresses needed to be treated for mosquitos. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.46, line 14-p.48, line 20). The first two Zika notifications from DHEC to Mr. Gaskins at Dorchester County occurred on August 9, 2016, and August 15, 2016. (Id).

As a result of the DHEC notifications, Mr. Gaskins testified that the County sent both trucks to spray for mosquitos at night, and that he went through the neighborhoods going door to door, making sure that there was no standing water. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.48, line 21-p.7). However, Mr. Gaskins testified that

there were places that he could not get to in order to spray. He stated that there were a lot of wooded areas that his trucks could not get into and that the area was too vast for someone to walk through and hand spray. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.49, line 18-p.50, line 2). Mr. Gaskins stated that at this time, he told his boss, Jackie Walters, that he had done everything he could do with regard to mosquito control with the equipment and resources available. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.50, line 14-p.51, line 22).

Mr. Gaskins testified that he had been suggesting aerial spraying to his supervisor for many years, and it had been discussed within the County in years past but Dorchester County had not conducted aerial mosquito sprays prior to August 2016 due to budget constraints. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.52, line 13-p.53, line 12). However, in June or July 2016, the County decided to establish a contract for aerial mosquito spraying due to the high mosquito populations. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.56, lines 9-24). According to Mr. Gaskins, Jason Ward, the Dorchester County Administrator, instructed him to call Charleston and Berkeley Counties to inquire as to who they use for aerial mosquito spraying and to ask whether they had an established contract with an aerial spraying company. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.57, lines 11-15).

Mr. Gaskins testified that Berkeley County had a contract with Allen Aviation for aerial mosquito spraying and that Dorchester County could use the established prices from its contract." (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.58, lines 1-8). Mr. Gaskins was not involved in the contract negotiations, but testified that Dorchester County pursued the contract with Allen Aviation so the County would be prepared to do an aerial mosquito

spray in the event the County's spraying by truck and hand was not sufficient. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.59, line 19-p.60, line 11). The County entered into a contract with Allen Aviation for aerial mosquito spraying on July 21, 2016. (Dorchester County's memorandum in support of summary judgment, Exhibit J).

With regard to the aerial spray at issue in this case, Mr. Gaskins testified that he had received notification from DHEC regarding the Zika cases in the county. During the same time period, he got complaints from the administration at Summerville Elementary, which was located in the area of the Zika cases as well as a call from a resident who lived near Summerville Elementary School, complaining that "the children are being absolutely tore up by mosquitos" and that "the mosquitos are absolutely horrible." (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.61, lines 8-19). Mr. Gaskins stated that he went to his boss with the information and asked him what the County wanted to do. (Exhibit A, p.61, line 20-62, line 2).

Mr. Gaskins testified that the large population of mosquitos combined with the travel Zika cases was a public health emergency. He stated that the complaints demonstrated how bad the mosquito populations were in the area where the two travel Zika cases were located. Mr. Gaskins stated that the people infected with the Zika virus were supposed to remain quarantined in their houses. However, if they did go outside, they could get bitten by mosquitos which in turn could infect others. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.63, line 15-p.64, line 7)

Jason Ward, the County Administrator, likewise, testified that Dorchester County had not conducted aerial sprays in the past, but citizen concern with the mosquito population, and the fact that Dorchester County had been informed by DHEC that travel related cases were located in

Dorchester County, was the genesis of the aerial mosquito spray. Mr. Ward testified that DHEC suggested that Dorchester County do targeted mosquito spraying because there was evidence of Zika in Dorchester County. (Dorchester County's memorandum in support of summary judgment, Exhibit G, p.13, line 6-p.14, line 1). Mr. Ward stated that the particular area to be treated was not easily accessible with ground spraying, so the County decided to do aerial spraying. (Id).

Mr. Ward testified that prior to DHEC notification, the County had already begun exploring aerial mosquito spraying as 2016 was a wet year that generated more mosquitos than normal and they were already trying to knock down the mosquito population. (Dorchester County's memorandum in support of summary judgment, Exhibit G, p.16, lines 16-20). He stated that County Council was receiving citizen complaints and questions as to whether the County was doing everything possible to control the mosquito population. (Dorchester County's memorandum in support of summary judgment, Exhibit G, p.32, lines 15-22). Accordingly, in late June or early July 2016, Mr. Ward requested and received funding from Dorchester County Council for additional mosquito control chemicals and briquettes and as well as to allow for aerial spraying if needed. (Dorchester County's memorandum in support of summary judgment, Exhibit G, p.36, lines 4-20.) According to Mr. Ward, the DHEC notification of Zika Virus in the County and directive that the County do targeted spraying of locations that included areas that were inaccessible by truck or hand, was just one more reason that the decision to conduct the aerial mosquito spray was made. (Dorchester County's memorandum in support of summary judgment, Exhibit G p.16, lines 16-23; p.32, line 23-p.33, line 6). Mr. Ward also stated that Dorchester knew that Charleston County and Berkeley County were both utilizing aerial mosquito spraying. (Dorchester County's memorandum in support of summary judgment, Exhibit G p.16 line 24).

