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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.

RESPONDENT'S GEORGETOWN COUNTY'S INITIAL BRIEF

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August 21,2024
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STATEMENT OF THE CASE

The present appeal arises from a lawsuit filed by Appellant Ron Christmas (Christmas) against Respondents County of Georgetown (County), City of Georgetown (City), and South Carolina Department of Transportation (SCDOT). Christmas alleges that his property in the City of Georgetown, S.C. was damaged because of tidal flooding from Winyah Bay and stormwater drainage from East Bay Park. Christmas sought a trial by jury and a judgment against all Respondents for actual damages; diminution of value; costs of suit; and a temporary and permanent injunction/mandamus to prevent future damages. Christmas alleged claims for Negligence/Gross Negligence as to all Respondents, Inverse Condemnation as to all Respondents,

Injunction/Mandamus as to all Respondents, and Violation of South Carolina Code § 5-31-450 against the City and the County.

At the close of Christmas's case, the trial court granted directed verdicts on all claims in favor of all Respondents. The trial court denied Christmas's motion for reconsideration and a new trial. Christmas appealed on the grounds of errors in evidentiary rulings, errors in granting Respondents' motions for directed verdict and errors in denying Christmas's request for a mandamus or injunctive relief.

The County contends some of the issues or arguments raised by Christmas in his appellant's brief do not apply to the County. However, the County adopts and incorporates herein the responses contained in the other Respondents' briefs in connection with all issues applicable to the County.

STATEMENT OF THE FACTS RELATED TO GEORGETOWN COUNTY

Mr. Christmas purchased the property in question in 2003. In 2005, he moved into a house he constructed on the property. [Tr. 543] Richard Pope, the resident maintenance engineer for Georgetown County, testified that within a year of Christmas moving into his house, Christmas began complaining about tidal water coming across Greenwich Drive from Winyah Bay and flooding his property. [Tr. 219, 232] Thereafter from time to time, when the tides from Winyah Bay would get up, Christmas would continue his complaints to Mr. Pope about flooding on his property. [Tr. 232] Pope retired from Georgetown County prior to any renovations to the park. [Tr. 235] Water from Winyah Bay had always been a flooding problem in the area of Christmas's property even before Christmas purchased the property. [Tr. 234]

The building permit for the construction of Christmas's house showed that the property was located in an AE-10 flood zone.[1] [Tr. 586] The USDA soil survey reports showed that at least half of Christmas's property soil texture was described as "levy silty clay loam." [2][Tr. 519] Christmas's expert on soils mentioned pluff mud in describing some of the soil beneath Christmas's house. [Tr. 503] His expert on soils testified that Christmas's property had been elevated with fill soils. [Tr. 523]

The water table for Christmas's property is zero inches and the frequency of flooding on his property was described as very frequent. [Tr. 519] Because of the property's location and soil conditions, Christmas was required to build his house on pilings with a base floor elevation of at least 10 feet above ground level. [Tr 585, 587] The elevation of the property at the garage level is 4.7 feet. Although the property still continues to flood, it has never entered the living areas of Christmas's house. [Tr. 585]

A topographical survey shows that the lowest property elevation for the area exists at the intersection of Greenwich Drive and Front Street at the southeastern corner of Christmas's property. [Tr. 311] Winyah Bay's tidal water comes from the north and from the east to that low point in the intersection. Primarily the flooding occurs during king tides and water floods the streets

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[1] The Federal Emergency Management Agency developed flood zones to determine each community's flood risks. Flood Zone AE are low-lying areas that have a high risk, because of their proximity to floodplains, rivers and lakes. *soilseries.sc.egov.usda.gov › OSD_Docs › LOfficial Series Description - LEVY Series – USDA*

[2] TYPICAL PEDON**:** Levy silty clay loam - fresh water marsh. Soils, soil taxonomy, typical pedon, geographically associated soils, competing series, distribution and extent, range in characteristics, type location, drainage and permeability, use and management. *National Cooperative Soil Survey U.S.A.*

in the entire area including Christmas's property. The flooding conditions existed before any improvement work was done to East Bay Park. [Tr. 477]

Christmas's civil engineering expert, Robert Castles, testified he calculated only a small rise in sea levels recorded in Charleston, South Carolina and he opined that the increasing sea level was not the cause of the alleged worsening of the flooding around Christmas's property. Because he eliminated the increasing sea level as a cause of the alleged worsening of the flooding, Castles speculated that the flooding of Christmas's property could be attributed to Respondents improvements constructed in East Bay Park and the alleged sinking of Greenwich Drive due to road use by heavy trucks going to East Bay Park during the construction phase of the improvements.

