

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. SUPREME COURT

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.

APPENDIX

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MARLOWE

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-000614

James Marlowe and Lori Marlowe, individually, and as Next Friends of K.P., H.M., and B.M., Minors under the age of Eighteen (18) years,

v.

South Carolina Department of Transportation,

Appellants,

Respondent.

RECORD ON APPEAL

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September 10, 2020

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Sep 10 2020

SC Court of Appeals

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

James Marlowe and Lori Marlowe,	)	
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANT SCDOT'S
VS.	)	MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Department of Transportation	)	
(SCDOT), Southern Asphalt, Inc.,	)	
	)	
Defendants.	)	
_____	)	

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

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

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

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

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

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

The governmental entity is not liable for a loss resulting from:

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(7) a nuisance;

(8) snow or ice conditions or **temporary or natural conditions on any public way or other public place due to weather conditions** unless the snow or ice thereon is affirmatively caused by a negligent act of the employee;

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

devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. **Governmental entities are not liable for the design of highways and other public ways.** Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. **Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice;**

SC Code Ann 15-78-60
[emphasis added]

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

The Stormwater Management and Sediment Reduction Act states:

- (A) Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed.
- (B) Each person responsible for the land disturbing activity shall certify, on the stormwater management and sediment control plan submitted, that all land disturbing activities will be done according to the approved plan.
- (C) All approved land disturbing activities must have associated therein at least one individual who functions as responsible personnel. (SC Code Ann. 48-14-30)

Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

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

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

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

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

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

A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.

Q: May have?

A. That's correct.

Q: So it still—you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?

A: It's possible, yes.

(Gregorie depo, page 84)

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

The Honorable Michael G. Nettles



Florence Common Pleas

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

Case Number: 2017CP2101168

Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2020-03-25 11:20:27 page 9 of 9

STATE OF SOUTH CAROLINA
COUNTY OF Florence
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2101168

James Marlowe et al
PLAINTIFF(S)

Department Of Transportation South Carolina
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This Court has reviewed the Motion to Reconsider, along with the Motion for Summary Judgment and the supporting and opposing memorandums. Based on this, the Motion to Reconsider is denied and a hearing is not necessary.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/06/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Florence Common Pleas

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

Case Number: 2017CP2101168

Type: Order/Electronic Form 4

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2020-04-06 11:32:55 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

James Marlowe and Lori Marlowe

Plaintiff(s)

vs.

South Carolina Department of Transportation, Southern
Asphalt, Inc., and United Infrastructure Group, Inc.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP - 21-

1168

Submitted By: J. Clay Hopkins
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Telephone #: (843) 314-4202
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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☒ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture—Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)			
☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)			

Submitting Party Signature:



CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Date: May 1, 2017

COPY

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

James Marlowe and Lori Marlowe,

Plaintiffs,

v.

South Carolina Department of
Transportation, Southern Asphalt, Inc., and
United Infrastructure Group, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) Docket No.: 2017-CP-21- 1168

SUMMONS

2017 MAY -3 PM 3:32
DORIS P. O'HARA
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

FILED

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action. A copy of the Complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service, at 12019 Ocean Highway, Pawleys Island, South Carolina 29585.

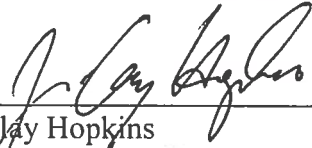
YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

[Signature Block on Following Page]

CERTIFIED: A TRUE COPY

Doris P. O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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Attorneys for the Plaintiffs

May 1, 2017

Pawleys Island, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) Docket No.: 2017-CP-21- 1168

James Marlowe and Lori Marlowe,

Plaintiffs,

v.

South Carolina Department of
Transportation, Southern Asphalt, Inc., and
United Infrastructure Group, Inc.,

Defendants.

**COMPLAINT
(JURY TRIAL DEMANDED)**

2017 MAY -3 PM 3:32
DORNEILL O'HARA
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

FILED

James Marlowe and Lori Marlowe (hereinafter "Plaintiffs"), complaining of South Carolina Department of Transportation ("SCDOT"), Southern Asphalt, Inc., and United Infrastructure Group, Inc. (collectively "Defendants"), would respectfully show unto the Court the following:

PARTIES

1. Plaintiffs are citizens and residents of Florence County, South Carolina.
2. Defendant SCDOT is a body politic and is subject to suit and its own name was created for the purpose of designing, maintaining, repairing, and installing roadway systems throughout the State of South Carolina, including, but not limited to, Florence County.
3. Defendant Southern Asphalt is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Horry County, South Carolina. At all times relevant herein, Defendant Southern Asphalt submitted bids for work to be performed in, and maintained agents in, Florence County.
4. Defendant United Infrastructure Group, Inc. is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Chester County, South Carolina. At all times relevant herein, Defendant United Infrastructure submitted

Dorinda O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

bids for work to be performed in, and maintained agents in, Florence County.

VENUE AND JURISDICTION

5. Venue and jurisdiction is proper because it concerns property located in Florence County, South Carolina with an address of 2479 W. Highway 378, Pamplico, South Carolina, and the most substantial portion of the acts complained of herein occurred in Florence County, South Carolina.

FACTS

6. Plaintiff realleges and restates all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

7. In 2003, Plaintiffs purchased the above-referenced real property and lived there continuously until such time as they were forced to leave due to Defendants' actions and conduct, which resulted in flooding of Plaintiffs' home and property.

8. At all times complained of herein, Defendants were responsible for the design, installation, maintenance, and other construction related to a road-widening project on Highway 378, to include that certain portion of Highway 378 that abuts and runs beside the real property and home of Plaintiffs (hereinafter referenced as "Subject Point").

9. On or about November 12, 2013, Defendant Southern Asphalt won a bid from SCDOT to complete a road-widening project for Highway 378 with the project including the Subject Point.

10. Upon information and belief, Defendant United Infrastructure Group, Inc. was subcontracted by SCDOT or Defendant Southern Asphalt for purposes of road, highway, bridge, and/or culvert system installation and construction at the Subject Point.

11. On or about March 31, 2015, the construction of the road-widening project was

begun at the Subject Point with such construction including relocating the existing road, designing and installing a roadway and bridge, and designing and installing a culvert that occurred at the Subject Point. Unbeknownst to Plaintiffs, the design created or selected by Defendants did not include sufficient directive or details to allow for the installation and construction of a roadway that would exist and be operated without flooding Plaintiffs' property.

12. On or about October 4, 2015, after the installation of the new roadway, Plaintiffs' home was flooded by rainfall (hereinafter "first flood").

13. Plaintiffs notified Defendants of the issues regarding the design and construction of the roadway, bridge, and culvert system and met with Defendants on numerous occasions in an effort to remediate the defective design, construction, and installation to avoid any further damage to Plaintiffs' property.

14. Up until that point in October 2015, Plaintiffs had never experienced any issue of standing water or flooding from rainfall.

15. Upon information and belief, at no time since the construction of Plaintiffs' home did Plaintiffs or any former owner experience any problems with standing water or flooding as a result of rainfall.

