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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman

Case No. 2020-CP-22-00356

Ron Christmas,

Appellant,

v.

County of Georgetown, City of Georgetown, and South Carolina Department of Transportation,

Respondents.

INITIAL BRIEF OF APPELLANT RON CHRISTMAS

Justin O'Toole Lucey (SC Bar No.: 15438)
Joshua F. Evans (SC Bar No.: 77448)
Sohayla R. Townes (SC Bar No.: 102814)
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
jlucey@lucey-law.com
jevans@lucey-law.com
stownes@lucey-law.com
Attorneys for the Appellant

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STATEMENT OF THE CASE

This appeal arises out of a case tried before a jury in the Georgetown County Court of Common Pleas. It seeks review of evidentiary rulings, including the failure to qualify an expert witness as tendered, and review of directed verdicts against Appellant Ron Christmas on all claims.

In 2005, Appellant completed construction of his home adjacent to East Bay Park (hereinafter "the Park") in Georgetown, South Carolina. The home faces the PeeDee River/Winyah Bay at the intersection of Greenwich Drive and Front Street ("the Intersection").

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[1] Hawkins v. City of Greenville, 358 S.C. 293, 594 S.E.2d 564 (Ct. App. 2004).
[2] Codified at S.C. Code Ann. § 5-31-450.

In 2006, the County of Georgetown (hereinafter "County") leased the Park from the City of Georgetown (hereinafter "City") for a term of twenty (20) years. Between approximately 2013 and 2019, the City and/or County embarked upon projects to improve the Park and solve its flooding. The project raised the existing grade of the Park such that the Park no longer flooded, but its surface waters were diverted north causing an increased amount of surface water directed towards the Intersection and Appellant's property.

Concurrently, tidal water from Winyah Bay would regularly backflow through the City's storm drainage system in the South Carolina Department of Transportation's (hereinafter "DOT") right of way and saturate the area. Regular saturation and heavy trucks from the Park improvement work resulted in road subsidence and several low spots adjacent to the Appellant's property, which began to permit tidal overflows.

All these factors combined to increase the amount and occurrence of flooding at the Intersection and at the Appellant's property. Appellant was given repeated assurances from Respondents that the flooding issues would be fixed. The flooding continued and eventually impeded access to and caused damage to the property and, thereafter forcing Appellant to move out in 2019 as he was often unable to safely enter or exit the property.

On April 3, 2020, Appellant filed suit against the County, the City, Green Wave Contracting, Inc. (hereinafter "Green Wave"),[3] and "John Doe No. 1-10." Appellant alleged causes of action for negligence and injunction as to all Respondents; inverse condemnation as to the City and County; and nuisance and trespass as to Green Wave. On December 7, 2021, Appellant amended his Complaint to substitute DOT for "John Doe No. 1." (Amd. Cpt, para. 6.) Appellant

[3] Green Wave Contracting, Inc. performed site work on the Park. (Comp. at 2.)

alleged negligence, inverse condemnation, and injunction against DOT. Appellant further added a cause of action for violation of South Carolina Code § 5-31-450 against the City and the County. On November 30, 2022, Appellant filed a Second Amended Complaint removing Green Wave (after settlement) from the matter and additionally requesting mandamus relief under the cause of action for injunction.

Trial commenced on August 14, 2023. On August 17, 2023, at the close of Appellant's case-in-chief, the Honorable Judge Hyman issued directed verdicts on all counts thereby ending the Trial and Appellant's case. (Form 4 Order.) The Court granted a directed verdict to DOT on the statute of limitations on the negligence claim (Tr. 695:1-12); granted a directed verdict to the County on the Stormwater statute (that it does not apply to the County as it is not a municipality) (Tr. 697:11-13); granted a directed verdict as to the City on the Stormwater Statute, finding it had been implicitly repealed (Tr. 696:25-697:10); granted a directed verdict on mandamus as to all Respondents finding no ministerial act (Tr. 695:13-696:3); granted a directed verdict as to all parties on inverse condemnation finding no taking (Tr. 696:4-24); and finally, granted a directed verdict to the City and County on negligence, finding that exceptions to the waiver of immunity in the Tort Claims Act applied and that a city's design and maintenance of drainage systems is a quasi-judicial function (Tr. 698:3-699:8.)

Appellant's motion for a new trial was denied. (Tr. 699:11-700:24.) On September 13, 2023, Appellant filed his Notice of Appeal.

STATEMENT OF THE FACTS

Appellant purchased a lot at 101 Greenwich Drive in Georgetown, South Carolina, in late 2001/early 2002. (Tr. 542:23-24.) The lot is situated at the intersection of Front Street and Greenwich Drive with a direct view of the Great Pee Dee River/Winyah Bay across Greenwich

Drive, and a direct view of the north of the Park across Front Street. (Pl. Ex. 49.) Appellant understood the lot was located in an AE10 flood zone, but he further understood AE10 meant a less severe flood zone with a possible flooding event every 15 years or so. (Tr. 586:8-19; Def. Ex. 4.)[4] Construction commenced in 2004, and the house was completed in 2005. (Tr. 543:11-12; Pl. Ex. 48 at 2.) Appellant's residence was constructed on pilings as required. The front yard contains a circular concrete driveway with brick pavers, and the backyard contains a pool surrounded by concrete and brick pavers. (Tr. 369:5-9, 370:3-13; Pl. Ex. 48 at 2; Pl. Ex. 176.) Appellant also purchased a lot across the street, on the other side of Greenwich Drive, bordering the river ("the Marsh Lot"). In the ensuing years, the Marsh Lot was used for parking, golf, and picnics.

A. Appellant's Property Experienced Only Minor Flooding Prior to the East Bay Park Renovation

By 2013, Appellant's Marsh Lot occasionally experienced minor flooding. Appellant testified the road would occasionally experience water overflowing from roadside drainage ditches and onto the edge of the property. (Tr. 544:5-11.) However, outside of two major weather events, the 100-Year-Flood in 2015 and Hurricane Matthew in 2016, the main property would only get a "little bit" of water to the edge of the fence area and a little on the lower end of the property line, but no flooding. (Tr. 545:4-10, 590:14-18.)

Appellant's neighbor, The Honorable Robert O'Donnell (hereinafter "Judge O'Donnell"), has lived next to Appellant on Greenwich Drive since 1988. (Tr. 457:13-20.) Judge O'Donnell confirmed there was very little flooding on the roads prior to 2016. (Tr. 459:4-9.) The Intersection experienced rare flooding that would dissipate, in instances of extreme weather events such as

[4] Appellant's expert, Robert Castles, testified that an AE10 flood has nothing to do with the ground elevation, but it instead requires the first floor of the residence be at least 11 feet off the ground. (Tr. 389:2-390:2.)

Hurricanes Hugo and Matthew, tropical storms, or the occasional king tide (full or new moons accompanied by strong northeast winds. (Tr. 459:13-24; 464:11-14.)

In contrast, the center of the Park and the tennis courts would flood regularly. (Tr. 465:25-466:6.)

B. Initial Attempts to Mitigate Flooding in the Park

The Park runs north to south with a Frisbee golf course at the north end, tennis courts in the middle on the east side, and baseball fields and boat landing on the south end. Additionally, there is an area of wetlands between the walking trail and Front Street at the northwest corner.

Historically, the Park would flood from Winyah Bay into and across the tennis courts. (Tr. 343:21-344:2; 465:25-466:3.) In approximately 2013, fill was added to the water side/perimeter of the Park. (Tr. 545:23-546:1.) The fill work increased the amount of water and sediment onto the road and up through the in-road drainage grates. (Tr. 545:23-546:6; 547:18-25.) However, the water had not yet impacted Appellant's residence or main lot. (Tr. 548:22-549:4.)

C. Initial Assurances from Respondents Regarding the Increased Flooding

Appellant became concerned about the increased water at the intersection of Front and Greenwich Streets and the surrounding areas, as the water continued to approach his own lot. Appellant contacted Jack Scoville, the Mayor of the City of Georgetown, as well as individuals from the DOT and the City Department of Water and Sewer. (Tr. 232:19-23; 547:18-548:12; 549:7-18; 552:11-17.) Appellant understood that City, County, and the DOT were investigating a solution. (Tr. 552:18-22.)

D. East Bay Park Renovation

In 2016/2017, the City and the County embarked upon a large-scale, capital improvement renovation of the Park. The existing, flat grade-level tennis courts were elevated three (3) to four (4) feet, which directed the water off the courts toward a low point and overflowing ditches at

Front Street, the Intersection, and Greenwich Drive. (Pl. Ex. 47; Tr. 336:9-23; 343:21-344:5; 413:21-24; 445:2-446:2; 472:25-473:8.)

The project also included the addition of a one-mile perimeter walking trail spearheaded by the City. (Tr. 251:14-252:9; 349:23.) The walking trail involved the installation of a granular base, followed by asphalt. (Tr. 349:20-350:3.) Additional dirt was added to the frisbee golf course. (Tr. 365:9-23.) The water from the raised areas shed towards the Intersection and Appellant's property. (Tr. 344:1-5; Pl. Ex. 49; Tr. 438:21-439:8; 444:16-446:5.)

The City also built a parking lot for the boat landing at the south end of the Park. (Tr. 252:1-6.) The installation of the parking lot required additional land disturbance and the installation of the parking lot itself. (Tr. 349:10-15.) Also, on the south end of the Park, the City removed old baseball fields by mucking out the existing material and replacing it with new material. (Tr. 347:16-24.) Both the south end and north end projects increased the heavy truck traffic traveling over the roads adjacent to Appellant's residence.

E. Site Work Performed During the Park Renovation Worsened Flooding

Greenwich Drive was originally designed and constructed in 1955, and, as such, the road was not designed to carry heavy trucks. (Tr. 358:23-25.) By 2006, Greenwich Drive was in poor condition. (Tr. 219:8-21.) At that time, the DOT shot "elevations" and built up the road in the low points by six (6) inches and subsequently repaved the entire road in 2009. (Tr. 222:1-225-2; 600:13-15.) There was no evidence presented of any surface water problems in the years immediately after the repair.

Subsequently, the Park renovation projects required large amounts of fill and debris to be removed from the site and replaced with new fill and materials by heavy dump trucks and other construction vehicles. Appellant observed "caravans" of trucks during the Park renovation project. (Tr. 573:16-22.) Many of the trucks would travel down Highmarket Street to the north of

Appellant's house and then down Greenwich Drive in order to access the Park. (Tr. 574:15-20.) Pictures were put into evidence of the Park being used as a large equipment staging area. (Pl. Ex. 48 at 175.)

