THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2023-001454
Case No. 2020-CP-22-0356

Ron Christmas,..... Appellant,

v.

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

INITIAL BRIEF OF RESPONDENT CITY OF GEORGETOWN

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STATEMENT OF THE CASE

The Appellant Ron Christmas is an owner of a residence located at 101 Greenwich Drive, Georgetown, South Carolina. The subject property is located at the intersection of Greenwich Drive and Front Street, which is waterfront property directly on Winyah Bay. The house itself is built on supports because the area is routinely subject to flooding from high tides and king tides from Winyah Bay. The property is, in fact, located in a FEMA flood zone.

The Respondent City of Georgetown owns the property across Front Street from Christmas' property. The City's property has been developed and used as East Bay Park. While the City owns the park, it has leased the park to the Respondent Georgetown County. In the 2016-2017 timeframe, the City undertook various improvements to East Bay Park, including removal of the ballfields, the addition of a walking trail, and improvements to the boat ramp area including the addition of a parking area and bathroom. In addition, the tennis courts were redone by Georgetown County.

East Bay Park is encircled by Greenwich Drive, Front Street, and East Bay Street, all of which are roads owned by the Respondent South Carolina Department of Transportation ("SCDOT"). Additionally, the drainage facilities within the SCDOT right-of-way are SCDOT's responsibility to maintain.

The Appellant Ron Christmas brought this lawsuit in April 2020, alleging claims against the City of Georgetown, Georgetown County, and Green Wave Contracting, Inc., the latter being the contractor who performed the re-build of the tennis courts. The causes of action against the City are negligence and inverse condemnation. Christmas then filed an Amended Complaint that added the South Carolina Department of Transportation ("SCDOT") as a party. In addition, Christmas amended the original Complaint to add a cause of action pursuant to Section 5-31-

450. He has also sued for mandamus relief and a permanent injunction. A Second Amended Complaint was later filed to make amendments to certain factual allegations.

The case proceeded to trial on August 14, 2023, before Circuit Court Judge B. Alex Hyman and a jury. The trial court initially heard pre-trial motions, including motions for summary judgment and motions in limine. The summary judgment motions were denied. Later, after Christmas' case-in-chief, the Respondents all made motions for a directed verdict. On August 17, 2023, the trial court granted those motions on various grounds that were placed on the record. (Tr. 693-700). The Appellant Christmas then made an oral motion for a new trial, which was denied. (Tr. 699-700). No other post-trial motions were made. The trial court's grant of a direct verdict was memorialized in a Form Order filed August 17, 2023.

The Appellant Christmas then filed a timely Notice of Appeal.

STATEMENT OF FACTS

The Appellant Ron Christmas purchased the lot at 101 Greenwich Drive in approximately 2001 or 2002. (Tr. 542). He began building the home in 2004 and completed it in 2005. (Tr. 543). With the exception of a "hundred-year flood" event and Hurricane Matthew, Christmas said he recalled no instances of flooding to the property on which the house rests before 2016. (Tr. 545). The residence is built in a FEMA flood zone across Greenwich Drive from Winyah Bay.

Beginning around 2013 or 2014, Christmas testified he noticed water "was coming up over the road and coming up under, and it was coming up out of the grates under the road." (Tr. 547). Between 2012 and 2014 is when Christmas first recognized that there were changes in the drainage of water on his property that could be problematic. (Tr. 608). He clarified that the issues then were affecting the lot he owned on the east side of Greenwich Drive adjacent to Winyah, not the one where the house sits. (Tr. 609). He explained, "We were [beginning] to get water, and I was afraid it was going to encroach over and start putting water on my lot" (Tr. 609).

At trial, Christmas' principal witness as to liability issues was his engineering expert witness, Robert Castles. As for his involvement with the case, Castles testified that he was first retained to provide expert opinions or consulting with respect to Christmas' property "somewhere around September of 2019." He denied any involvement with the design or construction of the home or any post-construction work prior to 2019. (Tr. 367).

During his testimony, Castles agreed that the natural low point for the watershed in which Christmas' house sits, meaning the point to which water naturally flows, is the northeast corner

of East Bay Park. (Tr. 363). He was confident that location remained the same from the time Christmas bought the house, in 2005, to the time the park was renovated, from 2016 to 2018. (Tr. 363). Castles then confirmed a natural low point of a watershed is unlikely to change absent human intervention. (Tr. 363).

Further, Castles confirmed the watershed that includes Christmas' residence does not include the entire park. As Castles described, from the Alford Building south, including where the ballfields were renovated and where the boat ramp parking was installed, water does not drain towards Front Street or towards the natural low area where the wetlands are situated; rather, it drains southward or into the Winyah Bay. (Tr. 364). Of the park areas renovated, Castles opined that the tennis courts and portions of the walking trail are located beyond the demarcation line in the park at which drainage would flow north, i.e., within the same watershed as Christmas' property. (Tr. 365-367).

Concerning the watershed in which Christmas' property is located, how far from the Christmas residence it extends northward, Castles said, "I believe it goes up to Prince Street, but I can't be positive without looking at the drawing." (Tr. 372). Castles did, however, confirm that the area just north of Christmas' property is at higher elevation than the property; therefore, all the watershed's surface water north of the property will flow to the natural low point, previously identified as the wetlands at the northeast corner of the park. (Tr. 373). Castles explained, then, that such water would either have to go through the Christmas property or around it, and he couldn't confirm either. (Tr. 373). When asked, "Did you look at the impact of any type of surface water from north of this property, the northern parts of that watershed?", Castles responded, "I did not." (Tr. 375). Later, Castles added that the watershed in which Christmas' property is located also stretched to the west of his property. (Tr. 441-442)

After explaining to the jury what a French drain is and how it works, Castles said he had never seen them on Christmas' property. Further, he expressed no awareness of whether any drainage system was incorporated into the original construction of the home. (Tr. 376). When asked what Christmas had done to mitigate drainage issues on his property, Casltes responded, "To my knowledge, nothing." (Tr. 376). Further, Castles testified that Christmas had never asked him to make recommendations concerning draining, nor had Castles ever provided recommendations on the matter to Christmas impromptu. However, during his trial testimony, Castles said, as a possible remedy, "He could tear up the pavement and put in some grass and trees." (Tr. 377). Castles had earlier described the vast majority of the front yard as impervious concrete with pavers interspersed. (Tr. 369). The side of the residence closest to his neighbor, Robert O'Donnell, is also concrete. (Tr. 370). The left side of the residence is a concrete driveway. (Tr. 370). The rear yard includes the swimming pool and otherwise brick pavers. (Tr. 370). He confirmed that the property has little grass or trees and "no bushes, no landscaping, the types of things that would have naturally absorbed rainwater or stormwater." (Tr. 371).