16. Defendants represented to Plaintiffs that the flooding would not happen again as Defendants would take steps necessary to ensure that the design and construction of the roadway and culvert system would, in the future, significantly restrict the water flow that caused the water at the culvert to back up and flood Plaintiffs' home.

17. The first flood caused approximately 18 inches of water to enter the interior of Plaintiffs' home. For a period of approximately ten (10) months, Plaintiffs undertook to replace the contents of their home and repair the interior of the home.

18. Despite the representations of Defendants, on or about October 8, 2016, Plaintiffs' home was flooded again by rainfall, which was the result of the inadequate design, installation, and construction of the roadway system, bridge, and culvert system.

19. Once again, Plaintiffs suffered a total loss of contents, as well as significant damage to the interior of the home.

20. Furthermore, during the course of construction on or about, up to, at and beyond the Subject Point, Defendants installed temporary barriers that prevented Plaintiffs from having any access to their property unless their car was parked on the edge of the highway and they accessed their home by foot.

21. As a result of Defendants' failure to anticipate and contemplate significant rainfall and the resulting effects to Plaintiffs' property, and failure to design, install, and construct an adequate roadway, highway, bridge, and/or culvert system to disperse said rainfall, Plaintiffs have continued to be unable to use and enjoy their home.

22. In fact, Plaintiffs have essentially been denied complete use and enjoyment of their home.

23. Plaintiffs have suffered and sustained irreparable harm and damages as a result of the loss of their home and its contents.

24. At all times complained of herein, Defendants were responsible for selecting a design that would allow for proper runoff, and to design and install such culverts and/or drains that would prevent any rain or water runoff from flooding and/or damaging Plaintiffs' property.

25. At all times complained of herein, Defendants were responsible for supervising and monitoring the design, installation, and construction of the road, highway, culvert, and/or drain installation at the Subject Point.

26. At all times complained of herein, SCDOT and its agents, employees, and/or servants were in a supervisory position over any contractors and/or subcontractors, including Defendants Southern Asphalt and United Infrastructure Group, Inc., to ensure the proper installation and construction of the roadway, highway, bridge, and/or culvert to include the Subject Point.

FOR A FIRST CAUSE OF ACTION
(Inverse Condemnation)

27. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

28. The above-described actions by Defendants constitute a taking by inverse condemnation for which the Plaintiffs are entitled to be compensated.

29. Because this action is necessitated by actions of a State Agency, Plaintiffs are entitled to recover attorney's fees.

30. As a direct and proximate result of the aforementioned actions of the Defendants, Plaintiffs have suffered and will suffer great loss of value to their property.

FOR A SECOND CAUSE OF ACTION
(Conversion)

31. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

32. Defendants' actions and/or conduct constitute conversion of the Plaintiffs' valuable property rights without legal justification.

33. As a direct and proximate result of the foregoing acts of Defendants, Plaintiffs have suffered damages.

FOR A THIRD CAUSE OF ACTION
(Due Process Violation)

34. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

35. The conditions imposed on Plaintiffs by SCDOT precludes use of Plaintiffs' real property for the chosen economically feasible use and deprives Plaintiffs of reasonable economic benefit from the property.

36. SCDOT's actions and/or conduct constitute a regulatory taking of Plaintiffs' property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

37. Plaintiffs are informed and believe that they are entitled to an award of damages.

FOR A FOURTH CAUSE OF ACTION
(Negligence)

38. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

39. Defendants owed a duty to Plaintiffs to design, select a design, install, and construct a roadway, highway, and/or culvert that would not result in excess water runoff to such a degree as to cause Plaintiffs' property to flood.

40. Defendants should have contemplated significant rainfall in the region wherein the Subject Point is located and should have considered such conditions when selecting a design, designing, installing, or constructing the roadway, highway, and/or culvert system.

41. Defendants, by and through their employees, agents and servants, at the foregoing times and places aforesaid were negligent, careless, grossly negligent, reckless, willful, and wanton in the following particulars to wit:

- a. In improperly designing, installing, and/or constructing roadway, highway, bridge, and/or culvert systems;
- b. In failing to select or design a roadway, highway, bridge, and/or culvert system that prevented substantial and harmful water runoff to the Plaintiffs' property;
- c. In failing to adequately inspect and accept the design, installation, and construction of the roadway, highway, bridge, and/or culvert system at the Subject Point;
- d. In failing to properly specify appropriate materials to be used in the construction of the aforementioned project;
- e. In failing to properly supervise their agents, employees, and/or servants;
- f. In failing to follow their own procedures;
- g. In failing to do those things which a reasonable and prudent persons would have done under the circumstances.

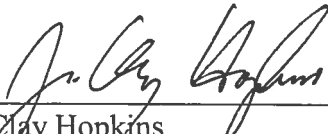
42. All of which were the direct and proximate cause of the Plaintiffs' injuries and damages as set forth more fully below, said acts being in violation of the laws of the State of South Carolina.

43. As a direct and proximate result of the aforementioned acts of Defendants, Plaintiffs have been severely damaged and will continue to sustain damages, to including extraordinary repairs, loss of use, depreciation in value, and such other damages as may be determined by a jury.

WHEREFORE, Plaintiffs pray for judgment against Defendants for actual, incidental and consequential damages, together with the costs and disbursements of this action, attorney's fees, and for such other and further relief as the Court deems just and proper.

Plaintiffs request a jury trial on all counts so triable.

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Attorneys for the Plaintiffs

May 1, 2017

Pawleys Island, South Carolina

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

James Marlowe and Lori Marlowe,)
)
 Plaintiffs,)

vs.)

South Carolina Department of)
 Transportation (SCDOT),)
 Southern Asphalt, Inc., and)
 United Infrastructure Group, Inc.,)
)
 Defendants.)

**ANSWER ON BEHALF OF DEFENDANT
 SOUTH CAROLINA DEPARTMENT
 OF TRANSPORTATION**

FILED
 11/13/18
 11:23:10
 CLERK OF COURT
 JUDGE: J. L. WILSON
 COUNTY: FLORENCE, SC

THE DEFENDANT, the South Carolina Department of Transportation, by and through its undersigned attorneys, make Answer to the Complaint and would show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiffs' Complaint which is not hereinafter specifically admitted, modified or explained is denied and strict proof is demanded thereof.

2. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraph 1 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

3. This Defendant admits the allegations contained the paragraph 2 of the Plaintiffs' Complaint.

4. This Defendant lacks sufficient information to form a belief concerning the

allegations contained in paragraphs 3 and 4 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

5. This Defendant contends that the allegations contained in paragraph 5 of the Plaintiffs' Complaint constitute a legal conclusion which requires no response from this Defendant. To the extent a response may be deemed necessary, the same is denied and strict proof demanded thereof.