F. Appellant Relied Upon Assurances That the Flooding Problem Would Be Solved

After the Park project commenced in 2016, Appellant observed the flooding increased greatly. (Tr. 553:14-18.) Throughout 2016-2018, Appellant continued to contact City Mayor Scoville and subsequent Mayor Brendon Barber (who served after Mayor Scofield from late 2017 to late 2022), the City and Water Department, and DOT representative, Mike Pope.[5] (Tr. 553:23-554:16.) Appellant relied upon assurances from Respondents that the flooding problems would be fixed.

Appellant relied upon these assurances, witnessed activity by Respondents to find a solution and fix the tidal gate, and believed those efforts would continue. (Tr. 548:13-23; 549:19-22; 552:23-553:6.) Appellant was informed of some of the proposed solutions being considered, such as additional pipe installation and backflow valves. (Tr. 550:4-22.) Appellant was told that some of the proposed solutions might take time and require permitting and funding, but the issue would be taken care of. (Tr. 549:19-550:3.) Appellant witnessed the installation of a back-flow valve on an existing tidal gate in order to stop the water from flowing out of the pipe system, as well as efforts to clean out drains and pipes. (Tr. 548:13-24.) At one point, Appellant was informed by City Mayor Barber that Representative Tom Rice had or was arranging for funding. (TR. 630:9-

[5] Mike Pope retired from the DOT in December 2017; Appellant had discussions with Pope before and after his retirement. (Tr. 554:5-14.) Appellant believed Pope would pass the information on to his successor. (Tr. 554:9-16.)

11; Tr. 551:22-25.) Appellant believed, based on these conversations, that Respondents were actively seeking a remedy for the flooding. (Tr. 554:21:555:25; Tr. 561:12-21.)

G. Respondents Failed to Remedy the Flooding Leaving Appellant's Property Damaged

After the Park renovation was complete, the flooding became deeper and more frequent, finally impacting Appellant's property. (Tr. 568:6-12; 568:23-25.) Appellant's property experienced water flooding across the driveway, through the side gates, and inundating the backyard. (Tr. 568:9-15.) The property, at times, was flooded daily leaving a couple of feet of standing water on the road and in Appellant's yard. (Tr. 569:3-12.) The City erected barricades to prevent transit into the surface waters at the Intersection, and then replaced the barricades with installed poles and chains. (Tr. 466:7-25.)

The flooding created safety issues for Appellant, as the water surrounding the home was, at times, too deep to get in and out of the home. (Tr. 575:18-25.) Given Appellant's age, health issues, and the inability to get in and out of his home, Appellant made the difficult decision to move out of the home in 2019. (Tr. 576:2-18.)

Appellant's expert, Robert Castles, testified as to the confluence of factors that caused the flooding at the Intersection, including the raising of the park, localized road subsidence from truck traffic, and the lack of drainage at this intersection for several hours during higher-than-average tides. Castles documented that Greenwich Drive had subsided 1.7 feet at the intersection of Greenwich and Front Streets and 1.54 feet in front of Appellant's home. (Tr. 326:5-327:2). The subsidence of the road due to the Park renovation work provided yet another avenue for water to flood from the Park and the River towards the Appellant's property. Castles documented longitudinal cracking and "alligator" cracks on Greenwich Drive, which is a sign of road failure, in part, as a result of heavy load activity. (Pl. Exs. 47 and 49; Tr. 415:19-417:10; 435:15-437:10.)

Despite notice of the increased flooding and continued deterioration of the roads, Respondents failed to perform any additional repair after the 2009 paving other than replacing the tidal valve in 2017. (Tr. 359:6-360:10; 600:13-17.)

STANDARD OF REVIEW

A. Abuse of Discretion

Appellate courts review a trial court's ruling on the admission or exclusion of evidence – when the ruling is based on the South Carolina Rules of Evidence – under an abuse of discretion standard. See, e.g., State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023). A trial court's evidentiary ruling is subject to reversal if an appellate court finds (1) the trial court "abused its discretion," meaning the appellate court finds there was commission of an error of law in the circumstances (rather than any reflection upon the presiding judge); or (2) the trial court acted outside of the discretion granted to it. Id. "[A] trial court acts outside of its discretion when the ruling is not supported by the evidence or is controlled by an error of law." Id.; see also Burke v. Republic Parking Sys., Inc., 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.").

An "arbitrary" or "unreasonable" ruling is outside of a trial court's discretion. Wallace, 440 S.C. at 543 n.3, 892 S.E.2d at 313 n.3. "[T]he trial court—when ruling on the admission or exclusion of evidence—*must* think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and *must* thoughtfully apply the correct law to the information and evidence before it." Wallace, 440 S.C. at 543, 892 S.E.2d at 313 (emphasis added); see also State v. Phillips, 430 S.C. 319, 340-41, 844 S.E.2d 651, 662 (2020) (reversing a trial court's ruling to admit expert testimony when the trial court did not "meaningfully exercise that discretion" and "we are actually conducting the analysis for the first time"); Hamrick

v. State, 426 S.C. 638, 648-49, 828 S.E.2d 596, 601 (2019) (holding the trial court erred because it "failed to make the necessary findings that the State established the foundation required by Rule 702"); Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 92, 754 S.E.2d 267, 271–72 (Ct. App. 2014) (finding the trial court "abused its discretion because it did not delineate any particular reason for its decision to not qualify Dawkins and we believe he held the prerequisite experience needed to testify as an expert under Rule 702, SCRE").

B. Expert Qualification

"The qualification of a witness as an expert and admissibility of his testimony are matters largely within the discretion of the trial judge." Creed v. City of Columbia, 310 S.C. 342, 344–45, 426 S.E.2d 785, 786 (1993). Pursuant to Rule 702, SCRE, a person may be qualified as an expert based upon knowledge, skill, experience, training, or education. Rule 702, SCRE, does not set forth mandatory requirements for the qualification of an expert witness, acknowledging that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence. Teseniar, 407 S.C. at 90, 754 S.E.2d at 270-71.

While "non-compliance with licensing requirements or with the statutory law in specialized areas should not require, *a fortiori,* a trial court to refuse to qualify a witness as an expert," a trial court can consider it as a factor "when judging a purported expert's qualification." Id. at 91, 754 S.E.2d at 271.The trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact. Id.

"To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified

than the jury to form an opinion on the particular subject of his testimony." Hamilton v. Reg'l Med. Ctr., 440 S.C. 605, 623, 891 S.E.2d 682, 692 (Ct. App. 2023), reh'g denied (Sept. 21, 2023), cert. denied (May 1, 2024). "The test is a relative one, depending on the particular witness's reference to the subject; an expert is not limited to any class of persons acting professionally." Hamilton, 440 S.C. at 623, 891 S.E.2d at 692.

A professional is not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved in the case. E.g., Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545, 555 (1943); see also Hamilton, 440 S.C. at 623, 891 S.E.2d at 692. The fact that a witness is not a specialist in the particular branch involved affects only the weight of the witness's testimony and affords no basis for completely rejecting it. Hamilton, 440 S.C. at 623–24, 891 S.E.2d at 692; Hill, 204 S.C. 83, 28 S.E.2d at 555.

C. Reliability of Expert Testimony

"In assessing the admissibility of expert testimony, the trial court must make a threshold determination of reliability." State v. Jones, 423 S.C. 631, 638, 817 S.E.2d 268, 272 (2018). "While both scientific and nonscientific expert testimony require the trial court make a finding of reliability, there is no formulaic approach for determining the reliability of nonscientific testimony." Id. at 638–639, 817 S.E.2d at 272. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." State v. White, 382 S.C. at 274, 676 S.E.2d at 688; see also Jones, 423 S.C. at 640, 817 S.E.2d at 272 ("Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence.").

"Counsel may rely upon circumstantial evidence to prove an essential fact in framing a hypothetical question." Trial Handbook for South Carolina Lawyers § 15:13 (5th ed.) (citing

Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010)). "Deciding whether a conclusion assumed in the hypothetical is at least reasonably supported by circumstantial evidence is a question of law for the court." Id. "If circumstantial evidence reasonably supports the assumptions, whether the evidence actually establishes the assumed facts becomes a question of fact for the trier of fact." Id.

D. Prejudice

"[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id. "Determining whether prejudice exists depends on the circumstances and the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Burke, 421 S.C. at 558, 808 S.E.2d at 628 (internal quotations omitted) (finding the trial court's erroneous exclusion of expert Shuman's testimony was prejudicial, noting Shuman was Republic's only expert witness to contradict Burke's expert and Shuman's testimony "was vital to Republic's causation and damages arguments").

E. Questions of Law Versus Fact

"This [c]ourt reviews all questions of law de novo." Lollis v. Dutton, 421 S.C. 467, 477–78, 807 S.E.2d 723, 728 (Ct. App. 2017). Further, "[w]hen a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Id.

"On appeal from an action at law tried with or without a jury, the appellate court's standard of review extends only to the correction of errors of law." Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 385, 752 S.E.2d 269, 273–74 (Ct. App. 2013) "The factual findings of the jury or the

trial judge [in such an action] will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports [its] findings." Id. "On appeal from an action in equity, [an appellate court] may find facts in accordance with its view of the preponderance of the evidence." Lollis, 421 S.C. at 477–78, 807 S.E.2d at 728. "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [circuit court] was in a better position to assess the credibility of the witnesses." Id. "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought." Id.

F. Directed Verdict

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. The trial court must deny the motions when the evidence yields more than one inference, or its inference is in doubt. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (noting the summary judgment standard under Rule 56(c) of the South Carolina Rules of Civil Procedure "mirrors" the standard for a directed verdict under Rule 50(a)).

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." Lockhart, 365 S.C. at 188, 617 S.E.2d at 130. Neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence on a directed verdict motion. Fickling v. City of Charleston, 372 S.C. 597, 603, 643 S.E.2d 110, 114 (Ct. App. 2007); Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 129 (Ct. App. 2005).

Reversal is warranted "only where there is no evidence to support the trial judge's ruling, or where the ruling was controlled by an error of law." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007). The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. Shenandoah Life Ins. Co. v. Smallwood, 402 S.C. 29, 34–35, 737 S.E.2d 857, 859–60 (Ct. App. 2013); see also Wright v. Craft, 372 S.C. 1, 18–19, 640 S.E.2d 486, 495–96 (Ct. App. 2006) (same); Lockhart, 365 S.C. at 188–89, 617 S.E.2d at 130. ("Essentially, our Court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor.").