Tracey Langley is the current Clerk to Dorchester County Council. However, in 2016, she was the acting public information officer for Dorchester County and the administrative assistant to Jason Ward, Dorchester County's administrator. (Dorchester County's memorandum in support of summary judgment, Exhibit E p.10, line 21-p.12, line 2). Ms. Langley testified that in 2016, the County was receiving an enormous amount of calls into the County administrator's office about mosquitos. (Dorchester County's memorandum in support of summary judgment, Exhibit E p.20, lines 5-16). She stated that not only was the County receiving calls from constituents but also from other towns that are within the County as well as DHEC, about mosquito control. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.20, lines 14-19). Ms. Langley testified that constituents were attending County Council meetings and requesting that the County conduct aerial sprays. She also stated that the historic flooding in October of 2015 combined with the large number of wetlands in the area caused a bad mosquito problem in 2016. She further stated that people were complaining and demanding that the County do something to better control the mosquito population. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.20, line 19-p.21, line 8).

David Chinnis, the chairman of Dorchester County Council in 2016, also testified that constituents in Dorchester County were very concerned with the transmission of Zika as "the media had been covering Zika very strongly." (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.11, lines 9-15; p.11, lines 12-23). Mr. Chinnis stated that Council began discussing doing an aerial spray as it would enable them to cover areas not accessible by truck, and they knew that Berkeley and Charleston Counties were already doing aerial sprays. (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.13, line 18-p.14, line 5). Mr. Chinnis testified, "we had heard stories about Miami. I mean, again, this is a

big - - its all over the media . . . and for [Dorchester County] to show up, you know as having Zika in Summerville because somebody got it as a result of something we had failed to do, to me wasn't an option." (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.14, line 25-p.15, line 8).

The factors discussed above, the discussions amongst the Dorchester County Council, the County Administrator, Dorchester County Facilities Management/Mosquito Abatement Department and Allen Aviation, the company that would actually perform the aerial mosquito spray, all cumulated with a decision that Dorchester County would conduct aerial mosquito control spraying in August of 2016. According to Mr. Gaskins, (head of mosquito abatement for the County), the label on the pesticide stated that the spray had to occur two hours before sunrise or two hours after sunset. (Dorchester County's memorandum in support of summary judgment, Exhibit I). Further, South Carolina State law required that the public be given 24-hour notice before an aerial spray. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.66, line 20-p.67, line 5). Due to a high school football game Friday evening and the Summerville Farmer's Market on Saturday morning, Dorchester County decided to conduct the aerial mosquito control spraying on Sunday August 28, 2016 between the hours of 6:30 a.m. and 8:30 a.m. (Dorchester County's memorandum in support of summary judgment, Exhibit K; Exhibit A, p.66, line 21-p.67, line 25).

Ms. Langley was responsible for writing the press release notifying the citizens of Dorchester County of the upcoming August 28, 2016, aerial mosquito spray. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.36, lines 1-9; Exhibit K). A map of the area that would be sprayed was attached to the press release. (Dorchester County's memorandum in support of summary judgment, Exhibit K; Exhibit E, p.39, lines 13-17). Ms.

Langley testified that she sent the release to the following media outlets, Channel 2; Channel 4; Channel 5; the Post and Courier; Summerville Journal Scene; The Eagle Record; radio stations 103.5; 102.5; 94.3; and 104.5. She also believes the press release was sent to the Charleston City Paper, and The State. The Town of Summerville also would have received the press release so they could post the information on their website, and social media sites. (Dorchester County's memorandum in support of summary judgment, Exhibit E p.36, line 9-p.37, line 3).

Ms. Langley stated that she knew for sure that Channel 4 and Channel 5 had the information on their Friday night and Saturday broadcasts, and that she believed it was on their websites. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.37, lines 4-17). She stated that the Post and Courier and the Summerville Journal Scene both had the information on their websites, and she believed that the Journal Scene put the information on its Facebook page as well. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.37, line 18-p.38, line 6). With regard to the Journal Scene, Ms. Langley testified that the notice was not in the physical edition of the paper, but only on the online edition and Facebook page. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.38, lines 12-23).

Ms. Langley was asked whether the presence of citizens with Zika had anything to do with the aerial spray and the location that was covered by the aerial spray. Ms. Langley responded that the presence of Zika was a component of the concern for the public's safety, but also included in that concern were all of the other diseases that mosquitos carry and transmit, as well as the fact that there were areas that were inaccessible by foot or truck. (Dorchester County's memorandum in support of summary judgment, Exhibit E, p.46, line 21-p.47, line 24; p.48, lines 3-23).