6. In answering paragraph 6 of the Plaintiffs' Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

7. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraph 7 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

8. In answering paragraph 8 of the Plaintiffs' Complaint, this Defendant would admit only that portion of said paragraph as indicates that this Defendant was responsible for the design, installation and maintenance and other construction related to a road widening project on Highway 378. As to the remaining allegations contained in paragraph 8 of the Plaintiffs' Complaint, they are hereby denied and strict proof demanded thereof.

9. In answering paragraph 9 of the Plaintiffs' Complaint, this Defendant admits only that portion of said paragraph that states that the Defendant, Southern Asphalt, was awarded a road widening project on Highway 378 in Florence County by the Defendant, South Carolina Department of Transportation, and craves reference to the contract documents associated with the project and denies any allegations inconsistent therewith.

10. This Defendant lacks sufficient information to form a belief as to the allegations

contained in paragraph 10 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

11. This Defendant, upon information and belief, admits only that portion of paragraph 11 that alleges that on or about March 31, 2015, the construction of the road widening project was begun at or near the subject property. As to the remaining allegations of said paragraph, there are denied and strict proof demanded thereof.

12. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraph 12 of the Plaintiffs' Complaint and would therefore deny the same and demand strict proof thereof.

13. In answering paragraph 13 of the Plaintiffs' Complaint, this Defendant would admit only that it had certain conversations with the Plaintiffs in this case but all of the remaining allegations of said paragraph are denied and strict proof demanded thereof.

14. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraphs 14 and 15 of the Plaintiffs' Complaint and therefore denies same and demands strict proof thereof.

15. This Defendant denies the allegations contained in paragraph 16 of the Plaintiffs' Complaint and therefore would demand strict proof thereof.

16. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraphs 17, 18, 19 and 20 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

17. This Defendant denies the allegations contained in paragraphs 21, 22, and 23 of the Plaintiffs' Complaint and therefore would deny the same and demand strict proof thereof.

18. This Defendant admits the allegations contained in paragraphs 24, 25 and 26 of the Plaintiffs' Complaint.

19. In answering paragraph 27 of the Plaintiffs' Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

20. This Defendant denies the allegations contained in paragraphs 28, 29 and 30 of the Plaintiffs' Complaint and therefore demands strict proof thereof.

21. In answering paragraph 31 of the Plaintiffs' Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

22. This Defendant denies the allegations contained in paragraphs 32 and 33 of the Plaintiffs' Complaint and therefore demands strict proof thereof.

23. In answering paragraph 34 of the Plaintiffs' Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

24. This Defendant denies the allegations contained in paragraphs 35, 36, and 37 of the Plaintiffs' Complaint and therefore demands strict proof thereof.

25. In answering paragraph 38 of the Plaintiffs' Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

26. This Defendant denies the allegations contained in paragraphs 39, 40, 41 (including all subparts), 42, and 43 of the Plaintiffs' Complaint and demands strict proof thereof.

27. This Defendant denies that the Plaintiffs are entitled to any of the relief requested in the paragraph beginning "Wherefore..." and demands strict proof thereof.

FOR A SECOND AND AFFIRMATIVE DEFENSE

28. The foregoing defenses are incorporated herein by reference as fully as if repeated

verbatim.

29. This Defendant asserts the provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., including all applicable exceptions to the waiver of immunity, limitations on actions, and limitations on liability and damages therein.

FOR A THIRD AND AFFIRMATIVE DEFENSE

30. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

31. The incident referred to in the Plaintiffs' Complaint and alleged injuries and damages were due to and caused by, the negligence, gross negligence, recklessness, willfulness and wantonness of the Plaintiffs combining and concurring with any and all acts of this Defendant as a direct and proximate cause thereof, and without which the same would not have occurred.

32. Therefore, this Defendant pleads the Plaintiffs' negligence, contributory negligence and/or negligence greater than that of this Defendant and the contributory gross negligence, recklessness, willfulness and wantonness of the Plaintiffs as a complete defense to the Plaintiffs' action herein and that should a determination be made that the Plaintiffs' negligence, gross negligence, recklessness, willfulness and wantonness is not greater than that of this Defendant, then this Defendant is entitled to a determination as to the percent of the Plaintiffs' negligence, gross negligence, recklessness, willfulness and wantonness and to a reduction of any amount awarded to the Plaintiffs in proportion to the amount thereof, pursuant to the South Carolina Doctrine of Comparative Negligence.

FOR A FOURTH AND AFFIRMATIVE DEFENSE

33. The foregoing defenses are incorporated herein by reference as fully as if repeated

verbatim.

34. This Defendant asserts any and all defenses and immunities available to it pursuant to the South Carolina Tort Claims Act § 15-78-10 et.seq., Code of Laws, South Carolina including but not limited to all applicable exceptions to the waiver of immunity as set forth therein and limitations on liability and recovery as set forth therein. Therefore, this Defendant pleads the foregoing as a complete defense to this action.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

35. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

36. Plaintiffs have failed to mitigate their damages.

FOR A SIXTH AND AFFIRMATIVE DEFENSE

37. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

38. This Defendant pleads the public duty rule.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE

39. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

40. This Defendant is not liable for a nuisance pursuant to § 15-78-60(7), South Carolina Tort Claims Act.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE

41. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

42. This Defendant pleads discretionary immunity pursuant to § 15-78-60(5), South Carolina Tort Claims Act.

FOR A NINTH AND AFFIRMATIVE DEFENSE

43. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

44. This Defendant is not liable for the design of highways and other public ways pursuant to § 15-78-60(15), South Carolina Tort Claims Act.

FOR A TENTH AND AFFIRMATIVE DEFENSE

45. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

46. This Defendant is not liable for the enforcement or compliance with any laws or regulations pursuant to § 15-78-60(4), South Carolina Tort Claims Act.

FOR AN ELEVENTH AND AFFIRMATIVE DEFENSE

47. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

48. This Defendant is not liable for loss resulting from natural conditions due to weather pursuant to § 15-78-60(8), South Carolina Tort Claims Act.

FOR A TWELFTH AND AFFIRMATIVE DEFENSE

49. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

50. This Defendant is not liable for punitive damages pursuant to § 15-78-120, South Carolina Tort Claims Act.

FOR A THIRTEENTH AND AFFIRMATIVE DEFENSE

51. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

52. Any damages alleged to have been caused by any Defendants must be apportioned between this Defendant and all other tortfeasors pursuant to § 15-78-100, South Carolina Tort Claims Act.

FOR A FOURTEENTH AND AFFIRMATIVE DEFENSE

53. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

54. This Defendant is immune from suit pursuant to the Storm Water Management and Sediment Reduction Act, in particular S.C. Code Anno. § 48-14-160(1) which provides impertinent part as follows: “nothing contained in this chapter and no action or failure to act under this chapter may be construed 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.”

FOR A FIFTEENTH AND AFFIRMATIVE DEFENSE

55. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

56. The claims against this Defendant are barred by the doctrine of laches, waiver and/or estoppel.

FOR A SIXTEENTH AND AFFIRMATIVE DEFENSE

57. The foregoing defenses are incorporated herein by reference as fully as if repeated

verbatim.