"If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created, and the motion should have been denied." Lockhart, 365 S.C. at 187, 617 S.E.2d at 129. See also Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 421, 472 S.E.2d 253, 255 (1996) ("A verdict should not be directed in a negligence action where there is a question of fact for the jury, and the evidence is such that reasonable persons might differ. The question of whether due care was exercised is controlled by the circumstances of the particular case and will not be determined by the court, as a matter of law, if the testimony is conflicting or the inferences to be drawn therefrom are doubtful.").

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO QUALIFY CASTLES AS AN EXPERT WITNESS IN THE AREA OF HYDROLOGY AND IN EXCLUDING AND LIMITING HIS TESTIMONY ON NUMEROUS ISSUES

The Trial Court determined there were concerns with engineer Robert Castles's qualifications to testify on the subject of hydrology, because Castles is not a specialist in hydrology

and does not hold a specialty license in hydrology. (Tr. 271:22-272:3; 275:4-9.) However, there is no requirement under South Carolina law that professional witnesses hold a specialty license in order to be qualified as an expert on a subject. Hamilton, 440 S.C. at 623–24, 891 S.E.2d at 692 ("For expert testimony to be admissible, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular branch of the field. . . .The fact that a witness is not a specialist in the particular branch involved affects only the weight of the witness's testimony, and affords no basis for completely rejecting it.") (emphasis added) (internal quotations omitted). This was the Trial Court's first error.

The Trial Court's second error was its failure to acknowledge Castles's extensive experience in hydrology on projects. It is precisely that - Castles's experience as a practicing engineer and in his forensic engineering work - that qualified him, similar to the wrongly excluded engineering expert in Teseniar 407 S.C. at 91, 754 S.E.2d at 271 (holding the trial court erred in failing to qualify Dawkins when Dawkins had nearly thirty years of experience in civil engineering and construction, was licensed in two states but not in South Carolina, and observed testing for four days at the building site and had a licensed professional engineer do the testing for him; finding Dawkins had technical and specialized knowledge that would assist the trier of fact to understand the proximate cause of the water intrusion). Castles attested to his more than three decades of experience on a multitude of projects, many of which employed hydrology – the study of the flow or movement of water – before the jury and Court. Mr. Castles described his time at engineering firm CH2M Hill:

> A: I was a project manager, design engineer. One of the first projects I did was down here at the beach. I oversaw the construction of the Murrells Inlet sewer system when they put the gravity sewers down Main Street of Murrells and put in the pump stations down there.

> I then did the Socastee Water System design and construction inspection, which went down 544 and down 707 and put in two wells and two elevated tanks that serviced the hospital, Conway Hospital at the time, and then out on 501. You've seen that one out there.

(Tr. 245:3-12.) He testified about his work on behalf of his own engineering firm, opened in 1984, in designing the drainage, roads, water, and sewers on a project called the Prince George's Ocean Tract:

> A: DeBordieu? It's two tracts. It's one on the river. It's one on the ocean. We were responsible for the Ocean Tract, which went from 17 all the way to the ocean. I designed the water, the sewer systems included three pump stations that actually ended up pumping all the way to Pawleys Island to – I'm trying to think of a golf course up there. Pawleys Plantation, I guess it is, where we intercepted with another pump station and then it went to the plant.
>
> That was a thirteen-thousand-foot-force main, so that was kind of a unique project there. The drainage was unique in that you were close to the ocean, and you obviously had to deal with the tides and how your ponds were going to work in that area.
>
> Q: And, just so we're clear, that storm drainage, sanitary water for drinking, and sewage?
>
> A: The first one was sanitary sewer, and then the second one was for storm drainage.

(Tr. 246:1-17.) He detailed his work on a project completed in 1993 at Broadway at the Beach:

> A: If you've been to Broadway at the Beach and you know where the buildings are, then my responsibility if five feet outside the building. So, when you get to the hardscape, we did the hardscape. Then we got away from the buildings, we did all the sewer system that serviced all those projects in there. We did the water system and the fire system that serviced all of those buildings in there.
>
> We designed all the parking lots, which was 6,000 parking space – parking lots there. We designed all those surrounding roads. When you go in there, there's a loop road that goes all the way around the project. We designed that loop road as well as the roads that tie back into the streets surrounding it.

We had 21st Avenue, 29th Avenue, 17 bypass, and Grissom Parkway. We actually designed a section of Grissom Parkway there that wasn't completed at that point.

Q: And you got all that done within how many months?

A: Six to get Phase One done.

Q: And that was a mile of road around Broadway at the Beach?

A: At least a mile of road.

Q: And did you have some unique soils to deal with in designing Broadway at the Beach?

A: I did. We had gumbo clay.

(Tr. 246:25-247:22.) He detailed the investigative work he performed on that project as well:

Q: And, besides constructing on soft soils, have you also investigated road or stormwater piping failures in soft soils, sir?

A: I have. We have – well, I say in soft soils. I have Northwood Plaza, which I put in a sub-drainage system, basically an infiltration system, in Northwood Plaza to take care of the water instead of putting it into retention ponds. And, when the first rain came after we finished, it backed up in one of the parking lots and would not flow out.

So we went into the catch basins and tried to figure out what was wrong and we found out that we had a crushed pipe that the construction equipment had actually crushed it when they were finishing it out. So we had to go in there and get that pipe rebuilt.

(Tr. 248:19-249:7.) He testified that his engineering practice changed to focus on forensic investigation in the last 10-15 years. (Tr. 249: 24-250:7.) Castles also described a current flooding issue that he was investigating and the scope of his current forensic engineering practice as water problems, sewer problems, and any other civil engineering issues:

A: Forensic engineering is where you've got a problem in a project. I've got one now in North Myrtle Beach where they were supposed to put four twenty-four-inch pipes under a dam to let the water out from one side to the other, and the contractor didn't do that. They

> apparently wasn't on the plans, and so they're having flooding problems now. So they've hired me to come and figure out what the issues are and how we can, after the fact, install these four twenty-four-inch pipes to get the system working.
>
> So it's really going into whether it's a water problem, a sewer problem, anything related to civil engineering, going there and looking at it after the fact, where it's failing, and come up with a solution no how to fix it.

(Tr. 250:10-22.) Appellant thereafter tendered engineer Castles as an expert in civil engineering, specializing in hydrology and drainage and forensic engineering. (Tr. 257:4-6.) Castles stated he is a registered civil engineer with 43 years of experience in hydrology. (Tr. 258:22-25.) He explained hydrology was not recognized as a specialty when he received his engineering license, and his practice has included it since he received his degree. (Tr. 259:1-3.) Although he does not have a formal certification as a hydrologist, he asserted that he is trained and educated to be a hydrologist. (Tr. 259:9-12.)[6] He elaborated that he took graduate work in hydrology, goes to continuing engineering seminars in hydrology, and does computer programs in hydrology. (Tr. 259:6-9.)

Yet, the Trial Court followed the foregoing background and education testimony with a query that conflated the sufficient technical and specialized knowledge on a topic (e.g., hydrology) with a (non-existent) requirement to be a specialist in order to qualify as an expert:

> The Court: Well, my concern is in regards to what you're trying to have him classified as an expert as. And I don't necessarily – I haven't heard anything about hydrology other than that you want to qualify him as an expert in hydrology, and it's been his testimony that he's not a specialist in hydrology.
>
> Am I missing something with that?

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[6] South Carolina recognizes the general practice of engineering (S.C. Code Ann. § 40-22-20 (25)) and grants a specialty in surveying (Id. at § 40-22-60 (B)).

(Tr. 271:22-272:3.) To which Appellant's counsel correctly summarized Castles's testimony: though Castles does not hold a specific paper or certificate or license concerning hydrology, Castles "employs hydrology" in "many, many of his projects" and has been educated in it. (Tr. 272:4-8.) Castles confirmed the same. (Tr. 272:9.)

The Trial Court's erroneous conclusion did not change; its failure to complete a proper qualification analysis and ruling was its third error. Wallace, 440 S.C. at 543, 892 S.E.2d at 313 (noting trial courts must think through the objection that has been made, the arguments of the attorneys, the law and applicable evidentiary rules and must thoughtfully apply the correct law to the information and evidence before it); Teseniar, 407 S.C. at 92, 754 S.E.2d at 271–72 (noting abuse of discretion occurs if trial court does not delineate any particular reason for its decision to not qualify a propounded expert witness when that witness held the prerequisite experience needed to testify as an expert under Rule 702, SCRE). The Trial Court found Castles to be qualified to testify as an expert in the field of civil engineering and forensic engineering and noted its "concern" about the hydrology aspect of Castles's experience. (Tr. 275:4-5; 276:4-10.) The Trial Court propounded no further questions on Castles's experience or education bearing on hydrology. Instead, it declined to qualify Castles on the subject of hydrology. See id.

In summary, it was error for the Trial Court to require that Castles have achieved a non-required specialization in hydrology (or a non-existent state certification) to qualify him as an expert on the topic, while simultaneously disregarding his experience and practice in hydrology for decades; and to commit the other errors regarding Castles' testimony described below.

A. The Trial Court Erred in Its Grounds for Limiting Castles's Testimony at Trial

The Trial Court shifted its focus to the substantive testimony that Castles would offer. It asked did Castles "specifically do any hydrological studies on this property." (Tr. 272:10-11.)

Appellant's Counsel answered in the negative, noting he instead reviewed hydrological information by others. (Tr. 272:12-13.)

The Trial Court then focused its queries on whether the others (who gathered the hydrological information that Castles reviewed) would be called to testify by Appellant's Counsel and be subject to cross-examination. (Tr. 272:14; 273:19-20; 274:22-24.) Appellant's Counsel again answered in the negative and further explained that the hydrology information that Castles reviewed was based on City stormwater maps that show where all the catch basins and outlets are for the water drainage immediately close to Front Street. (Tr. 272:15-17; 272:23-273:1.) That information included two calculations which Castles verified, of: 1) the flows going in the direction of immediately close to Front Street; and, 2) the background calculation of how many acres empty into this particular location (the area immediately close to Front Street). (See Tr. 272:18-273:1.) Hearing the Court's apparent confusion and concerns, Appellant's Counsel further explained "the hydrology aspect that he's [Castles's] addressing is so simplified that it can just be subsumed within his drainage focus[,]" and offered to "modify the tender to make it easier for the Court" and tender Castles as an "expert in civil engineering with a focus on drainage and forensics." (Tr. 274:19-21.) Appellant's Counsel further noted that the necessary information is "what pipes flow into this drainage basin. It's in their maps[,]" therefore Castles's testimony would fall within general drainage, rather than hydrology. (Tr. 275:10-17.)