None of Christmas's witnesses did any hydrology studies showing the increase of water in Winyah Bay or the City of Georgetown. The Waccamaw River, the Pee Dee River, the Black River, the Santee River and the Sampit River empty into Winyah Bay around the City of Georgetown. There are no studies on the rise of river levels in those rivers in the record. There are no studies of changes in wind directions in Winyah Bay in the record. There are no studies on effect of property development around those rivers or Winyah Bay in the record. Those studies are not in the record because Christmas's witnesses did not do them or introduce reliable evidence of a third party's studies.

In 2017, Respondents City and County began work on improvements to East Bay Park which is located across Front Street south of Christmas's property. The County removed three (3) existing tennis courts and replaced them with six (6) new tennis courts and accessories. The tennis courts are significantly south of Christmas's property and Front Street. [Exhibit 48] A stand of pine trees, a frisbee golf course and a wetlands area separate the tennis courts from Front Street

and from Christmas's property. The remaining work or improvement acts for East Bay Park were done independently by the City.

STANDARD OF REVIEW

South Carolina adheres to the rule which requires submission of an issue to a jury whenever there is competent and relevant evidence tending to establish the issue in the mind of a reasonable juror. The rule does not authorize submission of speculative, theoretical or hypothetical views nor does it permit a verdict to stand upon surmise, conjecture or speculation. This declaration is but to say that the scintilla of evidence upon which a case should be sent to the jury must be real, material, and pertinent and relevant evidence, not speculative and theoretical deductions.' *Turner v. American Motorists Ins. Co.,* 176 S.C. 260, 180 S.E. 55, 57. It is axiomatic that when there is no competent and relevant evidence to sustain an issue of fact, the latter becomes an issue of law, and nonsuit or directed verdict is proper upon timely motion. *Johnson v. Metro. Life Ins. Co.*, 206 S.C. 415, 419–20, 34 S.E.2d 757, 758–59 (1945); also see *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 460, 892 S.E.2d 297, 300 (2023).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF CHRISTMAS'S EXPERT ROBERT CASTLES.

Christmas claims the trial court erred in limiting the testimony of Robert Castles, his proposed expert on the subject of hydrology. He claims that the trial court unfairly limited Castle's testimony because he was not licensed as a hydrologist and because the trial court failed to acknowledge Castle's experience in civil engineering. The County disagrees with Christmas's claims.

First it should be noted that Castles was not tendered as an expert in hydrology as shown by the following court exchange:

> MR. LUCEY: What I'm saying to Your Honor is I'm willing to modify the tender to make it easier for the Court. Simply tender him as an expert in civil engineering with a focus on drainage and forensics. I'll take hydrology --
>
> THE COURT: I think that he is, with his experiences, would certainly be an expert in civil engineering. My concern has been the hydrology aspect of it. And again, potentially, geo -- I think it's a geotech issue but if you've got an expert coming tomorrow for the geotechnical side of that, then that may solve that.
>
> MR. LUCEY: Well, the hydrology would be the flow of the water. I don't need that.
>
> [Tr. 274-275]

The qualification of an expert witness and the admissibility of an expert's testimony are matters within the trial court's discretion and will not be overturned absent a finding of abuse of that discretion. *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 344, 468 S.E.2d 633, 636 (1996) An abuse of discretion occurs when the circuit court's rulings either lack evidentiary support or are controlled by an error of law. *Graves v. CAS Med. Sys., Inc*., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *Rule 702, SCRE*. Regardless of whether the expert testimony is scientific, technical or otherwise, all expert testimony must meet the requirements of Rule 702. *Graves,* 401 S.C. at 74, 735 S.E.2d at 655 (2012)