Castles confirmed that Christmas' property is in a FEMA flood zone, which, at that particular location, requires the first floor of the residence needed to be situated ten-plus-one-foot off the ground. (Tr. 389). He said the regulations may differ slightly by location – 11 feet versus 13, for example. The Christmas residence, Castles confirmed, is above ten feet and built on pilings. (Tr. 389-390).

In recounting an early conversation he had with Ron Christmas after getting retained, Castles said that Christmas complained to him of flooding on his property since as far back as 2012. (Tr. 390). Castles remembered Christmas referring to handwritten notes during that

meeting, but he could not remember if the meeting was before this lawsuit was filed. (Tr. 391). Castles said he was not provided the notes.

Castles confirmed that all the streets in question – Greenwich Drive, Front Street, and East Bay Street – are not owned by the City of Georgetown. He also agreed that all the drainage issues at question in this case are within the SCDOT-owned roadway or SCDOT's right-of-way with the exception of the outfall at the end of Front Street. (Tr. 392). Castles said he had never personally observed the pipe or tidal gate on the end of that outfall, nor had he attempted to investigate the piping infrastructure in that area. (Tr. 394). Castles confirmed the presence of five catch basins in the immediate vicinity of Christmas' residence, and explained to the jury where they are relatively situated. (Tr. 395).

In his expert opinion, Castles testified that at least ninety percent of the water affecting Christmas' property was tidal flooding from Winyah Bay, but he did not perform any studies or calculations to ascertain that figure or account for the origins of the remaining ten percent. (Tr. 397). Castles testified he had never, as far as East Bay Park is concerned, conducted any type of surface water analysis or hydrological study. (Tr. 397).

Castles confirmed that he had never actually observed any flooding in Christmas' backyard, including on October 1, 2019, when he took his photographs. (Tr. 398). He also confirmed that day experienced a higher tide than normal. (Tr. 398).

Castles denied ever observing the elevations of the roads in question prior to the beginning of the park renovation project that began in 2016. He confirmed the first time he observed Greenwich Drive was in 2019, after the East Bay Park project was completed. (Tr. 408). He confirmed that he had no data, no survey, nor any other information pertaining to the elevation of the roadway in 2015 nor at any other time from the construction of the road, in 1956,

to the beginning of the park renovations; he had only seen the original design drawings. (Tr. 408).

STANDARD OF REVIEW

The standard of review for questions of law is *de novo.* The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning,* 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.*

Moreover, as this Court has held, "[t]he grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. South Carolina Department of Corrections*, 386 S.C. 182, 687 S.E.2d 54, 56 (Ct. App. 2009).

The standard of review for an evidentiary ruling, including an order limiting expert testimony, is an abuse of discretion standard. The Supreme Court has held that "[a] trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 676 S.E.2d 684, 686 (2009). "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 Medical Systems, Inc.*, 401 S.C. 63, 735 S.E.2d 650, 655 (2012).

ARGUMENTS

I. The trial court correctly ruled in directing a verdict and dismissing the Appellant's inverse condemnation claim against the Respondent City of Georgetown.

The Appellant pled an inverse condemnation claim against each of the three government parties, including the City of Georgetown. To establish an inverse condemnation, a plaintiff must show (1) an affirmative, positive, aggressive act on the part of the governmental entity, (2) a taking, and (3) the taking is for public use. *See*, *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76, 79 (2005). South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proven by affirmative, positive, aggressive acts by the governmental entity. *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 563 (2004). The allegation and proof of mere failure to act are insufficient. *Id*., *citing Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796, 797 (1981); *Gray v. South Carolina Dept. of Highways & Pub. Transp.*, 311 S.C. 144, 427 S.E.2d 899, 902 (Ct. App. 1993). The Supreme Court has explained that "[t]o prevail in such an 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." *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869, 877 (2011).

In his opening brief, the Appellant does not specifically identify the affirmative, aggressive, and positive act alleged to have been committed by the City. Without a citation to the record, he writes that his expert, Robert Castles, "testified that the raising of the Park and the unrepaired damage to the road were the dominate causes of the harmful flood." *See*, Appellant's Opening Brief, p. 37. He later argues that the elevation of the tennis courts "changed the drainage." *See*, Appellant's Opening Brief, p. 37. However, during the directed verdict arguments, the Appellant cited as the only "affirmative act" by the City to be "failing to keep the water out from underneath

the roads and coming into our property." (Tr. 681).

By way of background, the evidence is undisputed, as confirmed by Christmas' expert, Robert Castles, that the roads adjacent to Christmas' property or that encircle East Bay Park are SCDOT-owned roads and that SCDOT also owns the drainage facilities within the rights-of-way of those roads. (Tr. 391-392).[1] The only drainage feature that is located outside of the SCDOT right-of-way was the outfall at the end of Front Street, on which there was a tidal valve. (Tr. 392). Castles further testified that East Bay Park is located in two distinct watersheds. The location of the Alford Building and its adjacent gravel driveway are the demarcation line between those watersheds. (Tr. 364-365). The southern end of the park is in one watershed, and the northern end of the park is in another. (Tr. 364-365, 440-441). Christmas' property is in the same watershed as the northern end of the park, and that watershed also includes other properties to the north and west of Christmas' property. (Tr. 364, 441-442). The watershed including the southern end of the park drains directly into Winyah Bay, and as Castles confirmed, the surface water from that watershed does not flow or impact Christmas' property. (Tr. 364). Certain park renovations occurred in the southern end of the park, including the replacement of the ballfields, the construction of the boat ramps with a parking lot, and the construction of bathrooms adjacent to the boat ramp. Those renovations, however, did not result in any additional surface water flowing to Christmas' property. (Tr. 364). The renovations in the northern end of the park included the re-built tennis courts, which was within Georgetown County's scope of work. (Tr. 365). The City was responsible for the addition of a walking trail; however, as Castles confirmed, a majority of that trail is located in the southern end of the park. (Tr. 366). Additionally, Castles did not offer any opinions that the

[1] In his Second Amended Complaint, Christmas has pled that SCDOT owns the roads at the intersection of Front Street and Greenwich Drive. *See*, Second Amended Complaint, ¶ 6. (R. __).

installation of the walking trail in the northern end of the park impacted the amount of surface water.

