RECEIVED

Oct 24 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS
THE HONORABLE MICHAEL G. NETTLES
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2023-001808
CIVIL ACTION NO. 2017-CP-21-01168

Opinion No. 6028 (S.C. Ct. App. filed September 27, 2023)

James Marlowe and Lori Marlowe,

RESPONDENTS,

versus

South Carolina Department of Transportation,

PETITIONER.

BRIEF OF PETITIONER

Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

QUESTIONS PRESENTED FOR REVIEW

I. Whether in reversing and remanding the Trial Court's grant of summary judgment to the SCDOT on the Marlowe's inverse condemnation claim, did the Court of Appeals err in holding that an affirmative, positive, aggressive act which caused the flooding of the Marlowes' property could be shown by expert opinion testimony which could only speculate as to causation?

II. Did the Trial Court correctly rely upon the Stormwater Act in granting immunity to the SCDOT?

INTRODUCTION

In both October 2015 and October 2016, the State of South Carolina experienced historic rainfall and flooding. James and Lori Marlowe owned a home in Pamplico, South Carolina, and their home flooded during both of these catastrophic events. Even though these two storms inundated parts of the state with precipitation, the Marlowes contend that construction by the South Carolina Department of Transportation ("SCDOT"), which began in March 2015 for the widening of U.S. Highway 378 in the vicinity of the Marlowes' home, caused the flooding of their home. The Marlowes subsequently brought suit against the SCDOT.

The evidence in the record showed that there was nothing the SCDOT could have done to have prevented the flooding of the Marlowes' home during these rain and flooding events caused by an Act of God, and the expert retained by the Marlowes could not render an opinion that the widening construction on U.S. Highway 378 most probably caused the flooding of the Marlowes' home or that the flooding of the Marlowes' home would have been prevented altogether had the road construction not existed. The SCDOT therefore moved for summary judgment on the claims raised by the Marlowes, including, for purposes of this appeal, a claim of inverse condemnation.

Based upon this evidence, the Trial Court, which determines as a matter of law whether an inverse condemnation claim has been established, granted summary judgment to the SCDOT. Following the Marlowes' appeal, the Court of Appeals remanded the inverse condemnation claim for further proceedings based on the Marlowes' expert's opinion that there was a possibility the flooding might have been prevented without the road construction.

The Opinion of the Court of Appeals radically departs from this Court's jurisprudence and legal requirements for the sufficiency of an expert opinion on causation. The Court of Appeals' Opinion establishes a new standard which would permit speculation alone to satisfy the causation element of an inverse condemnation claim. The Trial Court understood that it could not permit the Marlowes' claim of inverse condemnation to rest upon surmise and conjecture. Yet, the Court of Appeals remanded the case for further proceedings based upon an equivocal opinion of the Marlowes' expert, granting the Marlowes a second chance to attempt to perfect their inverse condemnation claim with additional evidence despite the requirements of Rule 56, SCRCP that a nonmoving party must come forward with specific facts showing there is a genuine issue for trial at the time a motion for summary judgment is filed. For the reasons set forth herein, the SCDOT respectfully requests this Court to reverse and correct the portion of Opinion of the Court of Appeals that remanded the inverse condemnation claim to the Trial Court.

STATEMENT OF THE CASE

On May 3, 2017, the Marlowes filed an action against the SCDOT, Southern Asphalt, Inc., and United Infrastructure Group, Inc. arising out of the flooding of their home located in Pamplico, South Carolina. [Appx. 17-24.] The Marlowes filed an Amended Complaint on August 22, 2018 to add their minor children as plaintiffs. [Appx. 35-43.]

The Marlowes alleged that the SCDOT's road widening project of U.S. Highway 378 caused their home to flood. The Marlowes asserted claims for inverse condemnation, conversion, due process violations, and negligence against the SCDOT. [Appx. 39-42.]