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in a particular subject matter,

although he need not be a specialist in the particular branch of the field. Finally, the substance of the testimony must be reliable. See *Holmes v. Haynsworth, Sinkler & Boyd, P.A.,* 408 S.C. 620, 635–36, 760 S.E.2d 399, 407 (2014), abrogated on other issues by *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

A. The Trial Court Did Not Err in Its Grounds for Limiting Castles' Testimony at Trial.

The problem with Castles' testimony on the flow of water from East Bay Park to Christmas's property was that Castles did not do any surface water analysis or hydrology studies for water flows in connection with Christmas's property. [Tr. 261] He said he looked at some hydrology "stuff" that was prepared by others. However, he did not have in court the data he claimed he relied upon, and he did not demonstrate that the "stuff" he viewed was reliable. [Tr 262] Christmas stated he was not calling as a witness anyone who did the alleged hydrology studies on which Castles claimed he relied. [Tr 272] Respondents had no means to question the reliability of the "stuff" upon which Castles claimed he relied. Due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability. *Rule 703, SCRE*; *Matter of Bilton*, 432 S.C. 157, 167, 851 S.E.2d 442, 446 (Ct. App. 2020).

Castles did not do a reliable analysis for the tidal water flowing to Christmas's property from Winyah Bay. He did not study or establish a means for measuring changes in tides from Winyah Bay in the area of Christmas's property. He did not consider the factors causing king tides. He did not study periodic water level increases for any of the rivers flowing into Winyah Bay near Christmas's property. He did not study wind directions in Winyah Bay. He did not consider changes in soil permeability in the area. He did not consider human development changes in surface areas around Winyah Bay. He considered data prepared by NOAA in Charleston, S.C.

and Spring Maid Beach north of the Town of Surfside Beach, S.C. He did not have any data on the conditions that would account for variations in changes in tides in Winyah Bay or the conditions in the areas he did consider. [Tr. 303-305]

Christmas's attorney then pivoted to a claim that Castles was relying on City maps showing drainage in East Bay Park. [Tr 272] His attorney claimed the City's stormwater maps actually showed the location of all the catchwater basins and outlets for all the water drainage. His attorney then stated that Christmas was only concerned with anything close to Front Street. He did not care about the rest of the information on water flows in East Bay Park. [Tr. 273] However, Castles did not verify the information on the City maps, and he did not explain how City maps would be reliable in supporting an opinion that the acts of the Respondents caused water in East Bay Park to cross Front Street and increase the flooding on Christmas's property. As for the County, its work on the tennis courts was not close to Front Street. Castles even testified he never said storm water was a big issue in connection with the tennis courts. [Tr 411] Even if Castles had been allowed to testify to the jury as an expert in hydrology, as shown in his proffer, Castles would have failed to connect water flow from the tennis court to flooding on Christmas's property. [Tr. 262]

The trial court allowed Christmas to testify about changes in the sea level. However, he found that Castles was not qualified to testify about why the sea levels rise or why they don't rise. [Tr. 306] The trial judge correctly exercised his discretion in limiting Christmas's expert's testimony on hydrology.

B. The Trial Court did not Err in Limiting Castles's Testimony Concerning East Bay Park Project Trucks' Causing or Contributing to Greenwich Drive Subsidence.

The County contends it has no control or maintenance duties in connection with Greenwich Drive. It is important to note that the ultimate issue in the case for the County is whether the

County's acts damaged Christmas's property. Castles opined that Greenwich Drive and Front Street in front of Christmas's property had sunk and before those roads sank, they functioned as a barrier to prevent most of the flooding on Christmas's property. Castles was allowed to opine that heavy truck traffic on Greenwich Drive may have caused that road to sink. However, Castles could not testify on what trucks or vehicles caused the roads to sink because no one identified whose trucks actually used Greenwich Drive. [Tr. 289]

C. The Trial Court's Rulings Limiting Castle's Testimony Did Not Prejudice Christmas.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Id.* at 429–30, 632 S.E.2d at 848. Prejudice exists when there is "a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 860–61 (Ct. App. 2010)

The trial court did not manifest an abuse of discretion by limiting Castles' opinions. The trial court did not limit Castle's testimony on matters he actually observed or matters that involved reliable opinions on facts in the record within Castle's area of expertise as a civil engineer. The trial judge did exercise his discretion properly to preclude Castles from giving speculative hydrology opinions on tidal waters from Winyah Bay or opinions on the flow of water from East Bay Park to Christmas's property. The trial court properly prevented Castles from opining that County trucks caused Greenwich Drive to sink when no one had identified the weight or number of County trucks actually using Greenwich Drive.