Castles further confirmed that the natural low point in the watershed that includes the northern end of the park and Christmas' property is the wetlands area at the northeast corner of the park – essentially at the corner of Front Street and Greenwich Drive. (Tr. 373). The surface water from the northern end of the park and from Christmas' property – as well as properties to the north and west of Christmas' property – flow to that natural low point. Castles confirmed that the renovations to East Bay Park did not change the natural low point of the watershed. (Tr. 363). Castles further confirmed the obvious – that water flows downhill. (Tr. 363). That is important because Christmas cannot show that the surface water from the park would even flow uphill to Christmas' property since the natural low point for the entire watershed is located at the northeast corner of the park.

Finally and most significantly, Castles opined that ninety percent of the surface water impacting Christmas' property resulted from tidal flooding from Winyah Bay. (Tr. 397). The other ten percent, as explained by Castles, includes water flowing from the portion of the same watershed located to the north of Christmas' property. (Tr. 397). Moreover, Castles confirmed that he had performed no surface water studies or hydrological studies to determine how much, if any, water was flowing from the northern end of the park to Christmas' property. (Tr. 397). As for the outfall at the end of Front Street, Castles testified that he had never inspected that outfall and had only heard that there was a tidal valve. (Tr. 392).

In consideration of this evidence from Christmas' own expert, the trial court was correct in granting a directed verdict to the City on the inverse condemnation claim. First, Christmas presented no evidence of an affirmative, aggressive, and positive act committed by the City which

caused any flooding to Christmas' property. As mentioned, during the directed verdict arguments, Christmas' counsel cited as the only "affirmative act" by the City to be "failing to keep the water out from underneath the roads and coming into our property." (Tr. 681). It is well settled, however, that "[a]llegations of mere failure to act are insufficient" to establish the requirement of an "affirmative, positive, aggressive act" by the municipality. *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 563 (Ct. App. 2004). The only renovation to East Bay Park attributable to the City in the northern end of the park is the walking trail, and Castles offered no evidence that the installation of that trail resulted in any flooding to Christmas' property. Additionally, Castles confirmed that the renovations in the southern end of the park impacted an entirely different watershed. Finally, the City had no responsibilities for the renovations of the tennis courts, but nonetheless, Castles was unable to quantify the impact, if any, of the renovations of the park. He also testified that the ten percent of the water not caused by tidal flooding would include water flowing from properties to the north of Christmas' property in the watershed. In short, Christmas has not shown any "affirmative, positive, aggressive act" caused any increased flooding to his property, and for those reasons, the trial court correctly directed a verdict for the City.

The trial court, in fact, correctly found that this Court's decision in *Hawkins*, *supra*, was on point. Christmas' attempts on appeal to distinguish *Hawkins* are without merit. In addition to those arguments being made for the first time on appeal and thus not preserved for appellate review, Christmas fails to recognize that *Hawkins* is dispositive on the inverse condemnation claim. In *Hawkins*, this Court affirmed summary judgment for a municipality on an inverse condemnation claim arising out of allegations that the municipality failed to properly design and maintain its stormwater drainage system which resulted in flooding of the plaintiff's building. Similar to the case at bar, the facts in *Hawkins* show multiple flooding events and include the

allegation that the city failed to take the appropriate remedial action to address the increased water flow through the existing drainage pipes. In addition to finding that the failure to act does not qualify as an "affirmative, positive, aggressive act," this Court also examined two changes made by the city to its drainage system and concluded that those acts were not shown to have "caused or precipitated the flooding" to plaintiff's property. 594 S.E.2d at 563.

Finally, it appears that Christmas misperceives inverse condemnation law because he suggests that "whether a governmental entity performed an overt or positive action to satisfy a taking is an issue of fact." *See*, Appellant's Brief, p. 38. That is incorrect. As the Supreme Court and this Court have clearly ruled, "[i]n an inverse condemnation case, the trial court will first determine whether a claim has been established. Then, the issue of compensation may be submitted to a jury at either party's request." *Frampton v. South Carolina Dept. of Transportation,* 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013), *citing Cobb v. South Carolina Dept. of Transportation*, 365 S.C. 360, 618 S.E.2d 299, 301 (2005). Therefore, contrary to Christmas' position, the determination of a "taking" was never a jury question.

For these reasons, the trial court correctly directed a verdict in favor of the City of Georgetown on the inverse condemnation claim.

II. The trial court correctly ruled in directing a verdict and dismissing the Appellant's negligence claim against the Respondent City of Georgetown.

The Plaintiff also directed a verdict for the City of Georgetown on Christmas' negligence cause of action. That ruling should be affirmed based on several alternative and independent bases.

First, the undisputed evidence from Christmas' own expert, Robert Castles, as outlined above, establishes that Christmas failed to support his negligence claim against the City. The entire

negligence claim is based on Castles' testimony. The other expert, Stephen Geiger, did not address issues of the breach of any duty; his testimony was limited to issues related to the alleged property damage to Christmas' property and the proximate cause of such damage from a geotechnical standpoint.

To recap, Castles testified that ninety percent of the surface water flooding Christmas' property was the result of tidal flooding from Winyah Bay. (Tr. 397). Christmas built in a FEMA flood zone designated AE10, requiring the first habitable floor to be eleven feet above grade. (Tr. 389). Quite obviously, the City is not legally responsible for the tidal flooding.

As for the surface water coming from East Bay Park and particularly the tennis courts, Castles conceded that it was not a "big issue." Specifically, Castles testified that "I never said storm water was a big issue here." (Tr. 411). Additionally, the evidence is undisputed that the roads surrounding the park and adjacent to Christmas' property are not City-owned roads. (Tr. 391-392). Thus, to the extent the roads are contributing to any surface water issues, for which there is no evidence, that is not the City's legal responsibility.