Preparing for and Completion of the August 28, 2016, Aerial Mosquito Spray

As stated above, Allen Aviation was the contractor hired by Dorchester County to conduct the aerial mosquito spray. In preparation for the aerial mosquito spray, Dorchester County Mosquito Abatement Officer, contacted David Garber, the GIS map Coordinator for Dorchester County, to see if Mr. Garber could adapt the current mosquito abatement zone shapefile maps for aerial mosquito spraying. (Dorchester County's memorandum in support of summary judgment, Exhibit D, p.9, lines 19-21; p.23, lines 11-19). The shapefile maps would be given to Allen Aviation to use during the aerial spray. (Dorchester County's memorandum in support of summary judgment, Exhibit D, p.23, lines 17-19).

Mr. Garber testified that in early August 2016, the County did a few tests with Allen Aviation transmitting the map data back and forth to ensure that Allen Aviation could use the map data in their system. (Dorchester County's memorandum in support of summary judgment, Exhibit D, p.23, lines 20-24). The map data transmitted by the County to Allen Aviation was in WGS 84. According to Mr. Garber, this software provides coordinates by longitude and latitude carried out to the 12th digit and allows the user to locate a target within a few inches. According to Mr. Garber, "its how you drop a bomb." (Dorchester County's memorandum in support of summary judgment, Exhibit D, p.26, lines 3-8). On August 22, 2016, Mr. Garber sent a map and two files which included the location of all known beekeepers in the area. (Dorchester County's memorandum in support of summary judgment, Exhibit D, p.29, lines 3-24; Exhibit L).

Mr. Al Allen is one of the owners and the pilot for Allen Aviation. Mr. Allen spent six years in the Air Force, and previously worked for the Florence City Police Department, the Conway City Police Department, and the Horry County's Sherriff's Office. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.5, lines 4-11). He bought Allen

Aviation in 2001, and has been employed as a pilot with Allen since that time. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.5, lines 17-22). Allen Aviation's main service is aerial application of chemicals and fertilizer. (Exhibit B, p.15, lines 7-17).

In addition to his many years of piloting experience, Mr. Allen has attended Agricultural Flight School, where he began a certified 137 operator/agriculture pilot⁹, and has attended numerous continuing education courses and recertification courses with Clemson, the Department of Pesticide Regulation, and the North Carolina Department of Agriculture. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.21, lines 5-23). Mr. Allen has also been certified by Clemson as a commercial aerial pesticide applicator, and is also licensed in the states of North Carolina, Georgia, Florida, Illinois, Indiana, Mississippi, and Tennessee. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.22, line 21-p.23, line 3).

Mr. Allen testified that approximately 15-20 percent of his business is aerial mosquito spraying. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.24, lines 9-20). His aerial mosquito spraying contracts are with Horry County, Berkeley County, and the one spray with Dorchester County. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.24, lines 22-25).

Mr. Allen testified that when he is contracted for an aerial mosquito spray by a county, the county's GIS department will send a shapefile of the area to be sprayed. After receiving the map, Allen will then work with the County to confirm the area to be sprayed and the chemical product to be used. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.28,

⁹ The FAA and the Federal Aviation Regulations, for a pilot to dispense economic fertilizer, or pesticides, he or she must be certified through the FAA as a 137 operator. (Exhibit B, p.22, lines 9-20)

lines 1-16). Once Allen has the chemical product on hand, he will again sit down with the maps and look over the air space for any towers, controlled airspace, obstacles or special areas such as large lakes or power plants. Next, he confirms the date with the county, and discuss the timing of the spray. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.28, line 18-p.29, line 3). He stated that the county will then make a public address post to inform the public of the time and date of the aerial spraying. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.29, lines 4-9). According to Mr. Allen, the time of the spray is also dictated by the label on the chemical to be applied, and that the time of day must be within the label constraints. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.34, line18-p.35, line 14).

With regard to the actual equipment on the plane that releases the pesticide product, Mr. Allen testified that Trey English, the sales person for the pesticide, as well as Charleston County Mosquito Control calibrates the plane's system and ensures that the product will be applied at the proper rate per acre. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.44, lines 3-21). Following an aerial spray, Mr. Allen will print a record of the acreage completed and the amount of pesticide that was actually disbursed. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.46, lines 4-14). If a client requests that an area not be sprayed, Mr. Allen stated, it will be shown on the map provided, and that he will cut off the spray prior to flying over the location, while he is over it, and for a period of time after he passes the location. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.47, line15-p.48, line 2). Industry standard is to cut off the spray three seconds before he is over the center of the do not spray location. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.49, lines 3-20).

With regard to the spray at issue in this case, Mr. Allen testified that Dorchester County contacted Allen for an aerial spray in July or August 2016. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.53, line 19-p.54, line 14). Per normal routine, he received the shapefile target maps from Dorchester County for the spray. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.95, lines 17-23, Exhibit Q). The map from the County contained the locations of two beehive sites within the target spray area, marked with a red circle, a triangle and an exclamation point. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.96, lines 11-21, Exhibit Q). Mr. Allen stated that there were no other exclusion zones on the map, with the exception of the two red dots that he was told were beehive locations. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.71, lines 7-12).