Christmas was allowed to proffer all of Castles' opinions and testimony to the trial court. After hearing Christmas's entire case, the trial court granted a directed verdict in favor of all Respondents. Christmas was not prejudiced by the trial court limiting Castles' testimony. *State v. Martucci,* 380 S.C. 232, 248, 669 S.E.2d 598, 606 (Ct.App.2008).

II. THE TRIAL COURT DID NOT ERR BY LIMITING CHRISTMAS TESTIMONY ON HIS CONVERSATIONS WITH THE RESPONDENTS.

Christmas's arguments in connection with the trial court's limitation of his testimony about conversations he had with Respondents should not include the County. In his proffer of evidence Christmas testified as follows:

> Q: When you had water in the road at this point in time, not on your property but up in the road, did you ask anyone -- did you talk to anybody, City, County, DOT?
>
> A: I talked several times, had representatives of the City and the State come down. It was my understanding that the County, when I had asked, that the County didn't have anything to do with it, that the City owned the park or across there, whatever -- across there. [Tr. 545].

Christmas did not identify any conversations in his brief with County representatives that would support his claims. [Appellant's Brief p. 31] Christmas's conversations with Richard Pope , county resident maintenance engineer, were not limited by the trial court and those conversations occurred before any construction improvements in East Bay Park had begun. [Tr. 235]

III. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT ON CHRISTMAS'S NEGLIGENCE CAUSE OF ACTION AGAINST THE COUNTY.

'To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty.' " *Vinson v. Hartley,* 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996); *Trivelas v. S.C. Dep't of Transp.,* 348 S.C. 125, 135, 558 S.E.2d 271, 276 (Ct. App. 2001) Proximate cause requires proof of both

causation in fact, and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. *Oliver v. S.C. Dep't of Highways and Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992); *Owners Ins. Co. v. Clayton,* 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005).

In a negligence action, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Id. Repko v. Cnty. of Georgetown*, 424 S.C. 494, 500, 818 S.E.2d 743, 747 (2018). On the issue of the County's duty to Christmas in connection with the treatment of surface water, the law is well settled in this State that surface water is a common enemy, and every landowner has the right to use such means as he deems necessary for the protection of his property from damages it would cause, except that (1) a landowner must not handle surface water in such a way as to create a nuisance, and (2) he must not by means of a ditch or other artificial means collect surface water and cast it in concentrated form upon the lands of another. Subject to the foregoing exceptions, a landowner has the right to take any measures necessary for the protection of his property from surface water, even if in doing so he throws it back upon an adjoining landowner to his damage. *Johnson v. Williams*, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961). *Lucas v. Rawl Fam. Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004).

Christmas did not show or allege in his Amended Complaint that the County has managed surface water in East Bay Park in such a way as to create a nuisance. Christmas has not alleged in his complaint that the County collected surface water in a ditch or an artificial device and cast it in concentrated form upon the lands of Christmas. The County contends that it has not breached any duty owed to Christmas in connection with its management of surface water in East Bay Park.

Christmas has alleged that the County did not property maintain the ditches on its property, and he has claimed that the County mowed the grass near Front Street adjacent to his property in such a way as to cause tidal water to back up and worsen the flooding from the tidal waters of Winyah Bay. The County contends that surface water in ditches on East Bay Park is still surface water subject to the common enemy rule unless it is cast in a concentrated form onto Christmas's property. The same rule applies to mowing grass. *Lucas v. Rawl Fam. Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004). There is no evidence in the record that the water in the ditches or the grassy area of East Bay Park were cast in a concentrated form onto Christmas's property.

