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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	C/A NO: 2017-CP-21-01168

James Marlowe and Lori Marlowe,

Plaintiff,

VS.

South Carolina Department of Transportation (SCDOT), Southern Asphalt, Inc.,

Defendants.

ORDER GRANTING DEFENDANT SCDOT'S MOTION FOR SUMMARY JUDGMENT

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SC Court of Appeals

The South Carolina Department of Transportation (SCODT) moved before this Honorable Court for an Order granting the SCDOT's Motion for Summary Judgment in the above-captioned matter. The motion was based upon the fact that the SCDOT is not liable to the Plaintiff as a matter of law pursuant to 15-78-10 et seq., and further, there is no evidence that the SCDOT breached any alleged duty to the Plaintiffs.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Knight v. Austin, 396 S.C. 518, 521-522, 722 S.E.2d 802 (2012).

The Plaintiffs own property located at 2479 W Highway 378, Pamplico, SC (See Amended Complaint, paragraph ¶ 5). In March 2015, the SCDOT began construction on widening Highway 378 in the area near the Plaintiffs' residence (see Amended Complaint, ¶ 11). The Plaintiffs allege

that on October 4, 2015 and October 5, 2016 their home flooded (see Amended Complaint ¶¶ 12 and 14). The Plaintiffs allege that the construction to Highway 378 caused the flooding at Plaintiffs' residence (see Amended Complaint).

However, the Tort Claims Act (SC Code Ann 15-78-10 et seq) exempts the SCDOT from liability for natural conditions on a public roadway, or nuisance. The Tort Claims Act further exempts the SCDOT from liability for design of highways and any defect or condition on a highway "unless the defect or condition is not corrected within a reasonable time after actual or constructive notice." SC Code Ann 15-78-60(15).

South Carolina Code Section 15-78-60 (the Tort Claims Act) states in relevant part that:

> The governmental entity is not liable for a loss resulting from:
>
> (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;
>
> (7) a nuisance;
>
> (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;
>
> (15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning

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> devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. **Governmental entities are not liable for the design of highways and other public ways.** Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. **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;**
>
> <u>SC Code Ann</u> 15-78-60
> [emphasis added]

Further, the Stormwater Management and Sediment Reduction Act does not impose any liability upon the state or governmental entity for acting or failing to act under the Stormwater Management and Sediment Reduction Act.

The Stormwater Management and Sediment Reduction Act states:

> (A) Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed.
> (B) Each person responsible for the land disturbing activity shall certify, on the stormwater management and sediment control plan submitted, that all land disturbing activities will be done according to the approved plan.
> (C) All approved land disturbing activities must have associated therein at least one individual who functions as responsible personnel. (<u>SC Code Ann.</u> 48-14-30)
>
> Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

(1) to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees thereof for the recovery of damages caused by such action or failure to act; or
(2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity. (SC Code Ann. 48-14-160)

Furthermore, the Plaintiffs' expert failed to opine whether any such alleged defect caused the flooding to a reasonable degree of engineering certainty. Any alleged defect and any damage resulting therefrom would not be in the purview of common knowledge, and thus, an expert is necessary to testify regarding the alleged defect and any potential causation. The expert's opinions must be to a reasonable degree of engineering certainty. Plaintiff's expert has failed to give opinions to that degree.

Jason Gregorie, PE, the Plaintiff's expert, testified to that he was "not alleging that there's a construction defect or a design defect of the road, in accordance with SCOOT standards." (Gregorie depo, page 61). He further testified "I don't take issue with the design or construction of the road itself." (Gregorie depo, page 61). Gregorie further testified that:

> What I'm going to testify about here today is what I state in my report, is that if the prior U.S. 378 existed and the new U.S. 378 had not been constructed. I can say – I do say to a reasonable degree of engineering certainty that the flood depth would have been less on the Marlowe property, and I believe the impact on the Marlowe property would have been less. I say that it's **possible** that it would have been prevented. (Gregorie depo, page 77. Emphasis added)

> I can say to a reasonable degree of engineering certainty that the construction project contributed to the flooding. I believe that it increased the flood depth on the property, but I cannot say definitely that if the project had not existed that it would have completely prevented the flooding. (Gregorie depo, page 79)

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> A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.
> Q: May have?
> A. That's correct.
> Q: So it still–you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?
> A: It's possible, yes.
> (Gregorie depo, page 84)

Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project, the Marlowe's residence may have still flooded.

The flooding in October 2015 and October 2016 were Acts of God and not caused by the SCDOT. In October 2015, the Grand Strand and Pee Dee suffered from the "1000 Year Flood." Then in October 2016, Hurricane Matthew struck South Carolina causing massive flooding throughout the Grand Strand and Pee Dee. Many residents suffered flooding in their homes, including many who had never experienced flooding previously.

The flooding to Plaintiffs' residence was caused by Acts of God, not any negligence on the part of the SCDOT.

Pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on the Marlowe's property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees. Furthermore, Jason Gregorie, Plaintiff's expert, testified that there was no defect in the design or construction of the project. If there is no defect in the construction or design, then there is no basis for liability on the part of SCDOT.

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The Plaintiffs have further alleged in their Complaint that the flooding on their property was a "taking" through inverse condemnation.

"To establish an inverse condemnation, a plaintiff must show: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Hawkins v. City of Greenville, 358 SC 280, (Ct.App.2004) 290 (the Court later determined that the permanence factor was no longer required).

"The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient." Hawkins at 291 (citing Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency")).

"[A] regulatory taking by its very nature necessitates the existence of some regulation, statute, ordinance, zoning law, or similar rule of law that impacts a landowner's use of his property. In other words, regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land." Kiriakides v. School District of Greenville County, 382 S.C. 8 (2009) (citing Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886 (1992).

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"The Supreme Court of the United States has held that the 'impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." Kiriakides v. School District of Greenville County, 382 S.C. 8 (2009) (quoting Kirby Forest Indus. V. United States, 467 U.S. 1, 15 (1984)).

In this case, the Plaintiffs have failed to show that SCDOT and its employees had any affirmative, positive, and aggressive acts that cause the Plaintiffs' alleged harm. As noted by the Hawkins court, a mere failure to act is insufficient. There has been no affirmative conduct on the part of the SCDOT restricting the Plaintiffs' land. Installing culverts and construction to public roadways is a "legitimate government action" on behalf of the SCDOT as discussed in the Kiriakides case above. Therefore, the Plaintiffs' inverse condemnation allegations fail to meet the standard of an affirmative, positive, and aggressive act by the SCDOT.

"It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages..." Hardin v. South Carolina Department of Transportation, 3714 S.C. 598, 606 (2007).

The Plaintiffs have failed to show that they suffered special damages, "different in kind" from that suffered from the public at large as required in Hardin. In fact, the Plaintiffs allege quite the opposite, indicating that several other homeowners near their property also flooded. Because the Plaintiffs have not suffered a special damage, different in kind from the public at large, then they do not have a claim for inverse condemnation.

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CONCLUSION

For the above stated reasons, this Court hereby grants summary judgment for the Defendant South Carolina Department of Transportation.

IT IS SO ORDERED.

The Honorable Michael G. Nettles

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Florence Common Pleas

Case Caption: James Marlowe , plaintiff, et al VS Department Of Transportation South Carolina , defendant, et al

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Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140