The Trial Court's resulting ruling narrowed Appellant's Counsel's examination of Castles and Castles's direct testimony pertaining to hydrology. (Tr. 276:12-14: "Now, in regards to the questioning, obviously, you're limited on what you can ask in regards to hydrology… .") The ruling was problematic and confounding. No explanation was provided as to the bounds of the limitation on Castles's substantive hydrology testimony – what would and would not be permitted

– and the Trial Court made no effort to understand the opinions and expertise Castles would offer on the subject. See Wallace, 440 S.C. at 549, 892 S.E.2d at 316 (describing the Wallace trial court's robust examination of a witness, deep inquiry into the complexity of the witness's proposed testimony, thorough familiarization with the facts and circumstances of the case, establishment of a clear understanding of the expert witness's intended testimony and knowledge on which it was based, inter alia, as "the 'textbook' exercise of discretion"). No explanation was provided concerning how Castles's testimony addressed to the flow of water would be unreliable – because the Trial Court did not engage in any such analysis either.

Permitting only an undefined, limited selection of hydrology testimony by Appellant's sole expert on the topic left Appellant without a means to enter material portions of its evidence during its case-in-chief. Even after the County reopened the door to Castles's hydrology testimony by moving into evidence a City map with Castles's handwritten drawings showing drainage in the area, the Trial Court curtailed Appellant's ability to follow up on the issues raised by the exhibit. (Tr. 418:7-419:11 & 448:10-12; see also Pl. Ex. 49.) Respondent's Counsel objected to Appellant asking Castles to testify about the frequency and duration which the drainage basin holds or retains, rather than drains, surface water. (Tr. 446:6-19.) In response, the Trial Court directed Appellant to "stick to my prior ruling[,]" stating Appellant is not permitted to elicit Castles's opinion about "the quantity [of water]" or "quantities of flows or anything like that that deal with hydrology" because those examinations of Castles run afoul of the Trial Court's hydrology ruling. (Tr. 449:4-17; 449:24-450:13.) This too was an error. This case is about surface water flooding and how the ditches, wetlands, and drainage basin in the area surrounding Appellant's property respond when inundated with water. This ruling (erroneously) classified an examination as hydrology testimony when Appellant's Counsel *did not ask* about quantity or flow in the examination that prompted the

Respondent's objection; Appellant's Counsel *asked* what the "effect of that sunken portion of the road . . . on how often this drainage basin becomes a holding pond[.]" (Tr. 446:6-13; 449:11-17) (Appellant's Counsel responding to Trial Court's statement that quantity is the problem, stating "We're talking about this big flooded area that you've already shown to the jury. Where it is coming from, where can it go, does it have drainage…").[7] This compounded the error of the Trial Court's prior hydrology ruling, improperly constraining even the drainage testimony elicited and making the line between hydrology and drainage ill-defined and arbitrary, and doubly erroneous after the Respondent opened the door with the drainage exhibit.

During its ruling and consideration of the Respondent's objection, the Trial Court erroneously conflated at least one other concept. The Trial Court stated it believed Castles could testify to how long surface water stays in a "retention pond" if Castles had designed said pond. (Tr. 452:17-19.) Carrying this logic forward presents additional problems for the Trial Court's hydrology ruling. For example, if Castles is qualified to design such a pond, his extensive experience in civil and forensic engineering makes him equally qualified to examine and draw conclusions about an existing pond or here, a drainage basin. Further still, Castles's many prior projects involving hydrology (as well as drainage) similarly qualifies him to review and opine on the effect of the sunken portion of Greenwich Drive on the drainage basin, and specifically how often the basin is inundated by surface water.

B. The Trial Court Erred in Limiting Castles's Testimony Concerning East Bay Park Project Trucks' Causing or Contributing to Greenwich Drive Subsidence

[7] And to the extent it was hydrology, it should have been permitted with Castles qualifications, as discussed above.

The Trial Court ruled it was outside of Castles's scope to testify through scientific evidence or expertise that the East Bay Park project trucks caused the damage to Greenwich Drive. (Tr. 285:22-25, 288:16-19, & 289:21-24.) The Trial Court also refused to permit a hypothetical query of Castles asking about the capacity of trucks like those during the Park project were capable of causing the kind of damage to Greenwich Drive. (Tr. 290:3-8.) These limitations were erroneous.

As an initial matter the Trial Court's ruling did not state its basis for excluding this testimony by Appellant's sole expert who could opine on this subject matter. The Trial Court's statement that Castles's testimony would be "outside of his scope" implies that the reason for this exclusionary ruling is the limits of Castles's expertise – as an expert in the field of civil engineering and forensic engineering, who has designed and supervised the construction of many roads. However, the Trial Court's ruling may have been meant to address the approach Castles employed and the bases for Castles's conclusion. Either way, Castles's numerous engineering projects involving soft soils, pavement/roads, subsidence, and forensic analyses (see above) confirm that he is qualified to testify on causation of subsidence in roadways resulting from heavy truck travel and loads.

As to the reliability of Castles's roadway subsidence causation testimony, Appellant's Counsel propounded inquiries showing how Castles analyzed the Greenwich Drive elevation changes, heavy truck usage in this immediate area, and cause of the roadway's subsidence:

- As a preliminary matter, it is undisputed that dips in the intersection were filled circa 2006 and the pertinent portion of the road was repaved in 2009, and put in a condition of good repair, prior to all matters pertinent to this case. This is documented by numerous witnesses and attorneys thought the trial, including the former Georgetown DOT district manager. (Tr. 222:1-10; 222:15-224:1; 628:17-19.) Therefore, by all appearances, whatever caused the flooding to increase before, during, and/or after the Park projects, most likely occurred after 2009, which corroborates all the evidence presented by Appellant.

- Castles visited the site and reviewed others' photos and City records. (Tr. 250:19-251:2, 254:9-13.)

- Castles engaged a surveyor to document the elevations at Greenwich Drive and prepared a drawing with spot elevations on it to see how the elevations of the roadway had changed compared to the original design, which now had dips and valleys in it. (Tr. 252:16-253:10.)

- Castles investigated alternative causation for Appellant's complaints (Tr. 254:14-16), including sea level rise. (Tr. 254:17-19.)

- Castles reviewed the DOT original construction design documents and compared that material to the recent elevations documented on two separate occasions by surveyors and he analyzed the history of the surrounding geographical area to see if there were other possible causes of the road subsidence that has occurred adjacent to Appellant's property by study of the area's soil. (Tr. 254:23-255:10.)

- Castles noted Greenwich Drive is not a thruway for travel. (Tr. 289:2-7.)

- Castles observed no other construction projects in the area. (Tr. 289:1-3.)

- Castles reviewed the City's files at the City engineer's office, including the plans for the East Bay Park improvement parking lots for the tennis courts, the tennis courts themselves, and the walking trails. (Tr. 251:14-252:15.)

- Castles consulted with industry resources to confirm the effect of truck traffic on roads with saturated road bases. (Tr. 428:25-430:15.)

The Trial Court interrupted Appellant's Counsel's voir dire of Castles – directed at establishing how Castles arrived at his conclusion that the East Bay project truck usage caused or contributed to the subsidence on Greenwich, which the Trial Court indicated was its concern – to conclude that it would not permit Castles to testify that the trucks used in the East Bay project damaged Greenwich Drive because Castles "can't testify with certainty" that it was "these trucks[.]" (Tr. 289:14-18.) This was obviously an error as the Court again conflated two concepts: the evidentiary burden of more likely than not, and the standard for engineering opinions being to a reasonable degree of certainty in the expert's field of expertise.

Appellant's Counsel then proposed that he use a hypothetical question to Castles, in lieu of asking Castles to address the East Bay trucks in particular, since that was the Trial Court's concern. (Tr. 289:25-290:1.) Appellant's Counsel posed the following potential hypothetical:

> The Court: Well, and what would the hypothetical be?
>
> Lucey: I'd have to think of it to make sure that it was appropriate, Your Honor, but it would be something like, Mr. Castles, in your opinion, if in fact trucks from these projects used that road to access these projects carrying out dirt, are those trucks capable of causing the kind of damage we see here.

(Tr. 290:2-8.) The Trial Court rejected this as well, stating that it agreed with City Defense Counsel that the hypothetical "doesn't solve the problem…because that's assuming facts not in evidence[.]" (Tr. 290:9-14.) That is incorrect. The hypothetical assumes facts which are supported by Castles's review of the East Bay project plans on file and photographic evidence and testimony of the use of heavy trucks hauling dirt for the Park renovations and the documented road damage. (E.g., Tr. 250:19-251:2; 251:14-252:15; 254:9-13); see also Trial Handbook for South Carolina Lawyers § 15:13 (5th ed.) (citing Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010)) ("Opinion testimony of an expert may be based upon a hypothetical question. The hypothetical question must be based on facts supported by the evidence. Counsel posing the hypothetical may, however, frame the question on any theory which can reasonably be deduced from the evidence, and select as a predicate for it such facts as the evidence proves or reasonably tends to prove."). One of the photographs actually captures one of the heavy trucks at the Intersection. (Ex. 48, p. 12.) Appellant's focus was not that the City and County caused the road damage as the owners of the trucks; rather, it was the East Bay Park renovation truck traffic that more likely than not caused the damage to the roads and, along with the raising of the Park generally, and the tennis courts and the walking path specifically, caused the increased flooding in

the Front Street-Greenwich Drive intersection/drainage basin. The effect of this erroneous exclusionary ruling was to permit Castles to testify, generally and only academically, about heavy trucks and subsidence (Tr. 289:20-22), while excluding Appellant's evidence 1) connecting the heavy trucks used in the Park project to the Intersection and its low points, and 2) establishing that the trucks – traveling roads not designed to withstand that kind of load, and roads which were weakened by wet/dry cycles that made them more likely to fail under such loads – more likely than not caused or contributed to the flooding at Appellant's property.

These errors prevented Appellant's Counsel from presenting the subsidence testimony specific to the Intersection and the flooding issues in this case for the trier of fact's consideration. Trivelas v. S.C. Dep't of Transp., 348 S.C. 125, 136–37, 558 S.E.2d 271, 276–77 (Ct. App. 2001) ("As a general rule, the question of proximate cause is one of fact for the jury. . . . Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law."). The Trial Court's exclusion of Castles's heavy truck impact on Greenwich and area flooding testimony, whether in the form of the above hypothetical or otherwise, was error.