There is no evidence in the record that the County's acts factually caused Christmas's alleged injuries to his property. The acts of the County in the present case were to add three tennis courts on two acres of land significantly south of Christmas's property within a 33-acre grass open park. [Tr. 266] The evidence is that the original 3 courts flooded from time to time and new courts don't appear to flood as much now. The original tennis courts were never intended to be a catch basin for water. Those courts were elevated but the amount of elevation is not in the record. The 2-acre area for the new courts was elevated to 3 to 4 feet. [Exhibit 38] There was not any evidence of a comparison of the elevation of the original courts and the new courts constructed by the County. The ground elevations of the property between the tennis courts and Christmas property varies. The area just south of Front Street adjacent to Christmas's property is 2.6 feet. [Exhibit 38] Christmas filled in his property and Christmas's garage level elevation is 4.7 feet. [Exhibit 43] No evidence was introduced by Christmas to show that water runoff from the tennis court area or the grassy areas actually flowed north in a concentrated form onto Christmas's property.

As to the County and the subsidence of Greenwich Drive, the trial court did not err because as stated above, Castles did not present evidence on the number of County trucks, the weight of

those trucks, and the impact those trucks had on the soil beneath Greenwich Avenue near Christmas's property. Castles relied on what Christmas had told him about a large number of unidentified big trucks passing by his property and going south on Greenwich Drive toward East Bay Park around the time of construction in East Bay Park. Castles also relied on his inspection of other empty roads in the general area. The trial court found there was no competent and relevant evidence tending to establish that the County's acts caused the subsidence of Greenwich Drive.

IV. THE TRIAL COURT DID NOT ERR IN FINDING THE COUNTY WAS IMMUNE UNDER THE SOUTH CAROLINA TORT CLAIMS ACT

The South Carolina Tort Claims Act contains exceptions to the waiver of governmental immunity from tort liability. A governmental entity is not liable for a loss resulting from:

(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee; or (8) snow or ice conditions or 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.*

Evidence was entered in the record through the testimony of Castles that he relied upon plans from a private consulting engineer, Stantec Consulting Services, Inc., who created the plans for the tennis courts and for drainage of water from those tennis courts. [TR. 413-414] Based upon the visual appearance of the tennis courts in the record, it is evident the County adopted Stantec's plans, and they were used to construct the tennis courts. Christmas did not offer any evidence that the County improperly planned or constructed the tennis courts. In South Carolina, the duties of the governmental authorities in adopting a general plan of drainage and determining

what size and at what level of drainage is necessary are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience. *Marlowe v. S.C. Dep't of Transportation*, 441 S.C. 319, 331–32, 893 S.E.2d 21, 27–28 (Ct. App. 2023), reh'g denied (Oct. 24, 2023). The exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. Therefore, the County has discretionary immunity from the Christmas's negligence claim for its quasi-judicial acts in connection with the tennis courts. *Marlowe v. S.C. Dep't of Transportation*, 441 S.C. 319, 331–32, 893 S.E.2d 21, 27–28 (Ct. App. 2023), reh'g denied (Oct. 24, 2023); *Hawkins v. City of Greenville,* 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

The County contends that the intermittent tidal flooding occurring in the present case is and has been a natural condition for many years. [Tr. 234] The County contends the burden of proving that the intermittent tidal flooding was caused by some negligent act of the County should be shifted back to Christmas to prove the County's alleged negligent act or omission proximately caused the damage to Christmas's property. *S.C. Code Ann. §15-78-60* (8).

As an additional sustaining ground, the County contends the work done for the County in East Bay Park was done by independent contractors. Christmas did not present any evidence of acts by employees of the County or acts controlled by County employees caused damage to Christmas's property. The SCTCA mandates that notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act", is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. *S.C. Code Ann. § 15-78-200.* The County is immune for an act or

omission of a person other than an employee of the County. *S.C. Code Ann. § 15-78-60 (20); & S.C. Code Ann. § 15-78-200* .

V. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT ON APPELLANT'S INVERSE CONDEMNATION CLAIM.