Finally, by Castles' own testimony, the watershed containing Christmas' property only includes the northern part of the park, which does not include the renovations that the City performed in the southern end of the park, including the replacement of the ballfields, the construction of the boat ramp with a parking lot, and the construction of bathrooms adjacent to the boat ramp. (Tr. 364-365). In the northern end of the park, the City was responsible only for the installation of the portion of walking trail at that end (although much of the walking trail is located in the southern end and outside the subject watershed). Neither Castles, nor any other witness, offered any opinion that the walking trail altered in any significant manner the surface water flowing to Christmas' property.

Next, Castles fully explained that the natural low point of the watershed containing Christmas' property was located at the northeast corner of the park, and hence all of the water flowed to that natural low point which pre-existed and was not altered by the renovations of East Bay Park. (Tr. 363). He also confirmed the obvious – that water cannot flow uphill, and thus the water did not flow from the natural low point north onto Christmas' property. (Tr. 363). Finally, Castles confirmed that the watershed containing Christmas' property stretched to the north and west of his property, and the flow of surface water from those properties – which are unrelated to East Bay Park – may have impacted the water flowing across Christmas' property. (Tr. 364, 373-374, 441-442).

With regard to surface water liability, "South Carolina follows the common enemy rule with respect to the diversion of surface waters naturally flowing across land. The rule allows a landowner to treat surface water as a common enemy and dispose of it as the landowner sees fit." *Lucas v. Rawl Family Ltd. Partnership,* 359 S.C. 505, 598 S.E.2d 712 (2004). More specifically, South Carolina has adopted the "Virginia Rule" which states: "where no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system." *Irwin v. Michelin Corp.*, 288 S.C. 221, 341 S.E.2d 783, 785 (1986). The Appellant Christmas, quite simply, did not present evidence to show that the City violated the Virgina Rule with any of its alleged actions.

Additionally, the trial court found that the City of Georgetown is entitled to several immunities under the Tort Claims Act.[2] Specifically, Section 15-78-60(8) precludes liability for a

[2] In *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), this Court explained that "[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability." 374 S.E.2d at 916. Therefore, the

governmental entity for "a loss resulting from 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(8). (Emphasis added). The City agrees with Christmas that the case at bar does not involve snow or ice conditions; however, that is not the extent to which Section 15-78-60(8) immunity applies. Section 15-78-60(8) also provides immunity for losses from "temporary or natural conditions on any public way or other public place due to weather conditions," which is directly applicable to this case, particularly given Christmas' evidence, through his expert, that ninety percent of the flooding comes from tides off of Winyah Bay. (Tr. 397). Those are precisely the type of "temporary or natural conditions" at issue here.[3]

The trial court also correctly relied on the discussion in this Court's decision in *Hawkins*, *supra*, in finding that quasi-judicial and discretionary immunities under the Tort Claims Act barred Christmas' negligence claims. In *Hawkins*, this Court affirmed the dismissal of the negligence claims against a municipality related to the design and maintenance of a drainage system, finding that "these acts are considered quasi-judicial, discretionary functions for which a governmental entity is not liable." *Hawkins*, 594 S.E.2d at 564. This Court favorably cited authority from Texas as follows:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi[-]judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and

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assertion of any immunity defense assumes some finding of fault but nonetheless serves as a bar to liability.

[3] In *Varn v. South Carolina Dept. of Highways & Public Transportation*, 311 S.C. 349, 428 S.E.2d 895 (Ct. App. 1993), this Court described Section 15-78-60(8) as providing "immunity from liability for a loss resulting from an of God." 428 S.E.2d at 898.

> general convenience throughout an extensive territory; and 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.

Id. Accordingly, this Court found that "the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." *Id.*

As the trial court correctly ruled, the same is true in this case. In fact, subsequent to the trial of this case and the directed verdict granted by the trial court, this Court reaffirmed *Hawkins* in *Marlowe v. South Carolina Dept. of Transportation*, 441 S.S. 319, 893 S.E.2d 21 (Ct. App. 2023). In that case, this Court noted that "the flooding incident is similar to the events that unfolded in *Hawkins*." 893 S.E.2d at 28. This Court further ruled that "[l]ike the general plan adopted in *Hawkins*, the adoption and execution of SCDOT's drainage plans are of a quasi-judicial nature not subject to revision by our courts." *Id*. Consequently, this Court in *Marlowe* affirmed the grant of sovereign immunity under the Tort Claims Act in circumstances similar to the case at bar.

Finally, as an additional sustaining ground, the City of Georgetown also asserts immunity under Section 15-78-60(7) which provides for immunity for a nuisance. Although Christmas did not explicitly allege a nuisance cause of action, he has, in effect, asserted a nuisance theory disguised as a negligence claim, presumably to circumvent the bar of Section 15-78-60(7). As the City argued at trial, that immunity provision is not intended solely to bar the filing of a nuisance claim, but is also intended to bar any nuisance-based theory of liability, even if asserted under the label of a negligence claim. (Tr. 675-676). As cited by the City, the South Carolina Supreme Court in a related context has ruled that a defamation claim may not be converted into a negligence claim. Instead, any allegation that a statement is false or otherwise defamatory must be brought as a

defamation cause of action. In *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006), the Supreme Court affirmed the Rule 12(b)(6) dismissal of a negligence claim that was based on the same factual allegations as a defamation claim. The Supreme Court explained that "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common law and constitutional law." 629 S.E.2d at 674. *See also*, *McGlothlin v. Henneley*, 370 F.Supp.3d 603, 620 (D.S.C. 2019) (citing *Erickson* in dismissing negligence claim for defamation). The same logic applies in the case at bar. Christmas should be precluded from re-alleging or converting a nuisance claim into a negligence or gross negligence claim just to avoid the obvious bar of Section 15-78-60(7). In effect, Christmas should not be allowed, through artful pleading, to pursue a nuisance theory under the guise of a negligence claim to circumvent the public policy granting immunity to governmental entities for conduct that, if actionable, would qualify as a nuisance.

For each of these separate and independent reasons, the trial court was correct in directing a verdict in favor of the City of Georgetown on the negligence claims.

III. The trial court correctly ruled that the Appellant failed to support his claim for a writ of mandamus to be issued against the Respondent City of Georgetown.