The Trial Court's approach to querying and analyzing Castles's heavy truck and roadway subsidence opinions and testimony strayed further from the standard set out in Wallace; it treated (disputed) issues of fact as if they have been resolved in a manner favorable to the Defense.. Take, for example, the question of whether City and County trucks used in the Park renovation project caused or contributed to road subsidence at Greenwich Drive. City Defense Counsel argued Castles's subsidence testimony should be excluded based on its factual argument that the dump trucks "were contractors" rather than the City. (Tr. 285:6-21.) He further argued that his "concern is the proof that the trucks caused subsitence[sic] [.]" (Id.) Rather than examine any evidence or inquire further on the subject of truck ownership, the Trial Court assumed that the trucks were

third party trucks, not City-owned (and that it mattered) – and limited Castles's testimony, based only upon y unsupported argument by Defense Counsel:

> Mr. Lindemann: Your Honor, objection. He testified earlier that he asked for the City's record –
>
> The Court: Yeah, I'm inclined to say if he wants to testify that heavy trucks can cause damage, that's one thing but if he can't testify with certainty that it was these trucks, which it sounds like were third parties. Is that right?
>
> Mr. Lindemann: That's correct, Your Honor.

(Tr. 289:12-19.) This was an error.

As to the issue of proof that the Park project trucks caused the subsidence raised by Defense Counsel, the Trial Court made no relevant inquiries during the proffer examination of Castles. Instead, it asked: "Were some [of the vehicles that traveled the road] boats?" (Tr. 286:23-287:8). The Trial Court initially stated it was "not playing devil's advocate" in that query – and at that, Appellant's Counsel endeavored to continue Castles's proffer focused on boats traveled the roadway, as the Trial Court asked. (Tr. 287:10-13). Appellant's Counsel made it eight questions into its proffer examination attempting to dispel concerns the Trial Court indicated only moments ago that it had concerning boats (rather than trucks), when the Trial Court reversed course and stated it "was simply playing devil's advocate with that[.]" (Tr. 288:10-15.) It does not appear that the Trial Court was acting as a neutral jurist, when there was no evidence that small boats on trailers weigh anything close to an empty dump truck, let alone a full one. See § 2:8. General conduct and demeanor of judge, Trial Handbook for South Carolina Lawyers § 2:8 (5th ed.) (citing Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114 (2004); Koon v. Fares, 379 S.C. 150, 666 S.E.2d 230 (2008); Simpson v. Simpson, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008)) ("[A] judge's

impartiality might reasonably be questioned when his factual findings are not supported by the record.").

C. The Trial Court's Rulings Limiting Castles's Testimony Prejudiced Appellant

One of the central disputes in this case was the *cause* of the change in the drainage/flow of water in the area surrounding Appellant's property after the Project's completion, including several factual issues:

- Whether and how the surface water travels from the Park to Appellant's property (Tr. 61:5-7; 62:22-63:6);
- What the topography maps and Castles's testimony indicate concerning the surface water's movement and flooding at Appellant's property (Tr. 61:8-24); and,
- The location of low spots and the lowest spot is at the intersection of Front and Greenwich Streets (Tr. 62:11-25; 64:17-22).

Appellant was severely limited or entirely precluded from asking Castles to opine on these subjects and any "teeter-tottering"[8] on the *cause* of the flooding to Appellant's property or the flow of surface water into the drainage basin, the basin's ineffectiveness, and the cause of the basin's ineffectiveness (e.g., how it became a "holding pond) was snuffed out, as briefed above.

Piling it on, before Appellant's examination of Castles was complete, the Trial Court stated in a bench conference that it "does not mind [Appellant] being thorough" and "I don't ever want to pressure lawyers to get going" but "I just wanted to try to move this quickly as we can":

> Reporter's Note: (Whereby bench conference is held.)
>
> The Court: I don't ever want to pressure lawyers to get going, but it doesn't – I don't see how in the world we're going to finish this this week. Do y'all? I mean, in all honesty.

[8] The Trial Court constantly reprimanded Appellant's Counsel that he was "teeter-tottering" on violating the Trial Court's evidentiary rulings. (Tr. 448: 24-450:13.)

Mr. Lucey: We're going to make an effort to.

The Court: Well, they've still got experts, too, though, is the problem. I don't mind y'all being thorough. I really don't, I just wanted to try to move this quickly as we can.

Mr. Lucey: Yes, Sir.

The Court: Again, I'm not trying to pressure y'all. I'm just saying if I need to call court administration, then I will, but they have ragged us about the fact that if you're going to do that, don't do it Friday. So I need to let them know as quickly as possible. And I probably need to let this jury know as quickly as possible so they can deal with – we've got some young jurors who probably need to look at childcare. But again, I'm not telling you how to try your case, I'm just simply saying if we can move as quick as possible. I know we've got a lot to get through, but I appreciate y'all's patience.

Mr. Lucey: Thank you, Your Honor.

Mr. Lindemann: Thank you, Your Honor.

Reporter's Note: (End of bench conference.)

(Tr. 454:1-24.) This instruction by the Trial Court, that the Appellant prioritize expediency during its case-in-chief, amplified the obstacles set for Appellant in trying this case without its principal expert's causation testimony and expertise on the factors which led to the impediments and flooding damage at Appellant's property.

II. THE TRIAL COURT ERRED IN LIMITING APPELLANT'S TESTIMONY OF HIS CONVERSATIONS WITH RESPONDENTS AND IN FAILING TO RECOGNIZE THAT HIS CONVERSATIONS WERE PERTINENT TO SEVERAL FACT ISSUES FOR JURY DETERMINATION

The Trial Court permitted only a "very limited" portion of Appellant's testimony of his conversations with the Mayors and other representatives of Respondents to be entered into

evidence. (Tr. 461:3-22; 546:7-16; 547:14-15.)[9] The Trial Court failed to understand that Respondents' multiple representations to Appellant (and related actions) evidencing their commitment to rectifying the flooding occurring at and around Appellant's property was relevant to a number of issues in this case, not just estoppel. For example, these representations were also relevant to:

1) the existence of a duty,

2) the duty created by undertaking,

3) whether Respondents assumed a duty here,

4) whether Respondents were on notice of the surface water flooding issues, including the drainage and roadway defects in the immediate area of the Park, and the resulting injuries to Appellant's property,

5) whether corrective repair work was in process, and

6) the evaluation of what a "reasonable" time would be for performance of repairs after notice.

The last three of the foregoing points were issues of fact in Appellant's case-in-chief necessary to Appellant's negligence claim. The testimony included that:

- Appellant initially sought help from the City and DOT in 2013 or 2014 when he noticed water collected on the edge of the road adjacent to his property. (Tr. 545:4-546:6.)

- After meetings on several occasions with DOT and City Water and Sewer representatives, as well as the Mayor of Georgetown and the City manager, Appellant understood that they were working to find a solution. Initial efforts included installation of a backflow valve and cleaning of the drainage pipes and catch basins. (Tr. 547:18-548:23.)

- Appellant understood from the Respondents that a variety of solutions were being considered, including larger pipes, backflow valves, and a trap box to hold water, and that the process could take a while. (Tr. 549:25-550:13.)

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[9] The Trial Court first applied this erroneous limitation to witness O'Donnell's testimony of his conversations with Respondents, and later applied it to Appellant's testimony. (See Tr. 461:3-22.) The limitations were error as to both witnesses.

- Appellant was not overly worried because water was not yet getting onto his property and he understood that the Park project was to include drainage improvements. (Tr. 555:16-25.)

- During this time, in 2017, the backflow valve was replaced when the older one was damaged/not functioning. (Tr. 557:24-558:10.)

- Appellant also called in a work request to DOT in 2018, after DOT representative Pope retired in 2017. (Tr. 560:20-561:11.)

- After much of the Park project was complete, i.e., in 2019 or so, Appellant had further conversations with Georgetown Mayor Barber, the City Sewer and Water representative, and likely DOT representatives regarding the flooding now occurring regularly on his property, rather than in the Park, as a result of the Park project. (Tr. 550:23-551:8.)

- Appellant was told the Respondents were going to do "water diversion" to redirect the water away from his property. (Tr. 551:16.)

- To further assuage Appellant's concerns, Georgetown Mayor Barber told him that the City had received $4.1 or $4.2 million from the government to fix some of the problems. (Tr. 551:22-25.)

This limitation on Appellant's testimony incorrectly excluded relevant, material evidence of notice, work efforts in process, and repair timing, making Appellant's case-in-chief incomplete. This was prejudicial error. See, e.g., Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 189, 573 S.E.2d 789, 794–95 (2002) (holding the trial court erred and prejudiced mother of injured child's negligence case when trial court excluded specific evidence "intended to establish the applicable duty of care" which was not otherwise established by evidence admitted).

Moreover, Appellant's witness examinations were repeatedly interrupted requiring Appellant to track which issues it was permitted to properly and fully cover before a jury versus which testimony was cut off (e.g., at an early point during direct examination or partially addressed during proffer outside of the jury's presence) and at what point or otherwise improperly or arbitrarily limited. (E.g., Tr. 545:23-547:15; 556:10-18; 448:24-450:13.) This placed an unreasonable burden on Appellant during its case-in-chief and made it unnecessarily burdensome

for Appellant to enter all the relevant, material evidence and present its complete case on the issues in dispute – to the jury and to the Trial Court. See, e.g., § 2:8. General conduct and demeanor of judge, Trial Handbook for South Carolina Lawyers § 2:8 (5th ed.) (citing State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995)) (finding "the combined effect" of unsolicited comments and arbitrary limitation on cross-examination of investigating officer unfairly unduly prejudicial, necessitating that the convictions be set aside).

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT ON APPELLANT'S NEGLIGENCE CAUSE OF ACTION

The Trial Court erroneously directed a verdict in favor of City and County while ignoring the absence of evidence that either Respondent had exercised discretion, and both failed to timely repair after notice. It misapplied the snow and ice liability Tort Claims Act exemption. It ignored that performance of corrective/repair work, once a defect or condition is reported, is required, not discretionary. It ignored evidence showing Respondents undertook a duty to correct the flooding issues, began corrective work, and then failed to fulfill their duty. It failed to recognize that Hawkins concerned challenges to stormwater system design, and a lack of proximate cause, while this case does not, making its reliance on Hawkins error as well.