With regard to the flight itself, Mr. Allen testified that the County had the pesticide product drop shipped to him, and that he confirmed the application instructions per the product label. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.71, line 17-p.72, line 5). Mr. Allen stated that he informed the County that he would apply the product in the morning up until two hours after sunrise. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.74, lines 8-10). Accordingly, on the day of the aerial application, they began the application process in air, approximately 6:35, which was a few minutes before official sunrise. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.78, lines 1-7).

Mr. Allen testified that during the aerial spray he used the maps provided by the County with the beehive markers to make his determination as to when to turn of the sprayer during the flight. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.97, lines

4-8). In fact, Mr. Allen testified that he specifically remembered cutting off the sprayer as he approached the beehive locations per the map. (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.80, lines 1-5). Mr. Allen said that the aerial spray was a "standard unit flight" and "uneventful." (Dorchester County's memorandum in support of summary judgment, Exhibit B, p.84, lines 3-12).

Appellants Contact the County Claiming Bee Die-Off Due to Aerial Spray

On August 29, 2016, one day after the spray, Mr. Gaskins, of Dorchester County Mosquito Abatement was contacted by Appellant Mitchell Yawn who stated he was not informed regarding the aerial mosquito spray, and that he lost approximately 50 bee hives after the aerial spray¹⁰. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.79, lines 19-24). Mr. Gaskins testified that upon receiving Yawn's message, he looked back at his beekeeper list and realized that when making the courtesy calls regarding the upcoming aerial spray, he mistakenly called the individual above Yawn's name, and not Mr. Yawn. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.78, line 25-p.79, line 5). Mr. Gaskins stated that he called Yawn back, told him that he made a mistake, and apologized to him. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.81, lines 5-18). Mr. Gaskins testified that he also informed his boss about the call and that his boss informed Dorchester County Administrator Jason Ward regarding the situation. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.79, lines 13-20; Exhibit M; Exhibit N). Mr. Ward informed Dorchester County Council of the situation, and began to conduct an investigation to determine what happened and if the aerial spray contributed to the bee die-off.

¹⁰ The County contests the number of honeybees the Plaintiffs claim to have lost as well as the income Plaintiffs claim to have lost as a result of the honeybee deaths. However, the County does not dispute that the Plaintiffs lost honeybees during the immediate timeframe after the spray.

(Dorchester County's memorandum in support of summary judgment, Exhibits M and O). During the investigation, Mr. Chinnis, Chairman of County Council testified that he was informed that Mr. Gaskins had "[taken] it upon himself to call folks that he knew. . . had bees, and that he routinely did that, and that there was a possibility that he had either called the wrong number or not gotten someone at one of those numbers." (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.21, lines 17-24)

Due to the number of calls, the County requested and opened the next day, a Call Hotline for anyone with questions regarding the spray or to report bees affected by the spray. (Dorchester County's memorandum in support of summary judgment, Exhibit G, p.58, lines 3-16). Additionally, on August 29, the County began receiving emails from news outlets, individuals and social media posts accusing the County of killing bees. One email received by Mr. Gaskins on August 29, from a reporter with WCIV/ABC News 4 states in pertinent part, "We are covering a story at a farm in Summerville. The beekeeper says mosquito spraying is killing her bees and her profits. Have you ever hearing anything like this before?" (Dorchester County's memorandum in support of summary judgment, Exhibit P). A social media post on the morning following the spray states "words cannot describe the devastating loss literally thousands upon thousands of bees from these couple of dozen beehives killed by aerial spraying [sic] not only is this devastating to the bees but also this person's livelihood [sic] tens of thousands of dollars loss [sic] have we lost our mind spraying poison from the sky." (Dorchester County's memorandum in support of summary judgment, Exhibit O; Exhibit F, p.40, lines 1-15).

While the County received numerous, calls and emails, the Appellants are the only people who claim to have lost bees as a result of the aerial spray. Nonetheless, the County contacted Clemson University's Department of Pesticide Regulation, the entity responsible under South

Carolina law, for regulating and investigating pesticide use and complaints. The Clemson Department of Pesticide Regulation performed an investigation, which included interviewing Appellant Stanley and observing the hives, collecting a representative sample of the bees as well as taking an “unofficial third-party sample of bees from Appellant Stanley which were analyzed at the Department of Pesticide Regulation’s Pesticide Residue Lab, meeting with County employees and officials, meeting with Allen Aviation and reviewing Allen’s records, reviewing the pesticide used in the aerial spray, and confirming with SCDHEC that Dorchester County had been notified of cases of travel related Zika virus in Dorchester County on August 9 and 15, 2016, and had provided maps to Dorchester County showing a mosquito target zone. (Dorchester County’s memorandum in support of summary judgment, Exhibit H).