The SCDOT answered the Amended Complaint on August 29, 2018, denying the material allegations of the Amended Complaint[1]. [Appx. 44-52.] On November 7, 2019, the SCDOT moved for summary judgment on each of the Marlowes' claims based upon the immunities of the South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 *et seq.*, and the Stormwater Management and Sediment Reduction Act, S.C. CODE ANN. § 48-14-10 *et seq.* ("Stormwater Act"). The SCDOT further argued that the Marlowes failed to present competent expert testimony that the construction and widening of U.S. Highway 378 caused the flooding of the Marlowes' home and that the flooding was rather caused by an Act of God. [Appx. 54-61.]

The Marlowes filed a Memorandum in Opposition to the Motion for Summary Judgment, [Appx. 62-78], and a hearing on the Motion for Summary Judgment was held before The Honorable Michael G. Nettles on February 10, 2020. [Appx. 383-406.] On March 25, 2020, the Trial Court granted the SCDOT's Motion for Summary Judgment on all claims. [Appx. 1-9.]

[1] Southern Asphalt, Inc. and United Infrastructure Group, Inc. were dismissed from the action by consent orders.

The Marlowes moved for reconsideration, which the Trial Court denied. [Appx. 10-12; 358-382.] The Marlowes appealed to the Court of Appeals on or about April 7, 2020.

On September 27, 2023, the Court of Appeals issued its Opinion affirming in part, reversing in part, and remanding the case to the Trial Court for further proceedings. [Appx. 494-508.] The Court of Appeals first found that the Trial Court did not err in finding that the SCDOT was not liable for damages under the Tort Claims Act, specifically pursuant to the maintenance and design and discretionary immunities under the Act as set forth in S.C. CODE ANN. §§ 15-78-60(5) and (15). [Appx. 500-503.] The Marlowes have not further challenged this holding by the Court of Appeals.

The Court of Appeals, however, held the Trial Court erred in granting summary judgment on the inverse condemnation claim. In so doing, the Court of Appeals concluded there was evidence in the record which suggested the construction of U.S. Highway 378 caused the flooding of the Marlowes' home. The Court of Appeals based this conclusion on statements by the Marlowes' expert who opined there was a possibility the flooding might have been prevented if the road widening project as constructed had not existed. [Appx. 503-506.] The Court of Appeals additionally held the Trial Court erred in finding the Stormwater Act granted immunity to the SCDOT. [Appx. 507-508.] The Court of Appeals remanded only the inverse condemnation claim for further proceedings. [Appx. 508.]

The SCDOT filed a Petition for Rehearing with the Court of Appeals on October 12, 2023, which was denied by the court on October 24, 2023. [Appx. 509-522.] The SCDOT filed a Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' reversal

and remand of the inverse condemnation claim. This Court granted the Petition on September 24, 2024.

STATEMENT OF FACTS

The Marlowes own property located at 2479 W. Highway 378, Pamplico, South Carolina which is an approximately 0.59-acre residential parcel containing a one-story single-family dwelling and several detached accessory structures. [Appx. 36, ¶¶ 5, 7; 80.] In March 2015, the SCDOT began construction on the widening of U.S. Highway 378 in the area near the Marlowes' residence. [Appx. 37, ¶ 11.] The construction included the widening and realignment of approximately 8.65 miles of U.S. Highway 378 from a two-lane roadway to a four-lane roadway, the installation of three new bridges, and the installation of new drainage infrastructure, including a larger culvert to meet the needs of the widened road. [Appx. 37, ¶ 11; 80-81.]

During this construction project, South Carolina experienced two significant rainfall events in October 2015 and in October 2016. [Appx. 98.] During the October 2015 storm, the two Community Collaborative Rain, Hail & Snow Network (CoCoRaHS) stations closest to the Marlowes' home recorded a 4-day precipitation of 12.76 inches to 14.16 inches, corresponding to a return interval of between 200 to 500 years. In the region, the greatest 4-day precipitation recorded was 23.35 inches, corresponding to a return interval of greater than 1,000 years. [Appx. 99-100.]