The trial court also was correct in dismissing the Appellant Christmas' claim seeking the issuance of a writ of mandamus. That mandamus claim appears to be more directed to the Respondent SCDOT, which owns the roads at issue, including Greenwich Drive and Front Street. Specifically, Christmas asked the trial court to issue a writ of mandamus "ordering Defendants to repair the roads and drainage at the Intersection and adjacent water management features." *See*, Second Amended Complaint, ¶ 57. (R. ___).

Under South Carolina law, a writ of mandamus is "the highest judicial writ known to the law." *Knight v. Austin*, 396 S.C. 518, 722 S.E.2d 802, 804 (2012). "The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created and imposed by law." *Id*. The "principal function" of a writ of mandamus is "to command and execute, and not to inquire and adjudicate." *Richland County v. South Carolina Dept. of Revenue,* 422 S.C. 292, 811 S.E.2d 758, 766 (2018). The Supreme Court has explained:

> The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial). The character of an official's public duties is determined by the nature of the act performed. The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.

Id. (Citations omitted). A writ of mandamus is "based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal." *Charleston County School District v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567, 572 (1999). "[T]o obtain a writ of mandamus requiring the performance of an act, the applicant must show (1) a duty of the opposing party to perform the act, (2) the ministerial nature of the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." 519 S.E.2d at 570.

Notably, Christmas did not even pled each of these elements. First, it is important to scrutinize the writ of mandamus that is actually sought. To reiterate, Christmas asked the trial court to issue a writ of mandamus "ordering Defendants to repair the roads and drainage at the Intersection and adjacent water management features." *See*, Second Amended Complaint, ¶ 57.

(R. ___). Clearly, what Christmas is seeking is not a "ministerial act" under South Carolina law. The City does not even own Greenwich Drive or Front Street, both of which are SCDOT-owned roads, and thus owes no duty to make repairs to SCDOT-owned roads. *See*, Second Amended Complaint, ¶ 6. (R. ___). Moreover, contrary to Christmas' reasoning, Section 57-5-140 does not create a duty for a municipality to repair or maintain an SCDOT-owned road. Instead, Section 57-5-140 is only *permissive* given that the statute states "nothing in this chapter 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 with the available funds." S.C. Code Ann. § 57-5-140. Thus, the City *may* undertake repairs or maintenance, but there is no obligation or legal duty to do so. Thus, Christmas has not and cannot show a ministerial duty on the part of the City.

In addition, Christmas has not shown that he enjoys any legal right as is claimed. Finally, he has not demonstrated the absence of any other legal remedy. To the contrary, he has sought in this very lawsuit both monetary damages and a permanent injunction. Clearly, Christmas' claim for mandamus relief was correctly dismissed.

IV. The trial court correctly ruled that S.C. Code Ann. § 5-31-450 was impliedly repealed by the enactment of the Tort Claims Act.

The Appellant Ron Christmas' Fourth Cause of Action alleges a violation of Section 5-31-450, which is a statute that long pre-dates the South Carolina Tort Claims Act and the waiver of sovereign immunity. At directed verdict, the City renewed its argument that Section 5-31-450 was impliedly repealed by the adoption of the Tort Claims Act, which reinstated sovereign

immunity then waived it with exceptions.[4] In *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the Supreme Court recognized that "exceptions [to the doctrine of sovereign immunity] that have been carved out by the legislature reflect a scattered patchwork of sovereign liability that lack continuity, logic or fairness." 329 S.E.2d at 742. Section 5-31-450 is one example of the statutorily created "scattered patchwork of sovereign liability" referred to in *McCall*.

In response to the Supreme Court's abrogation of sovereign immunity in *McCall*, the General Assembly enacted the Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. Section 15-78-20(b) of the Tort Claims Act provides that "[t]he General Assembly in this chapter intends 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 this chapter*." S.C. Code Ann. § 15-78-20(b). (Emphasis added). The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated.

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[4] In footnote 18 of his Opening Brief, Christmas appears to suggest that a previous order denying a Rule 12(b)(6) motion to dismiss is somehow preclusive or establishes the law of the case. Christmas is mistaken. Under South Carolina precedent, the denial of a Rule 12 motion, like the denial of a motion for summary judgment, does not establish the law of the case or a final judgment. The Supreme Court has clearly held that "the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *McLendon v. South Carolina Department of Highways and Public Transportation*, 313 S.C. 525, 443 S.E.2d 539, 540, n.2 (1994). Similarly, the Supreme Court has explained that "[a] denial of a motion for summary judgment decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." *Id*. The Supreme Court further explained in *Ballenger* that "the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Id.* (Emphasis in original).

This historical background has been best summarized by the Supreme Court in its 1995 decision in *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995). The Supreme Court wrote:

> Historically, all persons were barred from bringing tort claims against governmental entities. The doctrine of sovereign immunity began to come under fire as being "archaic and outmoded." The legislature subsequently passed various exceptions to the doctrine. We noted, however, the exceptions reflected "a scattered patchwork of sovereign liability that lack[ed] continuity, logic or fairness." Thus, in *McCall* we abolished the doctrine of sovereign immunity. In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Citations omitted). In effect, as the Supreme Court summarizes in *Murphy*, in 1986, absolute sovereign immunity was restored by the General Assembly. That had the important effect of eliminating the "scattered patchwork of sovereign liability" that had been created by prior legislation passed to limit or ameliorate the effects of absolute sovereign immunity. The General Assembly then had a "clean slate" from that point forward on which to legislate the waivers and limitations to be placed on sovereign immunity. As of 1986, absolute sovereign immunity was no longer the law, but neither was the "scattered patchwork of sovereign liability" including the statute at issue, Section 5-31-450. That "scattered patchwork" had been repealed.

The Supreme Court has explained that "[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). There can be no question that the Tort Claims Act "fully embraces the

whole subject matter" of governmental liability. The history set forth in *Murphy* shows that the Tort Claims Act was intended to reinstate sovereign immunity in full, thereby eliminating the "scattered patchwork of sovereign liability" that preexisted it, which includes Section 5-31-450. By fully embracing the whole subject matter, statutes such as Section 5-31-450 were impliedly repealed. This is likewise evident from the express language of the Tort Claims Act providing that "[*n*]*otwithstanding 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. (Emphasis added).[5] The use of the phrase "notwithstanding any provision of law" compels the conclusion that the Tort Claims Act is the exclusive and sole remedy regardless of any other provision of law, which would necessarily include Section 5-31-450.