While the report did not rule out the pesticide used in the mosquito spray as a cause of the Appellants’ loss of bees, it found no violations as to the aerial mosquito spray:

This investigation found no violations occurred as a result of the Trumpet EC application performed on August 28th. This conclusion was supported by the following statements: the nature and timing of the pesticide application was published in a mass media outlet greater than 24-hours prior to the application, the application was performed at or below the labeled rate, the application was not applied more than 2 hours after sunrise, and the application was performed to prevent a threat to public health after identifying the occurrence of a mosquito-borne disease in the human population.

(Dorchester County’s memorandum in support of summary judgment, Exhibit H).

Even though the Clemson report found no violations and could not definitively state what caused the Appellants’ loss of bees, the County tried to work with the Appellants toward a resolution. Mr. Chinnis testified that he discussed the potential for an insurance claim against the County if the bees did die as a result of the spray with the Appellants. (Dorchester County’s memorandum in support of summary judgment, Exhibit C, p.30, lines 1-8). Mr. Chinnis also met

with the Plaintiffs and requested that they fill out the insurance paperwork to start a claim against the County; asked them to get the County information regarding the value of the lost bees; and even suggested that he would try to get a vote through on County Council to use some of the County's contingency funds to help pay for replacement bee costs. (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.32, line 5-p.33, line 13). In fact, Mr. Yawn provided information regarding the value of the bees to Mr. Chinnis, but the Plaintiffs never gave the County the completed paperwork to process the claim. (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.33, lines 14-22). Mr. Chinnis stated that once the Appellants hired an attorney, he did not have any further discussions with the Appellants and litigation subsequently ensued. (Dorchester County's memorandum in support of summary judgment, Exhibit C, p.33, lines 22-25).

The County has wide discretion in its operation of its mosquito abatement program. The evidence in the record demonstrates that with regard to the decision to conduct an aerial mosquito spray, the County, both in the time period leading up to the aerial mosquito spray and during the aerial mosquito spray, weighed competing alternatives and utilized professional standards. There is no issue of material fact that the County complied with South Carolina State Law with regard to the aerial mosquito spray, including compliance with the notification provisions. (See Clemson Report). As to Appellants' claim that the County was negligent in failing to personally notify them prior to the spray, even if Mr. Gaskins' previous courtesy calls to beekeepers created a duty, Appellants claims are barred by S.C. Code Ann. 15-78-60(4), which states in pertinent part that a governmental entity is not liable for the "adoption, enforcement, or compliance with any law or failure to adopt any law, whether valid or invalid, including *but not limited to*, any charter, provision, ordinance, resolution, rule, regulation, or written policies[.]" (emphasis added). Finally,

Appellants' trespass claim fails as they cannot satisfy the "intentional act" requirement. Accordingly, the circuit court properly granted summary judgment, and the order should be affirmed.

ARGUMENT

Standard of Review

On review of a grant of summary judgment, the Appellate Court applies the same standard that governs the trial court, namely, summary judgment is properly granted when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRCP; *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. *Id.*”

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS’ NEGLIGENCE AND GROSS NEGLIGENCE CLAIMS AS RESPONDENT COMPLIED WITH STATE LAW NOTICE PROVISIONS PRIOR TO THE SPRAY.

In a negligence action, “[t]he court must determine as a matter of law, whether the law recognizes a particular duty.” *Repko v. Cnty of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) citing *Steinke v. Dep’t of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). If there is no duty, then the defendant in a negligence action is entitled to a directed verdict. *Id.* In this appeal, Appellants claim that the County was negligent and grossly negligent because it did not personally notify them of the aerial mosquito spray¹¹.

Pesticide use in South Carolina is governed by the Pesticide Control Act, S.C. Code Ann. 46-13-10 *et seq.* The Act delegates authority regarding pesticide use to the “director” which is

¹¹In their initial brief, Appellants do not address their previous arguments that the County was negligent in that it should not have conducted an aerial spray but rather, should have used “reasonable alternative methods of killing mosquitos” and that the chemical used during the aerial spray was improper. To the extent, these arguments are considered, Dorchester County refers to and incorporates its memorandum in support of summary judgment. See also S.C. Code Ann. § 15-78-60(1) and (5).

defined as “the Director of the Division of Regulatory and Public Service Programs, College of Agricultural Sciences, Clemson University.” S.C. Code Ann. § 46-13-20(k). The director is responsible for promulgating regulations regarding the use of pesticides in the state of South Carolina. S.C. Code Ann. §. The Regulations are contained in Article 17 of the South Carolina Pesticide Control Regulations and govern among many things, the products that can be used as a pesticide, adherence to the products’ labeling instructions, notice provisions to the public when a pesticide is going to be used, as well as investigatory duties when there is an alleged violation of the Regulations.¹² <https://www.clemson.edu/public/regulatory/pesticide-regulation/pdfs/rules-and-regs-dpr.pdf>.