In October 2016, the station closest to the Marlowes' home with 4 consecutive days of data available recorded a total of 11.37 inches of precipitation, corresponding to a return interval between 100 to 200 years. In the region, the greatest 4-day precipitation recorded was 13.7 inches, corresponding to a return interval between 200-500 years. [Appx. 99-100.]

The Marlowes alleged that the design created by the SCDOT for the widening project did not "allow for the installation and construction of a roadway that would exist and be operated without flooding [the Marlowes'] property." [Appx. 37, ¶ 11.] The Marlowes contended that the flooding of their home in both October 2015 and October 2016 was the result of the "inadequate design, installation, and construction of the roadway system, bridge, and culvert system." [Appx. 38, ¶ 18.] Pertinent to this appeal, the Marlowes asserted that the road construction project by the SCDOT constituted a taking by inverse condemnation for which the Marlowes were entitled to compensation. [Appx. 39, ¶ 28.]

According to the Marlowes, the roadway was not only widened in front of their residence, but the new four-lane roadway was constructed higher in elevation than the existing two-lane roadway. [Appx. 81, 87.] The existing road was left in place, and the new roadway was constructed adjacent to and higher than the existing road. [Appx. 87.] The Marlowes believed "the elevation of the new road, in combination with the construction modifications to the creek crossings adjacent to [their] property, negatively affected the overland flow and drainage patterns on [their] property" which caused the flooding. [Appx. 81.]

The road widening project also called for the installation of a new and larger culvert to handle the drainage needs of the new roadway because the existing culvert in place would be undersized for the widened roadway. [Appx. 123, ll. 6-20.] Data showed that the existing culvert might overtop and be impacted by a flood associated with a 25-year return interval and potentially the 10 year interval. [Appx. 79.] The standard for the new culvert would be to withstand a 100 year rain event. [Appx. 140, ll. 4-8; 141, ll. 7-11, 19-21.] The new culvert had

not yet been installed during the October 2015 and 2016 storms. [Appx. 125, ll. 13-14; 149, ll. 14-16; 313, l. 19 – 314, l. 3.]

Evidence in the record established that installation of the new culvert would not have prevented the flooding on the Marlowes' property for the extraordinary amount of rainfall during the four (4) day events in October 2015 and October 2016 of over 100 year intervals. [Appx. 168, ll. 3-14.] The record also contained evidence there was nothing that the SCDOT could have done differently with this road construction project to have prevented the flooding during these catastrophic events. [Appx. 316, ll. 9-12; 349, l. 23 – 350, l. 2.]

The Marlowes retained Jason Gregorie, PE of Applied Building Sciences, Inc. as an expert on causation of the flooding of their residence. He prepared a report in which he opined that as a result of the construction of the new roadway at a higher elevation, it was "possible" that runoff would be impounded on the Marlowes' property for significant or historic rain events. [Appx. 106.]

Gregorie testified that he was "not alleging that there's a construction defect or a design defect of the road, in accordance with SCDOT standards." [Appx. 4.] He further testified, "I don't take issue with the design or construction of the road itself." [Id.] Gregorie expounded on his opinion:

> 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.
>
> 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**.
>
> 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.

[Appx. 4-5 (emphasis added).]

The SCDOT moved for and was granted summary judgment on the inverse condemnation claim by the Trial Court based upon, in part, the insufficiency of the Marlowe's expert's opinion and lack of any other evidence on the issue of causation. The Court of Appeals reversed the grant of summary judgment for which the SCDOT now seeks reversal by this Court.

ARGUMENT

I. In reversing and remanding the Trial Court's grant of summary judgment to the SCDOT on the Marlowe's inverse condemnation claim, the Court of Appeals erred in holding that an affirmative, positive, aggressive act which caused the flooding of the Marlowes' property could be shown by expert opinion testimony which could only speculate as to causation.