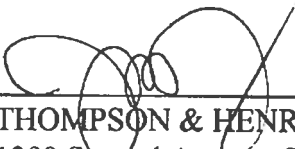
58. This Defendant pleads Acts of God as a defense under the rule of impossibility or impracticability. Therefore, this Defendant pleads the foregoing as a complete defense to this action.

RESERVATION AND NON-WAIVER

59. This Defendant reserves the right to assert, and does not waive, any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, this Defendant prays that the Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

Lisa A. Thomas, SC Bar #66458
John B. McCutcheon, Jr., SC Bar #3767
*Attorneys for the Defendant South Carolina
Department of Transportation*



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July 17, 2017
Conway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2017-CP-21-01168
)

James Marlowe and Lori Marlowe,
individually and as Next Friend of K. P.,
H. M. and B. M., Minors under the age
of eighteen (18) years,

Plaintiffs,

v.

South Carolina Department of
Transportation, Southern Asphalt, Inc.,
and United Infrastructure Group, Inc.,

Defendants.

**AMENDED COMPLAINT
(JURY TRIAL DEMANDED)**

2018 AUG 22 PM 1:55
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

FILED

James Marlowe and Lori Marlowe (hereinafter "Plaintiffs"), complaining of South Carolina Department of Transportation ("SCDOT"), Southern Asphalt, Inc., and United Infrastructure Group, Inc. (collectively "Defendants"), would respectfully show unto the Court the following:

PARTIES

1. Plaintiffs are citizens and residents of Florence County, South Carolina.
2. Defendant SCDOT is a body politic and is subject to suit and its own name was created for the purpose of designing, maintaining, repairing, and installing roadway systems throughout the State of South Carolina, including, but not limited to, Florence County.
3. Defendant Southern Asphalt is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Horry County, South Carolina. At all times relevant herein, Defendant Southern Asphalt submitted bids for work to be performed in, and maintained agents in, Florence County.

4. Defendant United Infrastructure Group, Inc. is a corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Chester County, South Carolina. At all times relevant herein, Defendant United Infrastructure submitted bids for work to be performed in, and maintained agents in, Florence County.

VENUE AND JURISDICTION

5. Venue and jurisdiction is proper because it concerns property located in Florence County, South Carolina with an address of 2479 W. Highway 378, Pamplico, South Carolina, and the most substantial portion of the acts complained of herein occurred in Florence County, South Carolina.

FACTS

6. Plaintiff realleges and restates all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

7. In 2003, Plaintiffs purchased the above-referenced real property and lived there continuously until such time as they were forced to leave due to Defendants' actions and conduct, which resulted in flooding of Plaintiffs' home and property.

8. At all times complained of herein, Defendants were responsible for the design, installation, maintenance, and other construction related to a road-widening project on Highway 378, to include that certain portion of Highway 378 that abuts and runs beside the real property and home of Plaintiffs (hereinafter referenced as "Subject Point").

9. On or about November 12, 2013, Defendant Southern Asphalt won a bid from SCDOT to complete a road-widening project for Highway 378 with the project

including the Subject Point.

10. Upon information and belief, Defendant United Infrastructure Group, Inc. was subcontracted by SCDOT or Defendant Southern Asphalt for purposes of road, highway, bridge, and/or culvert system installation and construction at the Subject Point.

11. On or about March 31, 2015, the construction of the road-widening project was begun at the Subject Point with such construction including relocating the existing road, designing and installing a roadway and bridge, and designing and installing a culvert that occurred at the Subject Point. Unbeknownst to Plaintiffs, the design created or selected by Defendants did not include sufficient directive or details to allow for the installation and construction of a roadway that would exist and be operated without flooding Plaintiffs' property.

12. On or about October 4, 2015, after the installation of the new roadway, Plaintiffs' home was flooded by rainfall (hereinafter "first flood").

13. Plaintiffs notified Defendants of the issues regarding the design and construction of the roadway, bridge, and culvert system and met with Defendants on numerous occasions in an effort to remediate the defective design, construction, and installation to avoid any further damage to Plaintiffs' property.

14. Up until that point in October 2015, Plaintiffs had never experienced any issue of standing water or flooding from rainfall.

15. Upon information and belief, at no time since the construction of Plaintiffs' home did Plaintiffs or any former owner experience any problems with standing water or flooding as a result of rainfall.

16. Defendants represented to Plaintiffs that the flooding would not happen

again as Defendants would take steps necessary to ensure that the design and construction of the roadway and culvert system would, in the future, significantly restrict the water flow that caused the water at the culvert to back up and flood Plaintiffs' home.

17. The first flood caused approximately 18 inches of water to enter the interior of Plaintiffs' home. For a period of approximately ten (10) months, Plaintiffs undertook to replace the contents of their home and repair the interior of the home.

18. Despite the representations of Defendants, on or about October 8, 2016, Plaintiffs' home was flooded again by rainfall, which was the result of the inadequate design, installation, and construction of the roadway system, bridge, and culvert system.

19. Once again, Plaintiffs suffered a total loss of contents, as well as significant damage to the interior of the home.

20. Furthermore, during the course of construction on or about, up to, at and beyond the Subject Point, Defendants installed temporary barriers that prevented Plaintiffs from having any access to their property unless their car was parked on the edge of the highway and they accessed their home by foot.

21. As a result of Defendants' failure to anticipate and contemplate significant rainfall and the resulting effects to Plaintiffs' property, and failure to design, install, and construct an adequate roadway, highway, bridge, and/or culvert system to disperse said rainfall, Plaintiffs have continued to be unable to use and enjoy their home.

22. In fact, Plaintiffs have essentially been denied complete use and enjoyment of their home.

23. Plaintiffs have suffered and sustained irreparable harm and damages as a result of the loss of their home and its contents.

24. At all times complained of herein, Defendants were responsible for selecting a design that would allow for proper runoff, and to design and install such culverts and/or drains that would prevent any rain or water runoff from flooding and/or damaging Plaintiffs' property.

25. At all times complained of herein, Defendants were responsible for supervising and monitoring the design, installation, and construction of the road, highway, culvert, and/or drain installation at the Subject Point.

26. At all times complained of herein, SCDOT and its agents, employees, and/or servants were in a supervisory position over any contractors and/or subcontractors, including Defendants Southern Asphalt and United Infrastructure Group, Inc., to ensure the proper installation and construction of the roadway, highway, bridge, and/or culvert to include the Subject Point.

FOR A FIRST CAUSE OF ACTION
(Inverse Condemnation)

27. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

28. The above-described actions by Defendants constitute a taking by inverse condemnation for which the Plaintiffs are entitled to be compensated.

29. Because this action is necessitated by actions of a State Agency, Plaintiffs are entitled to recover attorney's fees.

30. As a direct and proximate result of the aforementioned actions of the Defendants, Plaintiffs have suffered and will suffer great loss of value to their property.

FOR A SECOND CAUSE OF ACTION
(Conversion)

31. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

32. Defendants' actions and/or conduct constitute conversion of the Plaintiffs' valuable property rights without legal justification.