Following notification from Dorchester County of the bee die off, pursuant to the duties delegated to it by the South Carolina Pesticide Act, The Clemson Department of Pesticide Regulation conducted an investigation and determined that the aerial spray performed by Dorchester County on August 28, 2016, did not violate any Rules or Regulations for the Enforcement of the South Carolina Pesticide Control Act. (Exhibit H).

Specifically, the Clemson Department of Pesticide found that the mosquito spray was performed pursuant to the labeling instructions on the pesticide in that “the application was performed at or below the labeled rate” and “was not applied more than two hours after sunrise.” (Exhibit H). The Clemson Department of Pesticide further determined that the mosquito spray “was performed to prevent a threat to public health after identifying the occurrence of a mosquito-borne disease in the human population. (Exhibit H).

¹² The regulations govern a voluminous number of topics ranging from licensing requirements of applicators to enforcement of violations.

With regard to notice, Section 27-1083(A)(4)¹³ of the Rules and Regulations for Enforcement of the South Carolina Pesticide Control Act provides:

For non-commercial applicators only, or for commercial applicators making applications for and under the direct supervision of a governmental entity, the disclosure requirements of the Above Sections may be met by announcement or publication of the nature and timing of pesticide applications in the appropriate media outlets not less than 24 hours prior to the application.”

There is no personal or individual notice requirement in the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act.

The Clemson investigation found that the Department of Public Relations for the County provided appropriate notice of the nature and timing of the pesticide application as it “was published in a mass media outlet greater than 24-hours prior to the application.” (Exhibit H). In fact, Tracey Langley testified that she created the press release and that in addition to the Summerville Journal Scene, she sent it to Channel 2; Channel 4; Channel 5; the Post and Courier; The Eagle Record; radio stations 103.5; 102.5; 94.3; and 104.5, and the Town of Summerville. (Defendant’s memorandum in support of its motion for summary judgment, Exhibit K; Exhibit E p.36, line 9-p.37, line 3). Ms. Langley further testified that The Town of Summerville also would have received the press release so they could post the information on their website, and social media sites. (Exhibit E p.36, line 9-p.37, line 3).

Ms. Langley stated that she knew for sure that Channel 4 and Channel 5 had the information on their Friday night and Saturday broadcasts, and that she believed it was on their websites. (Exhibit E, p.37, lines 4-17). She stated that the Post and Courier and the Summerville Journal Scene both had the information on their websites, and she believed that the Journal Scene put the

¹³ The Clemson Report references section 27-1084(A)(4), but this appears to be a typo-graphical error as 27-1083(A)(4) contains the notice requirements.

information on its Facebook page as well. (Exhibit E, p.37, line 18-p.38, line 6). With regard to the Journal Scene, Ms. Langley testified that the notice was not in the physical edition of the paper, but only on the online edition and Facebook page. (Exhibit E, p.38, lines 12-23).

As determined by Clemson's Department of Pesticide Regulation, the County complied with the law and provided the required notice which was published in, and broadcast on all of the mass media outlets listed above. Accordingly, there is no issue of fact that the County complied with the notice provisions and summary judgment was proper.

II. EVEN IF PRIOR COURTESY CALLS TO BEEKEEPERS BEFORE MOSQUITO TREATMENT CREATED A DUTY, THE CIRCUIT COURT PROPERLY HELD THAT APPELLANTS' CLAIM IS BARRED PURSUANT TO THE TORT CLAIMS ACT, S.C. CODE ANN. § 15-78-60(4).

Even though the County complied with South Carolina state law notice requirements with regard to the aerial spray, Appellants contend that in addition to the notice provided to the public via mass media outlets, the County should have also personally notified them prior to the aerial spray. This position is based on Mr. Gaskin's previous calls to area beekeepers prior to sending out County trucks to treat for mosquitos. Initially, it should be noted that there is no issue of fact that Dorchester County had never conducted an aerial mosquito spray in the past. (Dorchester County's memorandum in support of summary judgment, Exhibit A, p.52, line 13-p.53, line 12; Exhibit G, p.13, line 6-p.14, line 1). Therefore, there is no history of action prior to an aerial spray. However, even if there was a duty based on Mr. Gaskin's previous actions, the Appellants claim is barred by the Tort Claims Act.

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq, governs all tort claims against governmental entities and is the exclusive civil remedy for any alleged tort committed by a governmental entity or its employees or agents. S.C. Code Ann. § 15-78-20. It is "the public policy of the State of South Carolina that the State, and its political subdivisions, are

only liable for torts within the limitations of this chapter and in accordance with the principles established herein.” *Id.* However, within the Tort Claims Act, the Legislature preserved the State’s immunity from certain claims. The provisions of the Act state that it “must be liberally construed in favor of limiting the liability of the State.” S.C. Code Ann. § 15-78-20(f).

South Carolina Code Ann. § 15-78-60 provides for certain exceptions to the waiver of immunity¹⁴. The exception most applicable to Appellants’ claim that personal notification prior to mosquito treatment was a County policy and practice and thus required is S.C. Code § 15-78-60(4) which provides in pertinent part, that a governmental entity is not liable for a loss resulting from:

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, ***including, but not limited to***, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

(emphasis added).