In reversing and remanding the Trial Court's grant of summary judgment to the SCDOT on the Marlowes' inverse condemnation claim, the Court of Appeals concluded there was a genuine issue of material fact as to whether the highway construction amounted to an affirmative, positive, aggressive act which caused the Marlowes' flooding. The Court of Appeals observed that for the Marlowes to prevail on their inverse condemnation claim, they had to prove an "affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property." The Court of Appeals also recognized that an "affirmative act" can only amount to an "affirmative, positive, aggressive act" when it has been proven to have **caused** the damage in question. In this case, causation is the critical issue.

The Marlowes complained that the SCDOT's failure to install an adequate culvert and its construction of an elevated highway caused the flooding to their property. The Court of Appeals properly recognized that the failure to install an adequate culvert could not be an affirmative act giving rise to an inverse condemnation claim. [Appx. 504]; Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 562-63 (Ct. App. 2004) (observing mere failures to act are insufficient to establish an inverse condemnation claim). This holding by the Court of Appeals has not been further challenged by the Marlowes; therefore, any issues with respect to the

adequacy or inadequacy of the existing culvert or any issues with the installation of the new, larger culvert are not relevant to the Marlowes' inverse condemnation claim.[2]

The Court of Appeals, however, determined there was evidence in the record suggesting that the construction of the elevated highway caused the flooding to the Marlowes' home and concluded that the construction of the elevated highway could be an affirmative, positive, aggressive act for purposes of an inverse condemnation claim. In finding the existence of a genuine issue of material fact, the Court of Appeals relied on testimony of the Marlowes' expert witness, Jason Gregorie, P.E., and in particular the following testimony:

> 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.
>
> . . .
>
> I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.

[Appx. 505.]

The SCDOT submits that the Court of Appeals misapprehended the testimony and evidence in the Record on Appeal, as well as the applicable law regarding the legal standard for the sufficiency of expert opinions.

[2] On October 7, 2024, the Marlowes filed with this Court their Final Appellants' Brief and Final Reply Brief previously submitted to the Court of Appeals, changing only the caption to reflect that the case is now pending in this Court. These briefs raise numerous unchallenged issues by the Marlowes to the Court of Appeals' Opinion, including Tort Claim Act immunity and issues with the adequacy or inadequacy of the existing culvert. The only issue preserved and pending before this Court is whether the SCDOT's construction of an elevated highway was an affirmative, positive, aggressive act which caused the Marlowes' flooding.

The precipitation totals during both the October 2015 and October 2016 storms were cataclysmic, with four (4) day totals of rain corresponding to 200 to 500 year intervals near the Marlowes' home and corresponding to a return interval of greater than 1,000 years in the region of the Marlowes' home during the October 2015 event. [Appx. 99-100.] During the October 2016 event, rain totals for four (4) consecutive days corresponded to 100 to 200 year intervals near the Marlowes' home, with the region of the Marlowes' home experiencing four (4) day precipitation levels corresponding to a return interval between 200-500 years. [Appx. 99-100.]

SCDOT representatives testified that nothing could have been done differently with the road construction project to have prevented the flooding during these massive rainfall and flooding events. [Appx. 316, ll. 9-12; 349, l. 23 – 350, l. 2.] During these two events in October 2015 and October 2016, extensive flooding occurred all over South Carolina. This flooding throughout the state was caused by an Act of God. The flooding of the Marlowes' residence was therefore caused by an Act of God and not by any act of the SCDOT. The Marlowes' lawsuit was only triggered because the SCDOT road construction project was simultaneously ongoing in the vicinity of the Marlowes' residence. But the presence of the road construction project during unprecedented flooding is not a ground for liability. The Trial Court had no competent evidence before it suggesting otherwise.

The Marlowes' expert, Jason Gregorie, PE, likewise could not render an opinion that the construction project on U.S. Highway 378, including the elevated highway, most probably caused the flooding of the Marlowes' home or that the flooding of the Marlowes' home would have been prevented altogether had the road construction, including the elevated highway, not existed:

> 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.
>
> 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**.
>
> 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.

[Appx. 4-5 (emphasis added).]