33. As a direct and proximate result of the foregoing acts of Defendants, Plaintiffs have suffered damages.

FOR A THIRD CAUSE OF ACTION
(Due Process Violation)

34. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

35. The conditions imposed on Plaintiffs by SCDOT precludes use of Plaintiffs' real property for the chosen economically feasible use and deprives Plaintiffs of reasonable economic benefit from the property.

36. SCDOT's actions and/or conduct constitute a regulatory taking of Plaintiffs' property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

37. Plaintiffs are informed and believe that they are entitled to an award of damages.

FOR A FOURTH CAUSE OF ACTION
(Negligence)

38. Plaintiffs reallege and restate all the allegations of the preceding paragraphs as if fully rewritten and restated herein verbatim.

39. Defendants owed a duty to Plaintiffs to design, select a design, install, and construct a roadway, highway, and/or culvert that would not result in excess water runoff to such a degree as to cause Plaintiffs' property to flood.

40. Defendants should have contemplated significant rainfall in the region wherein the Subject Point is located and should have considered such conditions when selecting a design, designing, installing, or constructing the roadway, highway, and/or culvert system.

41. Defendants, by and through their employees, agents and servants, at the foregoing times and places aforesaid were negligent, careless, grossly negligent, reckless, willful, and wanton in the following particulars to wit:

- a. In improperly designing, installing, and/or constructing roadway, highway, bridge, and/or culvert systems;
- b. In failing to select or design a roadway, highway, bridge, and/or culvert system that prevented substantial and harmful water runoff to the Plaintiffs' property;
- c. In failing to adequately inspect and accept the design, installation, and construction of the roadway, highway, bridge, and/or culvert system at the Subject Point;
- d. In failing to properly specify appropriate materials to be used in the construction of the aforementioned project;
- e. In failing to properly supervise their agents, employees, and/or servants;
- f. In failing to follow their own procedures;

g. In failing to do those things which a reasonable and prudent person would have done under the circumstances.

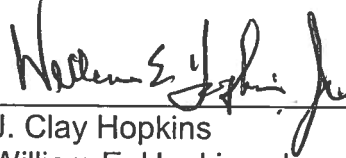
42. All of which were the direct and proximate cause of the Plaintiffs' injuries and damages as set forth more fully below, said acts being in violation of the laws of the State of South Carolina.

43. As a direct and proximate result of the aforementioned acts of Defendants, Plaintiffs have been severely damaged and will continue to sustain damages, to including extraordinary repairs, loss of use, depreciation in value, and such other damages as may be determined by a jury.

WHEREFORE, Plaintiffs pray for judgment against Defendants for actual, incidental and consequential damages, together with the costs and disbursements of this action, attorney's fees, and for such other and further relief as the Court deems just and proper.

Plaintiffs request a jury trial on all counts so triable.

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Attorneys for the Plaintiffs

Pawleys Island, South Carolina

~~July~~ __, 2018

August 20, 2018

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

James Marlowe and Lori Marlowe,)
 individually and as Next Friend of)
 K.P., H.M. and B.M., minors under)
 the age of eighteen (18) years,)

Plaintiffs,)

vs.)

South Carolina Department of)
 Transportation (SCDOT),)
 Southern Asphalt, Inc., and)
 United Infrastructure Group, Inc.,)
)
 Defendants.)

**ANSWER TO
 AMENDED COMPLAINT
 ON BEHALF OF DEFENDANT
 SOUTH CAROLINA DEPARTMENT
 OF TRANSPORTATION**

FILED
 2018 AUG 29 PM 12:42
 CLERK'S OFFICE
 12TH JUDICIAL CIRCUIT
 FLORENCE, SC

THE DEFENDANT, the South Carolina Department of Transportation, by and through its undersigned attorneys, make Answer to the Amended Complaint and would show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiffs' Amended Complaint which is not hereinafter specifically admitted, modified or explained is denied and strict proof is demanded thereof.

2. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraph 1 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

3. This Defendant admits the allegations contained the paragraph 2 of the Plaintiffs'

Amended Complaint.

4. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 3 and 4 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

5. This Defendant contends that the allegations contained in paragraph 5 of the Plaintiffs' Amended Complaint constitute a legal conclusion which requires no response from this Defendant. To the extent a response may be deemed necessary, the same is denied and strict proof demanded thereof.

6. In answering paragraph 6 of the Plaintiffs' Amended Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

7. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraph 7 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

8. In answering paragraph 8 of the Plaintiffs' Amended Complaint, this Defendant would admit only that portion of said paragraph as indicates that this Defendant was responsible for the design, installation and maintenance and other construction related to a road widening project on Highway 378. As to the remaining allegations contained in paragraph 8 of the Plaintiffs' Complaint, they are hereby denied and strict proof demanded thereof.

9. In answering paragraph 9 of the Plaintiffs' Amended Complaint, this Defendant admits only that portion of said paragraph that states that the Defendant, Southern Asphalt, was awarded a road widening project on Highway 378 in Florence County by the Defendant, South Carolina Department of Transportation, and craves reference to the contract documents associated

with the project and denies any allegations inconsistent therewith.

10. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraph 10 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

11. This Defendant, upon information and belief, admits only that portion of paragraph 11 that alleges that on or about March 31, 2015, the construction of the road widening project was begun at or near the subject property. As to the remaining allegations of said paragraph, there are denied and strict proof demanded thereof.

12. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraph 12 of the Plaintiffs' Amended Complaint and would therefore deny the same and demand strict proof thereof.

13. In answering paragraph 13 of the Plaintiffs' Amended Complaint, this Defendant would admit only that it had certain conversations with the Plaintiffs in this case but all of the remaining allegations of said paragraph are denied and strict proof demanded thereof.

14. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraphs 14 and 15 of the Plaintiffs' Amended Complaint and therefore denies same and demands strict proof thereof.

15. This Defendant denies the allegations contained in paragraph 16 of the Plaintiffs' Amended Complaint and therefore would demand strict proof thereof.

16. This Defendant lacks sufficient information to form a belief as to the allegations contained in paragraphs 17, 18, 19 and 20 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

17. This Defendant denies the allegations contained in paragraphs 21, 22, and 23 of the Plaintiffs' Amended Complaint and therefore would deny the same and demand strict proof thereof.

18. This Defendant admits the allegations contained in paragraphs 24, 25 and 26 of the Plaintiffs' Amended Complaint.

19. In answering paragraph 27 of the Plaintiffs' Amended Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

20. This Defendant denies the allegations contained in paragraphs 28, 29 and 30 of the Plaintiffs' Amended Complaint and therefore demands strict proof thereof.

21. In answering paragraph 31 of the Plaintiffs' Amended Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

22. This Defendant denies the allegations contained in paragraphs 32 and 33 of the Plaintiffs' Amended Complaint and therefore demands strict proof thereof.

23. In answering paragraph 34 of the Plaintiffs' Amended Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

24. This Defendant denies the allegations contained in paragraphs 35, 36, and 37 of the Plaintiffs' Amended Complaint and therefore demands strict proof thereof.