Although there is no South Carolina appellate decision addressing the implied repeal of S.C. Code Ann. § 5-31-450, two Circuit Court Judges – Judge R. Markley Dennis, Jr. and Judge Bentley Price – have issued orders ruling that Sections 5-31-450 was impliedly repealed by the adoption of the Tort Claims Act. *See*, *Wiggins v. City of Charleston*, Civil Action Number 2018-CP-10-01494; *McKittrick v. Tennyson at Park West Association, Inc.*, Civil Action Number 2020-CP-10-04421. (R. ___). Those decisions, while not precedent, are persuasive on this issue.

Moreover, the federal courts have specifically looked at whether the Tort Claims Act impliedly repealed part of the "scattered patchwork of sovereign liability" referred to in *McCall*. Of particular significance is *Sadek v. Lambert*, 2014 WL 117671 (D.S.C. 2014), in which Judge

[5] Similarly, Section 15-78-20(b) states that the Tort Claims Act is the "exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b). The exceptions as set forth in Section 15-78-70(b) have no applicability here.

Terry Wooten adopted a magistrate judge's report and agreed with the very analysis offered by the City of Georgetown in the present case, except that Judge Wooten was addressing the implied repeal of Section 16-5-60. Judge Wooten concluded that "the Tort Claims Act impliedly repealed § 16-5-60." 2014 WL 117671, *3. The federal court determined that Section 16-5-60 is irreconcilable with the Tort Claims Act. The court recognized that "the Tort Claims Act expressly and completely restores sovereign immunity" which is "incapable of reconcilement with § 16-5-60's unlimited waiver of a county's immunity from suit based on wrongful acts of third parties." *Id*. Judge Wooten also explained that "the Tort Claims Act provides for limited liability of a governmental entity for the wrongdoing of its own employees whereas § 16-5-60 contrarily provides for unlimited and strict liability of a county for the acts of others. Such a result is contrary to both the plain language of the Tort Claims Act and the recorded legislative intent of the Act." *Id*. Ultimately, the federal court ruled "that § 16-5-60, enacted to provide strict liability of counties for constitutional torts committed by others, is repugnant to and therefore was impliedly repealed by the South Carolina Tort Claims Act's complete restoration of sovereign immunity and limited waiver for certain torts committed by governmental employees. The plaintiff's cause of action against York County under § 16-5-60 therefore fails to state a claim upon which relief can be granted." 2014 WL 117671, *6.[6]

As reflected by Judge Wooten's analysis in *Sadek v. Lambert* and the decisions by Judges Dennis and Price, the ruling by the trial court is a correct one. With the adoption of the Tort Claims Act and its restoration of sovereign immunity in full followed by a limited waiver, the

[6] Other federal judges have addressed the same issue and agree with Judge Wooten's analysis. *See*, *Doe v. Charleston County Sheriff's Office*, 2018 WL 4224063 (D.S.C. 2018) (Judge Richard Gergel); *Doe v. McGowan*, 2017 WL 659938 (D.S.C. 2017) (Judge Richard Gergel); *Mial v. Charleston County Sheriff's Department,* 2018 WL 4725288, *adopted in* 2018 WL 4701366 (D.S.C. 2018) (Judge Joseph F. Anderson, Jr.).

"scattered patchwork of sovereign liability" from pre-Tort Claims Act times was wiped clean. Section 5-31-450, as part of that archaic "scattered patchwork," was impliedly repealed. As Section 15-78-200 makes clear with its use of the phrase "notwithstanding any provision of law," the Tort Claims Act is the exclusive and sole remedy for any tort committed by a governmental entity, and Section 5-31-450 cannot co-exist with the Tort Claims Act by providing a different tort claim or remedy against the City of Georgetown.

Moreover, as an alternative position and also as an additional sustaining ground, even if Section 5-31-450 remains viable, Christmas has not proven a claim under that Code section because the roads at issue, specifically Greenwich Drive and Front Street, are not City-owned roads. The City has no legal duty under Section 5-31-450 to remove water from state-owned roads. On this additional basis, the Appellant's Fourth Cause of Action was correctly dismissed.

V. The trial court did not err in its evidentiary rulings related to the qualifications and testimony by the Appellant's engineering expert witness, Robert Castles.

The Appellant Christmas argues that the trial court erred in failing to qualify his engineering expert witness, Robert Castles, as an expert in the area of hydrology and in limiting his opinion testimony.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> 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. The South Carolina Supreme Court has recognized that "expert testimony receives additional scrutiny relative to other evidentiary decisions." *Watson v. Ford Motor Co.*, 389

S.C. 434, 699 S.E.2d 169, 175 (2010). In fulfilling its "gatekeeping" duties, a trial court is required to make "three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Id*. The third of those findings requires the trial court to "evaluate the substance of the testimony and determine whether it is reliable." *Id*. In other words, "[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

The Supreme Court has stressed that "[r]eliability is a central feature of Rule 702 admissibility." *Id*. The Court has explained as follows:

> [T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

White, 676 S.E.2d at 689. As the Supreme Court stated in *White*, the case of *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), is the leading case that addresses "the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence." 676 S.E.2d at 688. In evaluating the reliability of scientific expert testimony, the Court considers factors which include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 515 S.E.2d at 517.

In sum, as the Supreme Court reaffirmed in *Watson*, "[t]he trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements, such as qualification of experts, reliability of the substance of the testimony, and substantial similarity of alleged similar incidents, before a jury may hear the evidence." *Watson*, 699 S.E.2d at 180. "If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence." *Id*.

In the case at bar, during the voir dire of Robert Castles, it was determined that he had not received any specialized training as a hydrologist. (Tr. 259). Importantly, Castles did admit, however, that hydrology is a recognized specialty. (Tr. 259). He further conceded that for this case he had not performed any type of surface water analysis or hydrology study. (Tr. 261). Instead, he claimed to have "looked at some hydrology stuff that was prepared by others." (Tr. 261-262).