In his report, Mr. Gregorie could also only state that as a result of the new road at a higher elevation, "it is **possible** that runoff will now be temporarily impounded on the subject property for significant or historic storm events." [Appx. 106 (emphasis added).] He also took no issue with the design or construction of the road itself. [Appx. 4.]

An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. 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, 358 S.C. at 290, 594 S.E.2d at 562 (internal citations omitted). An inverse condemnation claim fails unless the plaintiff can establish that an affirmative, positive, aggressive act by the government **caused** the plaintiff's damage. Id. at 291-92, 594 S.E.2d at 562-63.

"[I]n 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." Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) (internal citation omitted); see also Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005). Therefore, whether the plaintiff has proven the elements of an inverse condemnation claim is within the province of the trial judge. It is not a factual determination for a jury.

The Marlowes did not submit any evidence to the Trial Court establishing that the SCDOT's road construction project of U.S. Highway 378 caused the flooding to their home during the catastrophic flooding events in October 2015 and October 2016. The testimony of Mr. Gregorie upon which the Court of Appeals relied to create an issue of material fact on the question of causation failed to meet the competency for an expert opinion on causation, and as such, could not create an issue of material fact on causation for an inverse condemnation claim.

This Court has mandated that an expert opinion "upon the question of the causal connection between plaintiff's injuries and the acts of the defendant" must satisfy the "most probably" rule. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). This Court observed: "[i]t is not sufficient for the expert ... to testify merely that the ailment might or could have resulted from the alleged cause." Id. (internal citation omitted).

Rather, the expert "must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged." Id. (internal citation omitted).

In Baughman, this Court concluded that an expert's opinion did not rise to the "most probably" level and instead rendered an opinion which was "within the realm of *possibility* only, not the required standard of *probability*." Id. (emphasis in original). The expert's opinion in Baughman was thus not reliable and did not satisfy the legal standard for admissibility on the issue of causation. Id. at 110-11, 410 S.E.2d at 542-43.

Mr. Gregorie's opinion does not ascend beyond the realm of possibility. He could only opine that it was **possible** the flooding might have been prevented without the road construction or that there was a **possibility** that without the road construction that flooding might have been prevented inside the Marlowes' home. [Appx. 4-5; 106.] He could not "definitely" state that if the road construction project had not existed, the flooding would have been prevented. [Appx. 4.] Mr. Gregorie agreed that with the old unelevated highway and the two rain events of October 2015 and October 2016, the Marlowe home might have still flooded. [Appx. 5.]

As this Court directed in Baughman, Mr. Gregorie's testimony is not enough to create a genuine issue of material fact on the issue of causation for the Marlowes' inverse condemnation claim. Mr. Gregorie did not opine that the road construction was a probable but for cause of the flooding of the Marlowes' home. See Hurd v. Williamsburg Cty., 353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005) ("[I]f the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause.").

Mr. Gregorie's testimony is uncertain and concedes the home could have flooded without the road construction. As the Supreme Court of the United States has recognized:

> [T]o hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no [action] of any kind. So to hold would far exceed even the "extremest" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private party owner for flood damages which it in no way caused.

United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

"To warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Gastineau v. Murphy, 331 S.C. 565, 570 n.2, 503 S.E.2d 712, 714 n.2 (1998) (internal citation omitted) "The facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates; the existence of a fact cannot rest in speculation, surmise or conjecture." Id. Correspondingly, liability against another party also cannot be founded upon idle supposition. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). The opinion of the Marlowes' expert does not satisfy these basic legal principles.

The Marlowes have previously relied upon the case of King v. N. River Ins. Co., 278 S.C. 411, 297 S.E.2d 637 (1982) as to the sufficiency of their expert's opinion, but this case does not bear upon the competency of their expert's causation opinion. In King, the plaintiff contracted with an insurance carrier for coverage on plaintiff's warehouse. The policy contained a provision insuring the property against damage caused by vandalism or malicious mischief.