25. In answering paragraph 38 of the Plaintiffs' Amended Complaint, the foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

26. This Defendant denies the allegations contained in paragraphs 39, 40, 41 (including all subparts), 42, and 43 of the Plaintiffs' Amended Complaint and demands strict proof thereof.

27. This Defendant denies that the Plaintiffs are entitled to any of the relief requested in the paragraph beginning "Wherefore..." and demands strict proof thereof.

FOR A SECOND AND AFFIRMATIVE DEFENSE

28. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

29. This Defendant asserts the provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., including all applicable exceptions to the waiver of immunity, limitations on actions, and limitations on liability and damages therein.

FOR A THIRD AND AFFIRMATIVE DEFENSE

30. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

31. The incident referred to in the Plaintiffs' Amended Complaint and alleged injuries and damages were due to and caused by, the negligence, gross negligence, recklessness, willfulness and wantonness of the Plaintiffs combining and concurring with any and all acts of this Defendant as a direct and proximate cause thereof, and without which the same would not have occurred.

32. Therefore, this Defendant pleads the Plaintiffs' negligence, contributory negligence and/or negligence greater than that of this Defendant and the contributory gross negligence, recklessness, willfulness and wantonness of the Plaintiffs as a complete defense to the Plaintiffs' action herein and that should a determination be made that the Plaintiffs' negligence, gross negligence, recklessness, willfulness and wantonness is not greater than that of this Defendant, then this Defendant is entitled to a determination as to the percent of the Plaintiffs' negligence, gross negligence, recklessness, willfulness and wantonness and to a reduction of any amount awarded to the Plaintiffs in proportion to the amount thereof, pursuant to the South Carolina Doctrine of Comparative Negligence.

FOR A FOURTH AND AFFIRMATIVE DEFENSE

33. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

34. This Defendant asserts any and all defenses and immunities available to it pursuant to the South Carolina Tort Claims Act § 15-78-10 et.seq., Code of Laws, South Carolina including but not limited to all applicable exceptions to the waiver of immunity as set forth therein and limitations on liability and recovery as set forth therein. Therefore, this Defendant pleads the foregoing as a complete defense to this action.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

35. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

36. Plaintiffs have failed to mitigate their damages.

FOR A SIXTH AND AFFIRMATIVE DEFENSE

37. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

38. This Defendant pleads the public duty rule.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE

39. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

40. This Defendant is not liable for a nuisance pursuant to § 15-78-60(7), South Carolina Tort Claims Act.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE

41. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

42. This Defendant pleads discretionary immunity pursuant to § 15-78-60(5), South Carolina Tort Claims Act.

FOR A NINTH AND AFFIRMATIVE DEFENSE

43. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

44. This Defendant is not liable for the design of highways and other public ways pursuant to § 15-78-60(15), South Carolina Tort Claims Act.

FOR A TENTH AND AFFIRMATIVE DEFENSE

45. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

46. This Defendant is not liable for the enforcement or compliance with any laws or regulations pursuant to § 15-78-60(4), South Carolina Tort Claims Act.

FOR AN ELEVENTH AND AFFIRMATIVE DEFENSE

47. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

48. This Defendant is not liable for loss resulting from natural conditions due to weather pursuant to § 15-78-60(8), South Carolina Tort Claims Act.

FOR A TWELFTH AND AFFIRMATIVE DEFENSE

49. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

50. This Defendant is not liable for punitive damages pursuant to § 15-78-120, South Carolina Tort Claims Act.

FOR A THIRTEENTH AND AFFIRMATIVE DEFENSE

51. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

52. Any damages alleged to have been caused by any Defendants must be apportioned between this Defendant and all other tortfeasors pursuant to § 15-78-100, South Carolina Tort Claims Act.

FOR A FOURTEENTH AND AFFIRMATIVE DEFENSE

53. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

54. This Defendant is immune from suit pursuant to the Storm Water Management and Sediment Reduction Act, in particular S.C. Code Anno. § 48-14-160(1) which provides impertinent part as follows: “nothing contained in this chapter and no action or failure to act under this chapter may be construed 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.”

FOR A FIFTEENTH AND AFFIRMATIVE DEFENSE

55. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

56. The claims against this Defendant are barred by the doctrine of laches, waiver and/or estoppel.

FOR A SIXTEENTH AND AFFIRMATIVE DEFENSE

57. The foregoing defenses are incorporated herein by reference as fully as if repeated verbatim.

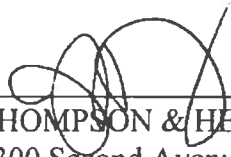
58. This Defendant pleads Acts of God as a defense under the rule of impossibility or impracticability. Therefore, this Defendant pleads the foregoing as a complete defense to this action.

RESERVATION AND NON-WAIVER

59. This Defendant reserves the right to assert, and does not waive, any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, this Defendant prays that the Amended Complaint be dismissed with costs, and for such other and further relief as the Court may deem just and proper.

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August 27, 2018
Conway, South Carolina

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

James Marlowe and Lori Marlowe,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	DEFENDANT SCDOT'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Department of Transportation	)	
(SCDOT), Southern Asphalt, Inc.,	)	
	)	
Defendants.	)	
_____	)	

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the presiding Judge of the Twelfth Judicial Circuit for an Order granting the Defendant South Carolina Department of Transportation's (SCDOT) Motion for Summary Judgment in the above-captioned matter. This motion is based upon the fact that the SCDOT is not liable to the Plaintiff as a matter of law pursuant to 15-78-10 et seq. This motion is further based on the relevant case law, the pleadings, discovery and depositions in this case. This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Signature page to follow

Lisa A. Thomas, SC Bar #66458
John B. McCutcheon, Jr., SC Bar #3767
*Attorneys for the Defendant South Carolina
Department of Transportation*

/s/John B. McCutcheon, Jr.

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November 7, 2019
Conway, South Carolina

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

James Marlowe and Lori Marlowe,	)	
	)	
Plaintiff,	)	DEFENDANT SCDOT'S
	)	MEMORANDUM IN SUPPORT OF
VS.	)	ITS MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Department of Transportation	)	
(SCDOT), Southern Asphalt, Inc.,	)	
	)	
Defendants.	)	
_____	)	

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

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

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

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

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

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

The governmental entity is not liable for a loss resulting from:

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(7) a nuisance;

(8) snow or ice conditions or **temporary or natural conditions on any public way or other public place due to weather conditions** unless the snow or ice thereon is affirmatively caused by a negligent act of the employee;

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

guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction.

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

SC Code Ann 15-78-60
[emphasis added]

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

The Stormwater Management and Sediment Reduction Act states:

- (A) Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed.
- (B) Each person responsible for the land disturbing activity shall certify, on the stormwater management and sediment control plan submitted, that all land disturbing activities will be done according to the approved plan.
- (C) All approved land disturbing activities must have associated therein at least one individual who functions as responsible personnel. (SC Code Ann. 48-14-30)

Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

- (1) to impose any liability on the State, department, districts, local

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

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

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

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

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

prevented the flooding. (Gregorie depo, page 79)

A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.