In exercising its "gatekeeper" role, the trial court confirmed that Castles conceded he was not a specialist in hydrology, had not conducted any hydrology studies himself, and intended to testify about some opinions that another expert had offered, namely Craig Rogers, who was an expert for Green Wave Contracting which settled prior to trial. (Tr. 271-273). The trial court expressed concern that the Respondents could not have the opportunity to cross-examine an expert who was not present at trial. (Tr. 273). It was also problematic that there was no opportunity for the court or the litigants to explore Rogers' qualifications and to determine if his opinions or work were reliable because Rogers was not going to be presented as a witness at trial. (Tr. 273-274). As a result, Christmas' counsel stated: "Simply tender him as an expert in

civil engineering with a focus on drainage and forensics. … Well, the hydrology would be the flow of the water. I don't need that." (Tr. 275).

Now, on appeal, Christmas argues that his counsel did not understand the parameters of any limitations placed on Castles' ability to offer hydrological opinions. Yet, to the extent there was any confusion, the clarification should have been requested during the trial and not raised for the first time as an issue on appeal. Moreover, Christmas never presented any proffer of hydrological opinions Castles sought to offer or any of the other "hydrology stuff that was prepared by others." (Tr. 261-262). What is clear is that Castles himself never performed any surface water analyses or hydrology studies relative to East Bay Park or Christmas' property. (Tr. 261). In short, Castles was only precluded from testifying to work that he had never done. There is no prejudice that has been demonstrated.

As a secondary issue, Christmas also contends that the trial court erred in limiting Castles' testimony concerning the effect of trucks used for the East Bay Park renovation project in causing subsidence to Greenwich Drive. Ultimately, the trial court did not limit Castles from offering opinions that the trucks caused subsidence. Instead, the court disallowed Castles from testifying who owned or operated the trucks during the project. Frankly, the testimony that was disallowed – the identity of the trucks – was not expert opinion testimony, and Castles was only precluded from testifying as a lay witness to identify any trucks because he was not present and did not personally observe any such trucks. (Tr. 289-290). Christmas has simply not shown that the trial court's ruling on the truck issue was erroneous in any respect, nor that the limitation on allowing him to identify any trucks that he did not observe was erroneous. Moreover, Christmas

has not shown any prejudice in that such testimony did not impact any aspect of the directed verdict granted by the trial court to the Respondents.[7]

In sum, as to the evidentiary issues related to the qualification and testimony by Robert Castles, Christmas has not demonstrated that the trial court abused its discretion in its rulings.

VI. The trial court did not err in limiting evidence from the Appellant regarding communications with City officials to the question of equitable estoppel which was an issue for the court, and not the jury, to decide.

The Appellant Christmas further argues on appeal that the trial court erred in limiting Christmas' testimony about conversations he had with elected officials and other employees of the City and SCDOT. When such testimony was first presented, counsel for the City objected, not to the testimony itself, but rather to the testimony being taken in the jury's presence given the understanding that such testimony was relevant and admissible only as to Christmas' equitable estoppel defense to the Respondents' statute of limitations defenses, and such a defense was solely an issue for the court. When the issue first arose during Robert O'Donnell's direct testimony, the City's counsel made that objection, and Christmas' counsel never argued that the testimony had any broader or alternative purpose. (Tr. 461-463). Later, the issue was raised again to the trial court by another of Christmas' counsel who only questioned why the equitable estoppel defense was not for the jury. (Tr. 512-515). At that point, the trial court revisited the issue and was presented with the Supreme Court's decision in *Gaymon v. Richland Memorial Hospital*, 327 S.C. 66, 488 S.E.2d 332 (1997), in which the Court held that "a defense of

[7] Such evidence is not even relevant to any claim for liability. As the City explained in its motion in limine, the use of dump trucks to carry fill dirt along Greenwich Drive was work performed by contractors for the City and County. The City cannot be held liable for the acts or omissions of contractors under Section 15-78-60(20) of the Tort Claims Act.

equitable estoppel interposed in a law case should be tried by the court as an equitable issue." 488 S.E.2d at 333. *See also*, *Black v. Lexington School District No. 2*, 327 S.C. 55, 488 S.E.2d 327, 330, n.1 (1997) ("this Court clarified that an equitable estoppel issue to be determined by the judge rather than by the jury"). The trial court then confirmed its earlier ruling that evidence as to the issue of equitable estoppel was not for the jury. Christmas' counsel did not appear to contest that ruling. (Tr. 512-515).

Later, during Christmas' direct testimony, the issue arose again when a question was asked about communications with City officials. (Tr. 546). At that point, another objection was made, and consistent with the earlier ruling, the trial court took Christmas' testimony outside the presence of the jury. (Tr. 547-564). Following that testimony, the trial court explained as follows: "what we've done is we've taken proper testimony about your interactions with these governmental entities. And that is so that I can make a decision at some point in this trial in regards to a claim that your attorneys are going to make in regards to equitable tolling and statute of limitations." (Tr. 564). Christmas' counsel never voiced any disagreement with that ruling nor how the trial court handled the issue procedurally. Moreover, there was never any argument made, as is now argued for the first time on appeal, that the testimony taken outside the jury's presence was somehow relevant to any issue actually for the jury's consideration.

At any rate, Christmas has not demonstrated that the evidence taken outside the jury's presence for purposes of the equitable estoppel defense is relevant to any issue on which a directed verdict was granted. In other words, Christmas has not shown that such evidence, if admissible for other purposes, precludes in any respect the trial court's direction of verdict for the City. The fact that the jury did not hear that evidence is not prejudicial because the case was never presented to the jury given the directed verdict that was entered for all Respondents at the

end of Christmas' case-in-chief. Likewise, he has not argued that the trial court's ruling based on *Gaymon* was erroneous. In short, Christmas has not shown an abuse of discretion nor any prejudice so as to warrant the grant of a new trial.[8]

VII. As an additional sustaining ground, the Appellant's tort claims against the Respondent City of Georgetown are barred by operation of S.C. Code Ann. § 15-78-70(d), as a result of the settlement entered in this action between the Appellant and the former Defendant Green Wave Contracting.

As an additional sustaining ground,[9] the Appellant Christmas' tort claims against the City of Georgetown are also barred by operation of Section 15-78-70(d) of the Tort Claims Act, as a result of the settlement entered in this action in October 2022, between Christmas and the co-Defendant Green Wave Contracting, Inc. Section 15-78-70(d) states: "A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." S.C. Code Ann. § 15-78-70(d).