In an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request. *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005). In the present case, the trial court determined that Christmas did not establish an inverse condemnation claim. *Id.*

Standard of Review for Inverse Condemnation

An action brought by a property owner against a governmental entity for the taking of the owner's property without just compensation is an action at law. *South Carolina Public Service Authority v. Arnold,* 287 S.C. 584, 340 S.E.2d 535 (1986); *Poole v. Combined Utility Sys.,* 269 S.C. 271, 237 S.E.2d 82 (1977). Since this action was heard by a circuit court judge for final judgment with a direct appeal to the S.C. Appellate Courts, this Court will correct any error of law. The court must affirm the trial judge's factual findings unless there is no evidence reasonably supporting them. *Crary v. Djebelli,* 329 S.C. 385, 496 S.E.2d 21 (1998); *King v. PYA/Monarch, Inc.,* 317 S.C. 385, 453 S.E.2d 885 (1995). *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999*), aff'd sub nom. Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001).

To prevail in an inverse condemnation action, 'a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property.' *Ray v. City of Rock Hill*, 434 S.C. at 47, 862 S.E.2d at 263 (quoting *WRB Ltd.*

P'ship v. Cnty. of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006). An "affirmative act" only amounts to an "affirmative, positive, aggressive act" when it has been proven to have caused or precipitated the damage in question. *See id.* at 47–48, 862 S.E.2d at 264. Also, "[a]llegations of mere failure[s] to act are insufficient." *Hawkins,* 358 S.C. at 291, 594 S.E.2d at 563. *Marlowe v. S.C. Dep't of Transportation*, 441 S.C. 319, 333, 893 S.E.2d 21, 29 (Ct. App. 2023), *reh'g denied* (Oct. 24, 2023).

Christmas claims the raising of the Park and the unrepaired subsidence of Greenwich Drive were the dominant causes of the harmful flooding, and those causes were greater causes of flooding on Christmas's property than sea level rise. The County disagrees. Even if there was any evidence to support such an opinion, the County is not liable for inverse condemnation under the facts in the record of this case. The County only acted to install 3 additional new tennis courts and replace 3 existing tennis courts on approximately 2 acres of land in a 33-acre open grass park. The tennis courts were located significantly south of Christmas's property. The videos and testimony of the witnesses show that the water flooding Christmas's property flowed from the north from Winyah Bay and onto Christmas's property. There is no evidence in the record that water on Christmas's property originated from the tennis courts. Apart from the tennis courts, there is no evidence the County raised the Park in any other way and the County did not have authority to do road repairs on Greenwich Drive or Front Street.

Christmas claims the trial judge failed to consider the trial testimony in the light most favorable to the non-moving party. The County contends Christmas has applied the wrong standard of review of the trial judge's decisions. In an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request. *Cobb v. South Carolina Dep't of Transp.*, 365 S.C. 360,

365, 618 S.E.2d 299, 301 (2005); *Kiriakides v. Sch. Dist. of Greenville Cnty*., 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009). Christmas's inverse condemnation claim against the County fails because the trial court determined that Christmas did not meet his burden of establishing inverse condemnation on the part of the County. *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999*), aff'd sub nom. Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001).

VI. THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S WRIT OF MANDAMUS, OR, ALTERNATIVELY, ERR IN FAILING TO ISSUE AN INJUNCTION AGAINST THE CITY OF GEORGETOWN.

This argument should not apply to the County. The County does not have the jurisdiction or the authority to repair roads or drainage in the City of Georgetown. *S.C. Code Ann. §5-7-30.* A writ of mandamus or injunction issued to the County would be a futile act. Mandamus will not be granted when its issuance would prove nugatory or unavailing. *Blalock v. Johnston,* 180 S.C. 40, 185 S.E. 51, 56 (1936). Another principle which must be kept in mind upon an application for an injunction is to be found in the general rule that a court will not grant injunctive relief unless it is shown that, if an injunction is granted, the Court may enforce the mandate of the injunction. See *Penn Cent. Co. v. Buckley & Co.*, 293 F. Supp. 653, 658 (D.N.J. 1968), aff'd, 415 F.2d 762 (3d Cir. 1969). The court does not have the authority to increase the County's jurisdiction to act in such matters in the city limits of the City of Georgetown.

VII. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE STORMWATER STATUTE (§5-31-450) CANNOT BE APPLIED TO THE COUNTY.