Q: May have?

A. That's correct.

Q: So it still–you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?

A: It's possible, yes.

(Gregorie depo, page 84)

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

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

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

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

is no basis for liability on the part of SCDOT.

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November 7, 2019
 Conway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James Marlowe and Lori Marlowe,
individually, and as Next Friends of K.P.,
H.M., and B.M., Minors under the age of
Eighteen (18) years,

Plaintiffs,

v.

South Carolina Department of
Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C.A. No. 2017-CP-21-01168

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

South Carolina Department of Transportation ("DOT" or "Defendant") moved for summary judgment on the basis that it is immune from liability on all of Plaintiffs' claims pursuant to the South Carolina Tort Claims Act ("TCA"), S.C. Code Ann. §15-78-10, *et seq.*, and that there is no evidence it breached any duty to Plaintiffs. Because Plaintiffs' claims for inverse condemnation and constitutional violations are not immune from liability under the TCA, and because there is a genuine issue of material fact concerning Plaintiffs' claims for gross negligence, Plaintiffs are entitled to an Order denying Defendant's Motion in its entirety.

FACTS

Plaintiffs own real property located at 2479 W. Highway 378, Pamplico, South Carolina, in Florence County, which Plaintiff Jamie Marlowe purchased in 2003. (**J. Marlowe Dep. p. 15, ¶¶6-19**). In late 2013, Defendant began designing and seeking bids for the 378 Widening Project (the "Project"), which would affect the roadway immediately

in front of Plaintiffs' property. Construction began in early 2015. **(See Am. Compl. ¶11).**

The Project included installing a new bridge box culvert adjacent to Plaintiffs' property, which would be installed under the new and existing 378 roadway. Before construction began, Defendant engaged in an extensive design phase.

Stanley Roof, an engineer with Defendant (and one (1) of its 30(b)(6) witnesses), performed an initial study concerning the existing box culvert adjacent to Plaintiffs' property in August of 2013. **(DOT Dep. p. 23-24).** In its initial investigation, Defendant determined that the existing culvert could not be extended and would need to be replaced. **(Id. p. 24, ¶¶5-9).** Defendant never considered placing the Project's new culvert in any other location than the one ultimately selected. **(Id., ¶¶17-20).**

During this process, Defendant determined that "[t]he resident construction engineer for Florence County indicated that he had never seen the roadway overtopped at this location." **(Id. p. 25, ¶¶17-23).** This was an important consideration for Defendant because it "usually look[s] at past floods for a site and tr[ies] to get as much as information as [it] can for it." **(Id. p. 26, ¶¶19-23).** Despite this important step in its design and evaluation, Defendant did not speak with Plaintiffs, or any other adjacent property owners, to ascertain whether the roadway in front of their property ever overtopped. **(Id., p. 28, ¶¶20-24).**

In June of 2017, after complaints primarily from Plaintiffs regarding flooding on their property, Defendant performed an investigation and completed an addendum to its original design. **(Id. p. 30-31).** At that point, the new culvert had not been completely installed. **(Id., p. 31, ¶¶8-18).**

However, this time, Defendant determined that for a 25-year rain event, the existing

roadway in front of Plaintiffs' property would experience overtopping (*Id.* p. 32, ¶20 – p. 33, ¶8), – that is, where flood waters from adjacent property flows over the top of the roadway to an outlet, which is usually a stream, river, pond, or lake. Defendant's standard for culverts is withstanding a 100-year rain event. (*Id.* p. 28, ¶¶4-8). Incredibly, Defendant claimed this new information was discovered because it "didn't have that information at the time" – in 2013. (*Id.* p.33, ¶¶9-13). The only reason this information was unavailable to Defendant was because of its failure perform any analysis on the subject.

Again, Defendant did not speak with Plaintiffs during its investigation, or any adjacent property owners. (*Id.* p. 35, ¶¶1-4; p. 53, ¶¶2-19). During the investigation, though, Defendant's analysis determined that the existing culvert (present prior to the Project's construction) "would overtop for discharges associated with the 25-year return interval and greater." (**attached hereto as Exhibit 1**). In its addendum, Defendant included its determination that Plaintiffs' "structure" – or house – "could be impacted by a flood associated with the 25-year return interval, and potentially the 10-year interval." (*Id.*) (**DOT Dep. p. 36, ¶¶1-5**). The most disturbing aspect of this information's inclusion in the addendum is the information was readily available to Defendant in 2013. (**DOT Dep. p. 59, ¶¶21-23**) ("Q: And, so, you had the same information in 2013, correct? A: **Correct.**"). At this point, though, the new culvert was still not completely installed. (**DOT Dep. p. 37, ¶¶6-13**).

A critical piece of Defendant's new addendum was missing: any consideration of the higher elevation of the Project's new roadway being built simultaneously next to the existing roadway. (*Id.* p. 39, ¶¶14-18). Therefore, the 2017 addendum, which included an analysis of the existing roadway's height compared to the height of Plaintiff's house, did

not even include an accurate figure for the height of the roadway in relation to Plaintiffs' home. (*Id.* p. 40, ¶¶5-8). In 2017, as it concerned the roadway's overtopping, Defendant again failed to consider whether the new roadway could potentially block the existing roadway's overtopping. (*Id.* p. 41, ¶¶2-5). More importantly, though, Defendant never considered this possibility or performed any analysis in 2013 when it drafted its initial design report. (*Id.*, ¶¶8-11).¹

In October of 2015, South Carolina experienced historic rainfall levels, with one-day rainfall levels at the two (2) closest NOAA weather states to Plaintiffs' property experiencing greater than 10-year but less than 25-year rainfall levels. (**Feb. 22, 2019 Report of Jason Gregorie, at 20**) (attached hereto as Exhibit 2). Those stations experienced 4-day rainfall levels between 200-500 years. (*Id.*). This event, in conjunction with Defendant's construction of the Project, caused catastrophic flooding to Plaintiffs' home, with approximately 18 inches of water in their house. (**L. Marlowe Dep. p. 26, ¶¶12-19**). After that, Plaintiffs' essentially reconstructed their home with the assistance of FEMA and taking out personal loans. (*Id.* p. 25-26). Then, in 2016, Hurricane Matthew passed through the region, again bringing historic levels of rainfall to Plaintiffs' property, with 1-day rainfall levels corresponding to greater than 10-year but less than 25-year levels. (**Ex. 2, p. 20**). Those stations experienced 4-day rainfall levels greater than 100-years but less than 200-years. (*Id.*). Plaintiffs' home was again destroyed, with water levels between 15 and 16 inches, and since then, Plaintiffs have been unable to live at

¹ Defendant also testified that it never performed (prior to construction beginning, in 2015, or in 2016) any analysis concerning whether the new roadway's construction next to the existing roadway could create a "choke point." (**DOT Dep. p. 49, ¶¶17-21; p. 49, ¶22 – p. 50, ¶5**).

their home. (**L. Marlowe Dep. p. 26, ¶¶16-25**).