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[8] Notably, this was not raised as a basis for Christmas' motion for new trial. That motion was made verbally at the close of the case and, in a conclusory manner, sought a new trial "based upon the restrictions on the admission of evidence that the Court made during the prosecution of the plaintiff's case, and we don't believe the jury was able to hear a fair amount of the evidence that plaintiff had brought to present to the jury because of those rulings." (Tr. 699). Those generalities did not state proper grounds for a new trial motion.

[9] In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id*. *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

Section 15-78-70(d) was interpreted by the South Carolina Supreme Court in the case of *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). That case arose out of a motor vehicle accident. The at-fault driver was employed at the time of the accident by Berkeley County, although he was driving his personal vehicle. The plaintiff in *Wade* initially sued only the driver individually and reached a settlement. Following that settlement, the plaintiff then sued Berkeley County, which raised Section 15-78-70(d) as a bar to that action. The Supreme Court ultimately concluded that "the General Assembly intended 'under this chapter' to modify both a 'settlement or judgment in an action' and a 'settlement of a claim.'" 559 S.E.2d at 588. The "chapter" as referenced is the Tort Claims Act. Therefore, because the settlement with the driver individually was not in an action under the Tort Claims Act, the Supreme Court concluded that Section 15-78-70(d) was not applicable. The Supreme Court emphasized that, when the settlement was reached,

> [N]o action [under the Tort Claims Act] has been initiated, nor had any claim been filed, against County. At the time of the settlement, Wade had only initiated an action against Pierce in his individual capacity, not against County as Pierce's employer. Accordingly, at the time Wade and Pierce executed the settlement document, there were no actions "under this chapter." Wade and Pierce's settlement did not invoke the provisions of § 15-78-70(d) barring Wade from further action against County.

559 S.E.2d at 589.

The Supreme Court in *Wade*, nonetheless, explained the scope of S.C. Code Ann. § 15-78-70(d). The Court held that "to invoke the provisions of § 15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act." 559 S.E.2d at 588-589. Therefore, if there is a settlement in an action brought under the Tort Claims Act, Section 15-78-70(d) may be invoked as a bar to any further proceedings or recovery against a governmental entity arising out of the same occurrence.

That is precisely what has occurred in the present case. There is no dispute that Christmas brought suit simultaneously against all Defendants, including the governmental Defendants as well as Green Wave Contracting, which was named as a party in the original Complaint and in the First Amended Complaint. The suit was brought pursuant to the Tort Claims Act in that Christmas has asserted the state law tort claims against all Defendants, and as discussed above, the Tort Claims Act is the exclusive means by which the governmental Defendants may be sued in tort. Thus, it is beyond dispute that Christmas brought this action under the Tort Claims Act.

There is likewise no dispute that Christmas settled with the co-Defendant Green Wave Contracting. The Appellant stipulated to that at trial. (Tr. 682-683). A release has been executed, and Green Wave Contracting has been dismissed from this action with prejudice.[10] Unlike in *Wade*, however, there were not separate suits filed. Christmas did not settle with Green Wave Contracting and then sue the current Defendants. To the contrary, the settlement occurred within the confines and context of this very Tort Claims Act case. This is precisely the scenario described by the Supreme Court in *Wade* where the bar of S.C. Code Ann. § 15-78-70(d) may be invoked.

Additionally, to the extent that Christmas may suggest that the interpretation of Section 15-78-70(d) may be unclear, it is important to recognize that the Tort Claims Act includes its own rules of statutory construction, including Section 15-78-20(f), which states: "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, *must* be liberally construed *in favor of limiting the liability of the State*." S.C. Code Ann. § 15-78-20(f). (Emphasis added). Thus, the limitation on liability as set forth in Section 15-78-70(d) must be

[10] Christmas filed a Stipulation of Dismissal with Prejudice of his claims against Green Wave Contracting on November 8, 2022.

liberally construed in favor of limiting the liability of the State and its political subdivisions as mandated by Section 15-78-20(f) and the supporting case law. *See, Faile v. South Carolina Department of Juvenile Justice,* 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"); *Baker v. Sanders,* 301 S.C. 170, 391 S.E.2d 229 (1990) (same).

Finally, Christmas' position at trial disregarded or was otherwise inconsistent with the well-settled rule of statutory construction that "[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196, 198 (2002). The reason that the General Assembly adopted Section 15-78-70(d) was to be read and applied *in pari materia* with Section 15-78-100(c) of the Tort Claims Act, which reads: "In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." S.C. Code Ann. § 15-78-100(c). Section 15-78-100(c) requires that a jury return a special verdict specifying the proportional liability of each joint tortfeasor, both governmental and non-governmental. The reason for this is clear and supported by constitutional principles: the government and the taxpayers are not jointly and severally liable and instead are only liable for its own proportioned share of liability. The right to apportioned fault under Section 15-78-100(c) is lost, however, if a joint tortfeasor is able to settle out of the litigation. That is the reason that Section 15-78-70(d) was enacted with and must be read *in pari materia* with Section 15-78-100(c). As the current case demonstrates, if Section 15-78-70(d) is read in any other manner than what the City argues, a plaintiff or claimant may settle with the principal wrongdoer for less than its share of the total liability and then attempt to

hold the governmental entity liable for damages based on a greater degree of fault than it would otherwise have, thereby resulting from the loss of its right of apportionment under Section 15-78-100(c). That was clearly not the intent of the General Assembly in enacting both Section 15-78-70(d) and Section 15-78-100(c) and the statutory scheme that was created for allowing qualified but not unlimited liability for governmental entities. *See*, *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564, 570 (1990) (recognizing the "legislative objectives" of the Tort Claims Act are "relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government"). To reiterate, Section 15-78-70(d) was not enacted by the General Assembly to have no purpose, meaning, or application. As the Supreme Court spelled out in *Wade*, Section 15-78-70(d) is intended to apply in the scenario before this Court in the case at bar.

In sum, as an additional sustaining ground, the City of Georgetown submits that the dismissal of Christmas' tort claims may also be affirmed on the basis of S.C. Code Ann. § 15-78-70(d).

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent City of Georgetown requests that this Court affirm the order of Circuit Court Judge B. Alex Hyman granting a directed verdict and dismissing this action with prejudice.

Respectfully submitted,

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October 16, 2024