In *Repko v. Cnty of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018), the South Carolina Supreme Court addressed similar claims of negligence regarding a county’s failure to properly administer its own policies and regulations. In *Repko*, Harmony Holdings began developing a residential subdivision in Georgetown County. Georgetown county had a regulation in place that allowed a developer to post a financial guarantee such as cash, bonds or letters of credit, with the county in lieu of completing required infrastructure such as roads, drainage, sewer, etc., prior to selling residential lots. *Id.* at 498, 881 S.E.2d 743, 746. Acceptance of a financial guarantee was

¹⁴ Appellants to not address their previous arguments that the County should not have conducted an aerial spray or that the chemical used during the spray was improper. However, both the decision to conduct and aerial spray and chemical used fall squarely into “legislative, judicial or quasi-judicial action” as contemplated by S.C. Code Ann. §15-78-60(1). It also constitutes the exercise of discretion as stated in S.C. Code. Ann. § 15-78-60(5). See also *Graham v. Town of Latta*, 417 S.C. 164, 184, 789 S.E.2d 71, 81 (Ct App. 2016); *Hawkins v. City of Greenville*, 358 S.C. 280, 293, 594 S.E.2d 557 (Ct. App. 2014).

within the discretion of the county. *Id.* Georgetown County also had policies and procedures in h if handled properly, as the developer completed certain stages of infrastructure, the county would take steps to verify completion of the work, and notify the issuing bank that the letter of credit could be reduced accordingly. *Id.*

In *Repko*, Georgetown County, in its discretion, allowed the developer to submit a letter of credit rather than completing the infrastructure and to begin selling residential lots in the development. Over a period of time, the developer submitted and the County approved, four requests to reduce the letter of credit. After the fourth reduction, the letter of credit totaled \$156,704.03. However, the cost of completing the remaining infrastructure in the residential development was over one million dollars. *Id.* at 499, 881 S.E.2d 743, 746. The developer then informed the county that it no longer had the financial means to complete additional infrastructure and declared bankruptcy. *Id.* Those who purchased residential lots in a certain phase of the development were unable to build on their lots because the infrastructure had not been completed. *Id.*

Plaintiff Repko was one of the property owners unable to build on his lot, and filed suit against Georgetown County alleging that the County was negligent and grossly negligent in failing to comply with its own rules, regulations and policies to verify that the infrastructure work had been completed before approving the requests to reduce the letter of credit. Georgetown County asserted various defenses including S.C. Code Ann. § 15-78-60(4). In its opinion, the South Carolina Supreme Court addressed only the application of this section.

The *Repko* Court first recognized that in a negligence action, “[t]he court must determine as a matter of law, whether the law recognizes a particular duty.” *Id.* citing *Steinke v. S.C. Dep’t of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). “If there is no

duty, then the defendant in a negligence action is entitled to a directed verdict.” *Id.* The Court first held that it need not determine whether the regulation created a duty of care, because “even if such duty was created, the County is immune from liability to Repko under subsection 15-78-60(4) of the TCA.” *Id.* at 500, 881 S.E.2d 743, 747. It then recognized that “because subsection (4) does not contain a gross negligence standard, standing alone, subsection (4) would entitle the County to immunity from liability from its failure to comply with or enforce its regulations.” *Id.* at 504, 818 S.E.2d 743, 749.

The Court continued, and held that it was improper to read into subsection (4) the gross negligence standard contained in subsection (12) solely because Georgetown County pled subsection (12). *Id.* The Court stated “in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence provision must first apply to the case.” *Id.* at 507, 818 S.E.2d 750. As subsection (12) was not applicable to *Repko*, the Court held that Georgetown County was immune from Plaintiff’s suit pursuant to S.C. Code § 15-78-60(4).

In the case at hand, even if Mr. Gaskins prior personal calls to beekeepers created a duty, the circuit court properly held that Appellants claims fail pursuant S.C. Code Ann. § 15-78-60(4). As in *Repko*, Appellants contend that the County breached a duty in that it failed to follow its own rules, policy, procedure, or however characterized, to personally call bee keepers prior to a spray.

First, the Appellants argue that “the existence of an assumed duty is a mixed question of law and fact” and cite to *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 826 S.E.2d 285 (2019) and *Roundtree Villas v. 4701 Kins Corp.*, 282 S.C. 415 321 S.E.2d 46 (1984) (Appellants’ brief, p.12), neither of which involved the application of the Tort Claims Act. However, in its order, the

circuit court did not grant summary judgment solely on the basis that there was no duty. Rather, the circuit court held that “even if there was a duty to call Plaintiffs prior to the spray, the County is immune from suit pursuant to S.C. Code Ann. § 15-78-60(4). In *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), a case cited by Appellants in support of this position, the Court held that even if “a governmental entity owes a duty of care to a plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in S.C. Code Ann. § 15-78-60 (2005 Supp. 2005) which are asserted by the governmental entity. *Madison ex Rel. v. Babcock*, 371 S.C. 123, 142, 638 S.E.2d 650 (2006)¹⁵. In the present case, that is exactly what the circuit court did; it found that even if Mr. Gaskins’ prior phone calls created a duty on behalf of the County, the Tort Claims Act, specifically, S.C. Code Ann. § 15-78-60(4) was applicable and barred Appellants’ claims.