The roof of the warehouse collapsed following a heavy rainstorm. An inspection revealed that a beer can and two whiskey bottles lodged in the downspout completely blocked drainage from the roof. Id. at 412, 297 S.E.2d at 637. The plaintiff contended that the clogged downspout caused water to accumulate, leading to the collapse of the roof, and that the downspout had become clogged through acts of vandalism by persons throwing the bottles on the roof. The plaintiff's expert opined that normally the downspout, free from clogs, should have been more than adequate to drain the roof. Id. at 412-13, 297 S.E.2d at 637.

The carrier contested liability under the policy's vandalism provision, arguing that the throwing of the bottles on the roof did not constitute vandalism or malicious mischief as defined by the policy. The carrier further contended that, even if the act of throwing bottles on the roof did constitute vandalism, the vandalism was not the proximate cause of the loss. Id. at 413, 297 S.E.2d at 638. The trial court granted a directed verdict to the carrier. Id. at 412, 297 S.E.2d at 637.

In reversing the grant of directed verdict, this Court held that as to causation, it is sufficient to prove the event insured against was the efficient cause of the loss even though it may not have been the sole cause. Thus, the Court found that where the plaintiff's expert testified that the accumulated water on the roof would not by itself have caused the roof to collapse, a factfinder could find that the clogging of the downspout was the efficient and proximate cause of the loss. Id. at 413-14, 297 S.E.2d at 638.

Notably, in King there was no issue with the sufficiency of the expert's opinion. The expert affirmatively testified that accumulated water on the roof from a heavy rainstorm would not have alone caused the roof to collapse: but for the vandalism, the roof would have held. In

contrast, the Marlowes' expert could not opine that their home would not have flooded from the 4-day storm events but for the road construction. The Marlowes' expert conceded the flooding of their home could have still occurred from the storm events alone. Their expert's testimony is legally insufficient to establish that the SCDOT"s construction of an elevated road was the efficient and proximate cause of the flooding. Without any competent proof of causation, the Marlowes' inverse condemnation claim fails as a matter of law.

There is no legally sufficient evidence in the record that the SCDOT road construction was a but for causation of the flooding of the Marlowes' home, and without causation, a claim for inverse condemnation cannot lie as a matter of law. The Marlowes' inverse condemnation claim against the SCDOT for the flooding that occurred to their home as a result of unprecedented storms violates the legal principle that liability "may not be permitted to rest upon surmise, conjecture or speculation" and that "speculative, theoretical and hypothetical views" should not be submitted to a factfinder. Hanahan, 326 S.C. at 149, 485 S.E.2d at 908.

The Court of Appeals erred in remanding the inverse condemnation claim for further proceedings. The Trial Court, having the legal authority to determine whether the Marlowes had established a claim of inverse condemnation, correctly ruled that the evidence presented on summary judgment all pointed to the singular conclusion that the SCDOT had not caused the flooding of the Marlowes' home. The SCDOT therefore requests this Court to reinstate the Trial Court's proper grant of summary judgment on the inverse condemnation claim.

II. The Trial Court correctly relied upon the Stormwater Act in granting immunity to the SCDOT.

The Stormwater Act requires those who intend to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity. See S.C. CODE ANN. § 48-14-10 *et seq.* The Stormwater Act then explicitly provides "no liability for damages" on the part of any governmental body:

> 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 [.]

S.C. CODE ANN. § 48-14-160.

The title of this statutory section and its provisions clearly establish that a governmental body will not be liable for damages for land disturbing activities. The Stormwater Act therefore does not impose any liability on the SCDOT and its agents and employees for the road construction near the Marlowes' residence. The Trial Court's grant of summary judgment on each of the Marlowes' claims against the SCDOT should be affirmed on this basis as well.

CONCLUSION

For the reasons set forth herein, the SCDOT respectfully requests this Court to reverse the Opinion of the Court of Appeals which vacated the Trial Court's grant of summary judgment and remanded the inverse condemnation claim for further proceedings.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

October 24, 2024.