A. The Trial Court Erred in Finding the City and the County Were Immune to Liability Under Three Tort Claims Act Exemptions

There was no evidence of quasi-judicial action entered at Trial; no evidence of any exercise of government judgment; no evidence of snow or ice; and there was evidence of an adverse condition that had been affirmatively caused by a negligent act of a government employee – making the Respondents' liability, at a minimum, an issue of weighing competing evidence. Therefore, the Trial Court erred in directing verdicts for the City and the County based on the Tort Claims Act exemptions concerning each of these grounds.

i. It Was Error to Direct a Verdict Absent Evidence of the Exercise of Discretion or Judgment By the Government Entity Pursuant to S.C. Code Ann. § 15-78-60(5)

To invoke discretionary immunity, a government entity bears the burden of demonstrating that it actually weighed competing considerations and made a choice:

> Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense.

Sabb v. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002) (internal citations omitted); see also Summer v. Carpenter, 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997) (same). No evidence was entered in this case that the City or the County actually weighed competing considerations and made a conscious choice that would entitle either of them to invoke discretionary immunity.

ii. It Was Error to Direct a Verdict Absent Evidence of Quasi-Judicial Action or Inaction Pursuant to S.C. Code Ann. § 15-78-60(1)

Similarly, the City's and County's respective immunity from tort liability for "legislative, judicial, or quasi-judicial action or inaction" turns on the question of whether the acts in question were discretionary rather than ministerial. S.C. Code Ann. §15-78-60(1); Hawkins, 358 S.C. at 293, 594 S.E.2d at 564. The burden of establishing discretionary immunity falls to the government entity. Id. at 294, 594 S.E.2d at 564. The same proof noted above, of a government entity actually weighing alternatives and making a conscious choice, is also required for this exemption to apply. And just as above, the absence of evidence that the City and County actually exercised discretion makes this Trial Court ruling erroneous.

iii. It Was Error to Direct a Verdict Pursuant to S.C. Code Ann. § 15-78-60(8) When There Was No Evidence of Snow or Ice or a Natural

Conditions on a Public Way Due to Weather Conditions That Was Not Affirmatively Caused by a Negligent Act of an Employee

In addition to "snow or ice conditions[,]" the exemption provides that the City or County is not immune from liability for "temporary or 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*[.]" S.C. Code Ann. §15-78-60(8) (emphasis added). Like the exemptions discussed above, the Trial Court erred by ruling the City and County were exempt due to this exemption because there was no evidence of snow or ice conditions. The Trial Court followed its statement that "you could in some way say that Subsection 8 […applies]," by noting:

> It was the testimony of the plaintiffs' witness that ninety percent of this water was coming from the tides.

(Tr. 698:16-17.) As seen earlier, the evidence showed that the tidal waters became part of the surface waters which were being redirected towards Appellant's residence by the Park's improvements; and that the tidal waters would not have reached Appellant's residence if the road and tidal gate/backflow valve had been kept in good repair. (See prior discussion.)

B. The Trial Court Failed to Recognize the Evidence Presented by Appellant Was in Support of a Duty – Voluntarily Undertaken and/or Arising Out of Shared Responsibilities to Maintain/Repair Defects and Conditions Reported – Owed to Appellant

As detailed above, Appellant introduced evidence at Trial that Respondents were on notice of the surface water flooding issues and damages. Respondents met repeatedly with Appellant and indicated permits and corrective work to address the surface water were in process. And Appellant observed activity directed at relieving some of flooding volume by installation of a tidal flap. Respondents' assurances, activities, and efforts occurred because Respondents were duty-bound to act after the elevation of the Park's tennis courts redirected surface water onto Appellant's property. See S.C. Jur. Architects and Engineers § 16 (A person must exercise due care in all

undertakings not to cause injury to another or to create a dangerous situation in which injury is foreseeable. This premise covers acts of omission and requires that a complete job be done whenever a job is undertaken); Jensen v. Anderson County Dep't of Social Services, 304 S.C. 195, 403 S.E.2d 615, 617 (1991) (An actor may voluntarily undertake to perform certain obligations by contract, and in so doing, assumes a duty of care to foreseeably affected third parties.)[10] It was error for the Trial Court to disregard this evidence – that Respondents voluntarily undertook a duty to correct the conditions causing the surface water to flood toward and onto Christmas's property, began the work to correct the flooding issues at Greenwich and Front, and therefore had an obligation to complete the flood repair work and to do so with due care.

C. The Trial Court Incorrectly Concluded that This Case Was About the City's Stormwater Design, Like in Hawkins, Therefore the Respondents Were Entitled to Design Immunity

This was error and a failure on the Trial Court's part to identify and correctly analyze the issues in this case, as more fully discussed below. Appellant's negligence claim should have been tried in full and determined by a jury. It was error for the Trial Court to ignore the law and

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[10] See also Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken."); Hurst v. Sandy, 329 S.C. 471, 480, 494 S.E.2d 847, 851 (Ct. App. 1997) ("Where there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care."); Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding when lender in effect took over a project and undertook to market units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose) (citing Restatement (Second) of Torts, § 323); Restatement (Second) of Torts, § 323A (1965) (South Carolina law provides that one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to that third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of harm; (b) he has undertaken to perform a duty owed by the other to the third person; or (c) harm is suffered because of reliance of the other or the third person upon the undertaking.).

evidence before it – of duty, breach, and damages – and conclude (erroneously) that because Hawkins concerned a city's stormwater system design, the Respondents here are immune.

IV. THE TRIAL COURT ERRED IN ITS ANALYSIS AND RELIANCE ON HAWKINS AND IN DIRECTING A VERDICT ON APPELLANT'S INVERSE CONDEMNATION CLAIM

The Trial Court relied on Hawkins in directing verdicts on Appellant's inverse condemnation claim. (Tr. 696:4-24 & 697:12-22, 698:18-25.) This was error. The pleadings, factual circumstances, and evidence entered during the Hawkins trial and this Trial are distinct.

In Hawkins, a business owner sued the City of Greenville. 358 S.C. at 285, 594 S.E.2d at 560. He alleged that the City of Greenville's failures in the design and maintenance of the drainage system caused the flooding of his property during a rainstorm in 1997. Id.[11] On appeal, the Hawkins Court affirmed the trial court's grant of summary judgment on the plaintiff's inverse condemnation claim. Id. It noted none of the Hawkins experts opined that either of the subject drainage modifications had an adverse impact on drainage. Id.[12] It was not the absence of an overt or positive act that drove the Hawkins Court's affirmance; it was that there was no evidence linking the cause of the flooding to the City of Greenville's positive actions. Id. As to the Hawkins plaintiff's negligence claim, the court noted the issues were akin to "adopting a general plan of drainage," noting that to "build and maintain an adequate municipal sewer and drainage system"

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[11] Hawkins previously brought suit against the City of Greenville in 1991 after runoff from heavy rainfall damaged his property, alleging in the earlier suit, just as he did in Hawkins, that the City of Greenville was negligent in "failing to design and maintain a reasonably adequate surface water drainage system." Id. at 286–87, 594 S.E.2d at 560. The earlier suit settled, and in the years between the two suits, the City installed "a large, elliptical arched pipe" and "riprap along the banks of the creek" to address flooding in the area. Id. at 286, 594 S.E.2d at 560.

[12] Unlike Castles's testimony in Appellant's case in chief, the Hawkins experts 1) testified that the affirmative act "likely improved" the drainage, 2) offered no opinion on the impact of the installations, or 3) opined it was impossible to determine how the drainage was affected, be it negatively or positively. 358 S.C. at 291, 594 S.E.2d at 563.

the City of Greenville was granted discretion to exercise "measured policy judgments[,]" much like the determinations, e.g., of when and where sewers shall be built, of what size, and at what level. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563.

Unlike Hawkins, this case concerns a project which redirected surface waters and damaged roads, and the failure to fix either after notice.

A. The Trial Court Failed to Recognize the Distinctions Between Hawkins and This Case

The Trial Court stated that the only difference between Hawkins and the case before it was Hawkins involved a business, not just an individual. (Tr. 696:17-19.) That is incorrect. The plaintiff in Hawkins alleged negligence in the *design* of the stormwater drainage systems and asserted that the municipality "improperly allowed the development of neighboring parcels…which altered the elevation of the area." Hawkins, 358 S.C. at 291, 594 S.E.2d at 562–63. The Hawkins Court concluded there was no evidence in the record that tended to prove that either of the acts of the City of Greenville *caused* or *precipitated* the flooding. Id. at 291, 594 S.E.2d at 563.

In contrast, here, Castles testified that the raising of the Park and the unrepaired damage to the road were the dominant causes of the harmful flooding; and that these were greater causes of flooding than sea level rise. And multiple witnesses testified that the raising of the Park had cast more water to Christmas' property. Additionally, as discussed above, during Appellant's case, the Trial Court erroneously disallowed evidence on hydrology by Castles and circumscribed his drainage testimony. (Tr. 276:12-14; 450:1-3; 453:8-9) As a result, a material portion of Appellant's evidence demonstrating the cause of the flooding was excluded from the Trial record.

Even so, the Trial Court failed to consider the Trial testimony in the light most favorable to the non-moving party in concluding "there's been no evidence to indicate that there has been a

taking in regards to the claim for inverse condemnations." (Tr. 696:4-6.) It instead relied on the evidence from Hawkins, a case it erroneously deemed to be "almost identical to this case." (Tr. 696:17-18.) This too was error.[13]

B. The Trial Court Erred In Disregarding the Evidence Entered During Trial Showing That the Increased Elevation of the Tennis Courts Did Change the Drainage and Cause the Flooding Issues

Castles testified about the Park renovation project, confirming his review of the Park redevelopment plans of the ballfield, walking trail, and tennis courts and the direction of drainage and stating that prior to the renovation "the old tennis courts flooded a good bit, so they stored a little water on them[;]" after the renovation "[w]hen they raised them, then the water just completely comes off the courts as soon as it hits the courts. So, it drains quicker to the low end, which is down around Front Street and Greenwich Drive." (See Tr. 342:18-343:10; 343:21-344:5.) There was no contradictory evidence entered about the act of raising the elevation by Respondents. Yet, the Trial Court (erroneously) stated if the install of a "double box culvert" among other potential installations in Hawkins was "not an overt act," then "[i]n reading that case and looking at the facts of this case" there is no evidence of an overt act here. ((Tr. 700:14-21.) This was error. First, Hawkins did not hold that there was no overt act; it held there was no causal link between the overt act and the damage claimed. Hawkins, 385 S.C. at 285, 594 S.E.2d at 560. Second, whether a government entity performed an overt or positive action to satisfy a taking is an issue of fact. Newsome v. Town of Surfside Beach, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989)

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[13] The analysis of the evidence in the Hawkins case cannot properly form the basis for a directed verdict ruling in this case - a completely, separate trial with different pleadings and evidence. (Tr. 696:4-8 ("I am pulling the evidence from that from Hawkins v. City of Greenville.").) The failure to analyze the evidence and specific expert testimony in the Trial at hand, substituting an analysis performed in an unrelated 20-year-old case on separate evidence as to different allegations, is an error of law.