Next, in an attempt to avoid the verbiage in S.C. Code Ann. §15-78-60(4), the Appellants characterize Mr. Gaskins previous personal phone calls to bee keepers as the County’s “pledge,” “routine,” or “adopted practice” and contend that S.C. Code Ann. § 15-78-60(4) is not applicable as Mr. Gaskins’ practice was never “codified as a law, or as a written policy having the force of law.” (Appellants’ Initial Brief, p.14). However, S.C. Code Ann. § 15-78-60(4) applicability is not limited only to “codified law” or “written policy having the force of law.” In fact, section (4) specifically states that the applicability is **not limited** to the examples written in the section:

¹⁵ Appellants also cite to *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 388 (1991), and *Vaughan v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006), however, neither are applicable to the case at hand. *Russell* involved a judgment on the pleadings and did not apply the Tort Claims Act. In *Vaughan*, the circuit court granted summary on the basis that there was no duty act and therefore, did not consider the application of the Tort Claims Act. While the summary judgment order was reversed, as stated by Justice Pleicones in his concurring opinion, “I therefore agree with the majority to the extent it holds that summary judgment was improperly granted to Lyman on the common law duty theory as there are general issues of material fact whether Lyman exercised a sufficient degree of control over the . . . sidewalk to give rise to a common law duty. If such duty is found, then the circuit court must consider Lyman’s TCA defenses. *Vaughan v. Town of Lyman*, 370 S.C. 436, 450, 635 S.E.d 631 (2006)

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, *but not limited to*, any charter, provision, ordinance, resolution, rule, regulation, or written policies.

S.C. Code Ann. § 15-78-60(4) (emphasis added). *Cf. Lawson v. S.C. Dep't of Corrs.*, 2:20-cv-01527-DCC-MGB decided June 29, 2021 (finding S.C. Code Ann. § 15-78-60(4), applied to a mission statement). Additionally, there is no other applicable subsection containing a gross negligence standard that would mandate the court read a gross negligence standard into subsection (4).

The Circuit Court properly held that there was no issue of material fact that the County complied with state law notice provisions regarding the aerial spray. The circuit court also properly determined that even if Mr. Gaskins' actions created a duty on behalf of the County, the Tort Claims Act, specifically, S.C. Code Ann. § 15-78-60(4) was applicable and barred the Appellants' claims.

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANTS' TRESSPASS CLAIM AS THERE WAS NO "INTENTIONAL ACT."

To constitute an actionable trespass, there must be an affirmative act, the invasion of the land must be intentional and the harm caused must be the direct result of that invasion. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). In the present case, the circuit court properly held that the Appellants cannot satisfy the "intentional act" requirement. There is no issue of fact that the County provided a shapefile map with the locations of the beekeepers to Allen Aviation so the pilot could turn off the spray in those locations. (Memorandum in support of summary judgment Exhibit D, p.29, lines 3-24; Exhibit L). The pilot for Allen testified that the map provided to him by the County had the beekeeper locations marked and that he used the map to make the determination as to when to turn off the sprayers during the flight. (Exhibit B, p.97,

lines 4-8). In fact, the pilot testified that he specifically remembered cutting off the sprayer as he approached the beehive locations per the map. (Exhibit B, p.80, lines 1-5). Moreover, the County provided notice to the public via numerous mass media outlets. (Exhibit E p.36, line 9-p.37, line 3-p.38, line 6). As the Fourth Circuit Court of Appeals concluded, “the death of [Appellants’] bees was neither intended nor foreseeable.” *Yawn v. Dorchester Cnty*, 1 4th 191, 196 (4th Cir. 2021). Accordingly, the circuit court properly found there was no issue of material fact and that the County was entitled to summary judgment on the trespass claim.

CONCLUSION

Per the finding of Clemson University Department of Pesticide Regulation, the circuit court properly found that there is no issue of material fact that the aerial mosquito spray conducted by the County was proper, and done pursuant to South Carolina law and regulations. Moreover, the circuit court properly held that even if the County had a duty to personally notify the Appellants, the Appellants claims for negligence and gross negligence are barred by S.C. Code Ann. § 15-78-60(4). Finally, the circuit court, properly held that there is no issue of material fact that Appellants cannot satisfy the “intentional act” requirement and therefore, their trespass claim fails. Accordingly, the Court should affirm the circuit court’s order granting summary judgment.