S.C. Code Ann. §5–31–450 was enacted by the legislature in 1902 and amended in 1953. The South Carolina Tort Claims Act (SCTCA) was enacted in 1986. The SCTCA expressly

mandates: “Notwithstanding any provision of law, this chapter, the “South Carolina Tort Claims Act”, is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty.” *S.C. Code Ann. § 15-78-200.*

In response to the S.C. Supreme Court’s abolition of the doctrine of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the General Assembly enacted the SCTCA. *See* S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2017). §15-78-40 provides that a political subdivision such as the County is “liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, *subject to the limitations upon liability and damages, and exemptions from liability and damages*” found in the SCTCA. (emphasis added). §15-78-20(a) provides in part, “The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions.” §15-78-20(f) provides, “The provisions of the SCTCA establishing limitations on and exemptions to the liability of the governmental entity or political subdivision, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the governmental entity or political subdivision.” §15-78-60 lists forty exceptions to the waiver of sovereign immunity.

The General Assembly in the SCTCA intended to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by the SCTCA. *S.C. Code Ann. § 15-78-20.* The stormwater statute mentioned in Christmas’s brief is S.C. Code §5-31-450.

A tort is defined in Black’s Law Dictionary as a private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy. Black's Law Dictionary p. 1335 (5th Ed.1979). Also see *Carroll v. Isle of Palms Pest Control, Inc.*, 441 S.C. 1, 12, 892 S.E.2d 161,

167 (Ct. App. 2023), reh'g denied (Sept. 21, 2023) (the purpose of the economic loss rule "is to define the line between recovery in tort and recovery in contract). The trial court correctly found that to the extent the Stormwater Statute conflicts with the South Carolina Tort Claims Act (SCTCA), the SCTA prevails.

SC Code Ann. § 5-31-450 creates a remedy against municipalities for road maintenance acts that cause flooding on private property and liability does not obtain under §5–31–450 absent some affirmative act. *Hawkins v. City of Greenville,* 358 S.C. 280, 295, 594 S.E.2d 557, 565 (Ct. App. 2004). The statute mandates:

> **§ 5-31-450. Drains for surface water.**
>
> Whenever, within the boundaries of any **municipality**, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such **municipality** shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, **any person injured thereby may have and maintain an action against such municipality** for the actual damages sustained by such person. (emphasis added) *S.C. Code Ann. § 5-31-450*

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, the court must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Thus, if the words are unambiguous, the court must apply their literal meaning. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). S.C. Code Ann. §5-31-

450 expressly states: "person injured thereby may have and maintain an action against such **municipality** for the actual damages sustained by such person." (emphasis added).

A municipality is defined in Black's Law dictionary as a legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes. Black's Law Dictionary p. 918 (5th Ed.1979). In *S.C. Code Ann. § 5-1-20* "Municipality" means a city or town issued a certificate of incorporation, or township created by act of the General Assembly. A County is a body politic and corporate. *S.C. Const. art. VII, § 9*

The County has not been issued a municipal certificate of incorporation by act of the General Assembly. The County and the City of Georgetown are not a consolidated political subdivision. See *S.C. Const. art. VIII, § 12.* They are separate governmental entities governed by separate enabling statutes. The trial court was correct in finding *S.C. Code Ann. § 5-31-450* does not apply to the County.

VIII. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT FOR THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION BASED ON THE STATUTE OF LIMITATIONS.

Christmas's arguments on the statute of limitations for SCDOT do not apply to the County because the County has no duty to Christmas in connection with the construction or maintenance of Greenwich Drive or Front Street. If such a duty did exist, which is denied, the County would adopt the arguments of SCDOT that the statute of limitations expired before Christmas brought its suit against the County.

CONCLUSION

For the reasons set forth hereinabove, Respondent Georgetown County respectfully requests that Order of Hon. Judge B. Alex Hyman in the present case be affirmed and that the

appeal of Appellant Ron Christmas be dismissed with prejudice together with such other relief as to the Court is just and proper.

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August 21, 2024

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 Respondent Georgetown County, do hereby certify that I have this date served the foregoing **INITIAL BRIEF** by personally serving the same upon the following counsel using the primary email addresses as listed via the Attorney Information.

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