(noting "the jury could have easily concluded that the building up of Fifth Avenue satisfied the requirement of an overt or positive action by the Town necessary to prove a taking under the cause of action for inverse condemnation").[14] Third, just as in Newsome, Castles's testimony and the topography maps showing the increased elevation of the Park tennis courts, inter alia, post-Park renovations, altering the surface water drainage, was evidence of an overt or positive act. Newsome, 300 S.C. at 16, 386 S.E.2d at 275 (Expert testimony that a town raised the level of a street higher than it previously existed altering where surface water naturally congregated, which subsequently flooded a nearby home which became the lowest property in that vicinity, was evidence of an overt act or positive action in the context of inverse condemnation claim).

V. THE TRIAL COURT ERRED IN FINDING MANDAMUS IMPROPER HERE

The Trial Court's mandamus analysis was erroneous because it disregarded that discretionary acts require a weighing of competing considerations and a conscious decision to act or not; the act at issue – the performance of corrective work to reported roadway defects – is a ministerial act by the DOT; notice was provided to DOT that damage exists at the Intersection, therefore DOT was duty-bound to timely repair it; that the County and City were also duty-bound to correct the flooding and roadway defects; and that the only evidence entered in the Trial record infers that the Respondents voluntarily undertook the duty to correct the defects.

A. A Discretionary Act Is One Where a Department, Faced with Alternatives, Actually Weighs Competing Considerations and Makes a Conscious Choice to Act Or Not

[14] See also Ray v. City of Rock Hill, 434 S.C. 39, 48, 862 S.E.2d 259, 264 (2021) (declining to decide fact issue as a matter of law when there was evidence entered that when "City [of Rock Hill] reconnected its three pipes to the catch basin, it directed water into the catch basin and through the Pipe.").

Our State Supreme Court's analysis of what constitutes a "discretionary" act or duty in Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 204, 403 S.E.2d 615, 619–20 (1991) is instructive. In Jensen, the Supreme Court considered whether alleged negligent conduct – by DSS and two of its social workers in an investigation of reported child abuse – occurred during the performance of a ministerial or discretionary duty. Id. 304 S.C. at 198–99, 403 S.E.2d at 617. The Jensen Court agreed with the Court of Appeals that 1) the duty to conduct a "thorough" investigation before a decision is taken to close a file is ministerial; 2) the manner in which the investigation is conducted is discretionary, except when an investigation is so incomplete it could not be found to be "thorough;" and 3) the decision to classify reported abuse as "unfounded" and close a file is discretionary, because it involves the application of judgment to the particular facts, unless the file is closed because the investigation was so incomplete and there were not enough facts to make an informed decision. See Jensen, 304 S.C. at 204, 403 S.E.2d at 620.

B. There Is No Evidence in the Record That Respondents Engaged in Weighing Competing Considerations, Applying Its Judgment to Particular Facts, and Making a Conscious Decision on That Basis

Not a single email or communication or shred of evidence was submitted at Trial supporting discretionary activity, likely because it does not exist. The DOT does not have a choice in whether or not it will *perform* a roadway repair once a defective condition or road defect is reported. It *performs* roadway repair work because it has a duty to do so, as discussed below.

Further, the Trial Court demonstrated that it misunderstood the duty at issue. It noted that its "quick Google search" showed the DOT "maintains" thousands of miles of roads. (Tr. 695:22-24.) It concluded that "[t]o indicate that they don't have discretion on which roads they're working on I think it's just not correct." (Tr. 695:24-696:1.) The issue is not, nor has it ever been, which roads DOT works on at any given time. The issue is whether the DOT is required to perform work

to correct reported roadway defects (it is) and whether it is required to perform said work within a reasonable time (it is). See, e.g., S.C. Code Ann. §15-78-60(15).

In fact, there was a lack of evidence that any Respondent performed a discretionary act.

C. DOT Was Duty-Bound to Repair Greenwich Drive and Front Street After It Was Given Express Notice of the Subsidence and Roadway Issues Contributing to the Flooding Damages and Failed to Correct Them Within a Reasonable Time

As noted earlier, the DOT had an obligation to timely repair roadway defects or conditions after receiving notice. See S.C. Code Ann. §15-78-60(15) (requiring DOT timely correct reported roadway defects). It has no discretion in whether it 1) repairs road conditions or defects reported and 2) does so timely. It must timely make the reported roadway repair.[15] It was error for the Trial Court to fail to recognize the ministerial nature of the DOT's duty to perform repairs to roads reported as defective and to do so within a reasonable time.

D. The City and the County Were Also Duty-Bound to Fix the Flooding and Streets

Here, the City and the County also had an obligation to maintain and repair the flooding and roadway defects in the immediate area of the Park – including at Greenwich and Front. See S.C. Code Ann. § 57-5-140 (Under South Carolina law, "[n]othing…shall prevent a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the department is able to undertake...."); see also Vaughan v. Town of Lyman, 370 S.C. 436, 446-47, 635 S.E.2d 631, 637 (2006) (recognizing a town that undertakes maintenance, repairs, or control of state-owned roads within its limits is duty-bound to do so with due care, and

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[15] See also Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n, 336 S.C. 174, 183, 519 S.E.2d 567, 572 (1999) ("[W]e agree with District that the general duty of organizing and conducting the election is a ministerial act. It would have been proper for the circuit court to issue a writ of mandamus directing County Commission to organize and conduct a bond referendum ordered by District if County Commission had refused to do so.").

whether a town undertook the duty of maintaining city streets, even though not all city streets were owned by town was a jury question, noting evidence of sidewalk maintenance in town minutes, ordinances regulating sidewalks, and previous complaints from town residents about sidewalks handled by town).[16]

E. Respondents Were Duty-Bound to Perform Road Repairs and Resolve the Surface Water Access Impediments to Appellant's Property Because It Undertook That Duty

"While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). "The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Miller v. City of Camden, 329 S.C. 310, 314–15, 494 S.E.2d 813, 815 (1997). See also Vaughan, 370 S.C. at 446–47, 635 S.E.2d at 637 (A duty of due care may arise when a municipality voluntarily undertakes to repair, control, or maintain the streets and sidewalks within it.) Here, the evidence, taken together, tends to indicate Respondents' voluntary undertaking of corrective repairs and maintenance work of both Greenwich and Front Streets to correct the flooding and drainage problems:

- Former DOT resident maintenance engineer, Richard Pope, testified that the DOT performs inspections of Greenwich and Front Streets once or twice a year to examine the condition of the roadway – for heavy potholes, cracking, and the like – for resurfacing purposes (Tr. 216:24-218:9);

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[16] The Trial Court erred when it failed to recognize these obligations (voluntarily undertaken and/or arising through shared maintenance and repair by the City and County) or allow the issue to be determined by the factfinder on Appellant's negligence claim, instead issuing a directed verdict that goes *against* the only evidence in the record.

- Pope testified that the DOT received and managed complaints about the road issues in the area immediately around Greenwich and Front Streets via phone call to him personally or through the complaint system (Tr. 218:20-219:3);

- Appellant's neighbor, Judge O'Donnell, testified that barricades[17] are put into place after rain events, which has occurred more frequently and with greater severity over time, to keep people from driving through the roads while flooded; barricades remain prepositioned at Greenwich and Front (Tr. 465:25-467:21);

- Pope confirmed he had a conversation with Christmas concerning the water issues at and around Greenwich Drive and in the area surrounding and including Appellant's property, recalling that the water was coming across the road flooding Appellant's property, that the road was in poor condition and was extremely settled in front of that property (Tr. 219:4-21);

- Appellant testified he had multiple meetings about the flooding problems with representatives of the City, County, and State (Tr. 553:14-554:4 & 550:23-551:2) and Pope recalled having many meetings with Christmas (Tr. 234:21-23);

- Appellant understood drainage work was to be included in the Park renovation work, as he was told the Park renovations would include water diversion (Tr. 555:16-25);

- Appellant reported the increase of flooding frequency post-Park renovations (Tr. 554:17-555:7 & 550:23-551:12);

- During the discussions between Christmas and representatives of the Respondents, Christmas was told corrective work would take awhile (Tr. 549:25-550:22);

- Permitting, installing a bigger pipe, putting on back flow valves, building a retention pond, installing a trap, funding the work with money secured by Representative Tom Rice, were discussion points (Tr. 550:1-25);

- Christmas testified that Mayor Barber acknowledged the flooding and post-Park renovation drainage problems and Barber told him they secured money to do the repair work (Tr. 554:17-555:7).

VI. THE TRIAL COURT ERRED IN HOLDING THE STORMWATER STATUTE WAS IMPLIEDLY REPEALED AND THAT IT DOES NOT APPLY TO COUNTIES

[17] These City barricades were within the DOT right of way, evidencing all Respondents were aware of the flooding and constructively participating in its management. The barricades were later replaced with installed poles and chains. (Tr. 467.)

The Trial Court ruled that the Stormwater Statute at S.C. Code Ann. § 5-31-450 was impliedly repealed by the Tort Claims Act. (Tr. 697:6-8.) It reasoned: "You can't read that statute and then read the Tort Claims Act and the waivers of immunity and sovereign immunity and say that it was not." (Tr. 697:8-10.) No legal precedent supports this ruling that the legislature intended to repeal the Stormwater Statute. In fact, repeal by implication is disfavored and is found only when two statutes are incapable of any reasonable reconcilement. Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994). A later statute on a given subject, not repealing an earlier one in terms, is *not* to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. State v. Hood, 181 S.C. 488, 188 S.E. 134, 136 (1936) (emphasis added). And, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. City of Rock Hill v. South Carolina DHEC, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955).

The General Assembly has clearly found that "while total immunity from liability on the part of the government is *not* desirable . . . neither should the government be subject to unlimited nor unqualified liability for its actions." S.C. Code Ann. § 15-78-20(a) (emphasis added). Here, it is not repugnant to the Stormwater Statute, it does not fully embrace the whole subject matter, and as a result, the two statutes can co-exist. While the SCTCA sets forth waivers and limitations on governmental immunity, it does not "fully embrace" damages, among other matters. Specifically, the Stormwater Statute first dictates specific performance of management of the stormwater; and,

if specific performance is not possible or refused, the Stormwater Statute permits and enables an award of damages. The Tort Claims Act does not provide a specific performance remedy. Appellant sought a remedy, not solely monetary damages.[18]

The Trial Court also ruled that the Stormwater Statute does not "in any way relate to the County[,]" it only applies to cities. (Tr. 696:25-697:5.) That is incorrect. Title 5 of the South Carolina Code, under which the Stormwater Statute exists, addresses "Municipal Corporations[.]" See S.C. Code Ann, at Title 5. The Stormwater Statute refers to both "any municipality" and "any municipal corporation" though neither term is defined. See S.C. Code Ann. § 5-31-450. See Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken, 354 S.C. 18, 23–24, 579 S.E.2d 334, 337 (Ct. App. 2003) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Dictionaries can be helpful tools...") (internal citations omitted). Our State Supreme Court has recognized that the term "municipal" is properly used in characterizing the government of a county:

> In speaking of the meaning of the term 'municipal government' as used in this section, the Court in Carolina Grocery Co. v. Burnet, supra [61 S.C. 205, 39 S.E. 385], said: 'It is no doubt true that the strict application of the term 'municipal' would limit it to incorporated cities, towns, and villages; but it is also true that it may properly be used in characterizing the government of a county or township. 'Municipal corporations are administrative agencies established for the local government of towns, cities, counties or other particular districts,' etc. Black, Const. Law, p. 374. In 15 Am. & Eng.Ency.Law, 953, it is stated: 'A 'municipal corporation' in its broader sense, is a body politic, such as a state and each of the governmental subdivisions of the state, such as counties, parishes, townships,

[18] The circuit court previously considered and rejected an "impliedly repealed" argument in this case. In a March 2022 Order, the circuit court correctly recognized that the City lacked legal precedent that the legislature intended to repeal the Stormwater Statute; that the SCTCA is not repugnant to the Stormwater Statute and does not fully embrace the whole subject matter; and refused to find the Stormwater Statute was impliedly repealed. Though superseded by a June 2022 Order which was silent on the issue, the circuit court's reasoned rejection of the impliedly repealed argument in the March 2022 Order was correct. Compare March 22, 2022 Order, R.p. __, with June 7, 2022 Superseding Order R. p. __.

> hundreds, New England 'towns,' and school districts, as well as cities and incorporated towns, villages, and boroughs.

Gaud v. Walker, 214 S.C. 451, 470–71, 53 S.E.2d 316, 324–25 (1949) (emphasis added). A "municipal corporation" is commonly defined as inclusive of a county, as a form of local government:

> A city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affairs; esp., a public corporation created for political purposes and endowed with political powers to be exercised for the public good in the administration of local civil government. — Also termed *municipality*; *statutory corporation.* Cf. *quasi-corporation* under CORPORATION.

MUNICIPAL CORPORATION, Black's Law Dictionary (11th ed. 2019).

VII. THE TRIAL COURT ERRED IN ITS STATUTE OF LIMITATIONS ANALYSIS AND IN DIRECTING A VERDICT FOR THE DOT ON THE STATUTE OF LIMITATIONS

The Trial Court ruled in favor of the DOT on the statute of limitations, explaining how it arrived at its conclusion in this way:

> I believe that the evidence in the record would show that there was no positive action done by the DOT to allow Mr. Christmas to in any way think that the DOT was acting in his interest within two years of that December the 7th, 2021 date.
>
> So, for that, I am going to grant your motion for directed verdict in regards to the statute of limitations.

(Tr. 697:7-12.) There is no precedent for this SOL analysis. There is no requirement for a "positive action" by the party asserting an SOL defense within two years of suit. (Tr. 697:7-8.) In fact, that is completely contrary to the doctrine of estoppel. [19] There is no requirement that the non-moving

[19] See also Hedgepath, 348 S.C. at 360, 559 S.E.2d at 338-39 ("An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other

party be "allow[ed]" to "think" the defending party "was acting in his interest" for a certain time period prior to the SOL's expiration. (Tr. 697:8-9.) This ruling was arbitrary and capricious. Ex parte DeBordieu Colony Cmty. Ass'n, Inc., 442 S.C. 285, 290, 898 S.E.2d 179, 181 (Ct. App. 2024) ("An error of law includes failing to consider all of the factors relevant to a particular decision.").

A. Additionally, the Trial Court Failed to Consider That the Tort Claims Act Maintenance Exception Altered the Statute of Limitation Timing Calculus

Section 15-78-60(15) of the Tort Claims Act states in pertinent part:

> Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party *unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice*[.]

S.C. Code Ann. § 15-78-60(15) (emphasis added). In other words, once on notice of a road's condition, South Carolina statute requires the corrective work to occur by the DOT but not on a specific timeline; rather, the defect or condition must be corrected within a "reasonable time." This alters the statute of limitations analysis here.

As seen above, Appellant provided notice of the conditions at the Intersection to Respondents. Respondents were again provided with notice by the publication of Castles' Report. (See Tr. 359-60 & Ex. 40.) Additionally, the flooding is a reoccurring condition. See also Major v. City of Hartsville, 410 S.C. 1, 4, 763 S.E.2d 348, 350 (2014) ("Where a recurring condition is

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conduct that suggests a lawsuit is not necessary… [The inducement] does not [need to be] intentional… It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire."); Am. Legion Post 15 v. Horry Cnty., 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009) ("Estoppel may apply against a government agency and the party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position.").

of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice.").

Both Pope's and Appellant's testimony confirmed that Pope met with Appellant along with the City, Water and Sewer, and DOT representatives to discuss corrective work to rectify the flooding problems to Appellant's property in part caused by the subsidence and conditions of Greenwich Drive. (Tr. 222:1-8; 225:11-12; 550:10-13.) The question of whether the time the that lapsed was "reasonable" should be weighed together, in favor of the assurances and discussion of anticipated delays provided by Respondents in conversations with Appellant. See, e.g., Mains v. K Mart Corp., 297 S.C. 142, 150, 375 S.E.2d 311, 315 (Ct. App. 1988) ("What is reasonable is ordinarily a question of fact for the jury.").

B. The Trial Court Failed to Consider the Impact of the Respondents' Representations That Repair Planning and Permitting Would Delay Performance in Its Estoppel Analysis

As noted above, the DOT participated in meetings where the Respondents told Appellant the flooding issues would be corrected, albeit slowly given the need for permitting, involvement by several agencies, and selection of repairs to be implemented. The Mayor and Respondents, including DOT, described the corrective work to Appellant, told him it was funded, and led Appellant to believe that no question remained about *whether* the corrective work would occur; it was only a matter of when and what. (See prior discussions.) There was no reason for Appellant to sue when the Respondents were working on a solution and the delays were expected.

It was error for the Trial Court to ignore the above facts when ruling on the statute of limitations on DOT's motion for directed verdict. See Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001) (A defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit.). Not only did the Trial Court ignore the above facts,

but the Trial Court, of its own volition during Trial, also referred to unpublished opinion Bennett v. Theola Pitts and failed to consider Magnolia North that repairs by a defendant may toll the statute of limitations. (Tr. 632:1-634:11.) See Bennett v. Pitts, No. 2023-UP-104 (S.C. Ct. App. Mar. 15, 2023); see also Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 373, 725 S.E.2d 112, 125 (Ct. App. 2012).

It was also error for the Trial Court to rule contrary to the evidence of 1) the DOT's conduct and representations lulling Christmas into a false sense of security regarding the need to file suit and 2) Appellant's reasonable reliance on DOT's conduct, when both questions should have been submitted to the fact finder on Appellant's negligence cause of action. See Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 219, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) ("The question of whether a defendant's conduct lulled a plaintiff into a false sense of security and thereby prevented the plaintiff from filing suit within the statutory period is ordinarily one of fact for a jury to determine."). And it was error for the Trial Court to disallow Appellant from testifying in full about the DOT's conduct and representations to him and to permit his limited testimony only to take place outside of the jury, as noted above. (Tr. 547:12-15; 564:24-565:1.)

CONCLUSION

For all the reasons set out above, this Court should reverse the Trial Court's erroneous rulings, during Trial and at the close of Appellant's case-in-chief, and remand this case for a new trial on all of Appellant's causes of action.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: */s/Justin Lucey*
Justin O'Toole Lucey (S.C. Bar No. 15438)
Joshua F. Evans (S.C Bar No. 77448)
Sohayla R. Townes (S.C. Bar No. 102814)
415 Mill Street
Mount Pleasant, SC 29464
Telephone: (843) 849-8400
Attorneys for Appellant

July 11, 2024
Charleston, SC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman

Case No. 2020-CP-22-00356
Appellate Case No. 2023-001454

Ron Christmas, Appellant,

v.

County of Georgetown; City of Georgetown; and South Carolina Department of Transportation, Respondents.

PROOF OF SERVICE

I, the undersigned, attorney for Appellant Ron Christmas, do hereby certify that I have this date served the foregoing **APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER** by personally serving the same upon the following counsel using the primary email addresses as listed via the Attorney Information System on July 11, 2024.

Counsel of Record
M. Kirk Battle, Esq.
Michael W. Battle, Esq.
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
kbattle@battlelawsc.com
mbattle@battlelawsc.com
Attorneys for County of Georgetown

Andrew F. Lindemann, Esq.
Lindemann Law Firm, P.A.
P.O. Box 6923
Columbia, SC 29260
andrew@ldlawsc.com
Attorney for City of Georgetown

Lisa A. Thomas, Esq.
Carmen V. Ganjehsani, Esq.
Richardson Plowden
Office: 2103 Farlow Street
Myrtle Beach, SC 29577
Mailing Address: P.O. Box 3646
Myrtle Beach, SC 29578
lthomas@richardsonplowden.com
cganjehsani@richardsonplowden.com
Attorneys for South Carolina Department of Transportation

JUSTIN O'TOOLE LUCEY, P.A.
/s/Justin Lucey
Justin O'Toole Lucey (S.C. Bar No. 15438)
Joshua F. Evans (S.C Bar No. 77448)
Sohayla R. Townes (S.C. Bar No. 102814)
415 Mill Street
Mount Pleasant, SC 29464
Attorneys for Appellant

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Charleston, South Carolina