Thereafter, on May 3, 2017, Plaintiffs Lori Marlowe and Jamie Marlowe brought this action against Defendant, with claims for inverse condemnation, conversion, due process violations, and negligence. On August 22, 2018, Plaintiffs filed an Amended Complaint, adding their minor children as named plaintiffs in the action, with the same claims alleged. On November 7, 2019, Defendant filed its motion for summary judgment.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *accord Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); *see also Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham v. Blue Cross & Blue Shield*

of South Carolina, Inc., 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)); accord *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Hall v. Fedor*, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing *Young v. South Carolina Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (1999)).

ARGUMENT

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT.

Defendant argues that pursuant to the TCA, it "is not liable for the flooding on [Plaintiffs'] property as the rain event and Hurricane were natural conditions, not caused by [Defendant] or its agents or employees." (**Def.'s Mem. 5**). Defendant further states, "[i]f there is no defect in the construction or design, then there is no basis for liability on

the part of [Defendant].” (*Id.* 5-6). Defendant misstates and misapplies the applicable law in this case. The TCA does not apply to Plaintiffs’ claims for inverse condemnation and constitutional violations because these claims do not sound in tort. Furthermore, a genuine issue of material fact exists with Plaintiffs’ remaining claims because Defendant was aware of, and had notice of, a hazard with the existing culvert adjacent to Plaintiffs’ property prior to, and during, the Project’s construction; Defendant failed to establish it is entitled to discretionary immunity under the TCA; and any defects in Plaintiffs’ expert opinion go to the weight of the opinion and do not justify granting summary judgment. For those reasons, Defendant’s motion should be denied in its entirety.

a. The TCA does not apply to Plaintiffs’ inverse condemnation and constitutional violation claims.

Defendant “appear[s] to rely on a tenet of the South Carolina Tort Claims Act that liability is founded on acts that are within a governmental defendant’s scope of official duty.” *Mowrer v. Charleston Cnty. Park Com’n*, 361 S.C. 476, 605 S.E.2d 563 (Ct. App. 2004) (citing S.C. Code Ann. § 15-78-50(a) (Supp.2003) (“Any person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter provided.”)). This reliance is misplaced. *Id.*

At issue here is not a tort committed by the government against an individual but the taking by the government of private property for public use without the payment of just compensation. *Id.* Because the right to compensation for such a taking is a constitutional right predating the Tort Claims Act, it cannot be altered by statute. See, e.g., *Ins. Fin. Servs. v. S.C. Ins. Co.*, 282 S.C. 144, 147, 318 S.E.2d 10, 11 (1984) (holding an automobile insurer’s contractual right to terminate its agents was protected by the state

and federal constitutions and therefore could not be altered by subsequent statutory law). Because the TCA does not apply to Plaintiffs' constitutional claims, the Court must deny Defendant's motion for summary judgment.

b. Plaintiffs' Remaining Claims are not Barred by the TCA.

Defendant also argued it cannot be liable for the flooding events because they were natural events for which the TCA provides immunity, and that if there is no construction or design defect, there can be no liability, as well. Both arguments are misplaced.

The Tort Claims Act waives immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties. See S.C. Code Ann. § 15-78-40 (Supp.1999). Defendant first relies on S.C. Code Ann. § 15-78-60(8), which states:

The governmental entity is not liable for a loss resulting from:

(8) snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon **is affirmatively caused by a negligent act of the employee;**

(emphasis added). This exception to Defendant's immunity specifically includes the condition that the natural conditions must not be affirmatively caused by a negligent act of a governmental employee. As discussed below, a genuine issue of material fact exists regarding Plaintiffs' negligence claims, and, therefore, whether the flooding or the degree of flooding on Plaintiffs' property was caused by a negligent act of Defendant is a question that should be resolved by the jury.

The Legislature enacted the Stormwater Management and Sediment Reduction Act ("Stormwater Act")² to specifically address stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167. The Stormwater Act requires a person who intends 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, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The stormwater regulations provide that unless exempted, "a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan." S.C. Code Ann. Regs. 72–305(A). In other words, all non-exempt development construction sites must have a permitted plan for handling stormwater, the requirements of which depend on the size and complexity of the project. See *id.* 72–305(B).

As an initial matter, Plaintiffs have not, and are not, alleging any deficiency in Defendant's obtaining of a permit under the Stormwater Act. Further, as Defendant notes, the Stormwater Act states that "[n]othing... in this chapter...may be construed: (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity." (Def.'s Mem. 3-4 (citing S.C. Code Ann. § 48-14-160(2))). For these reasons, not only are Plaintiffs unaware how the Stormwater Act provides immunity

² S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2005).

for Defendant's negligence in this case, the Stormwater Act expressly states that it does not relieve Defendant from its liability. For that reason, the Stormwater Act does not shield Defendant from Plaintiffs' claims in this case.

Defendant's final contention is "[i]f there is no defect in the construction or design [of the Project], then there is no basis for liability on the part of [Defendant]." (Def.'s Mem. 5-6). This is legally and factually incorrect. Defendant asserts that S.C. Code § 15-78-60(15) shields it from liability. Section 15-78-60(15) sets forth exceptions to the state's waiver of sovereign immunity, stating, in pertinent part, that a governmental entity is not liable for loss resulting from:

(15) absence, condition or malfunction ... of any ... median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.... Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity.... Governmental entities are not liable for the design of highways and other public ways....

Defendant contends it owed no duty because its actions were the result of the design of the highway, such that it is immune from liability. Defendant's position misstates Plaintiffs' theories of liability. First, Defendant is liable to Plaintiffs because it knew or should have known in 2013 during its design of the Project, again in 2015 when it began construction on the Project, after the 2015 rain event, and after the 2016 rain event, that the existing box culvert adjacent to Plaintiffs' property was substandard under its own design requirements, and made no efforts to correct or replace the culvert. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008)

In *Giannini*, the plaintiffs claimed that DOT failed to take proper measures after notice of an existing hazard. 664 S.E.2d at 453. In that case, the portion of the roadway

where the plaintiff's car accident occurred had experienced several crossover accidents within two miles of their accident in which two people had been killed, and the accidents had been publicized by local media. *Id.* The Supreme Court of South Carolina determined that the plaintiff's claim was not a claim of defective construction but, rather, one of failure to take corrective action after notice of a defect. *Id.*

The *Giannini* Court determined that the case was analogous to *Wooten v. SCDOT*, 333 S.C. 464, 511 S.E.2d 355 (1999). *Id.* In *Wooten*, the Supreme Court affirmed the Court of Appeals' ruling that although SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition. 333 S.C. at 467-468, 511 S.E.2d at 357. In *Wooten*, the plaintiffs claimed SCDOT was negligent in failing to provide traffic lights at an intersection which would allow a pedestrian ample time to cross the street. *Id.* The Court of Appeals held that although DOT initially had design immunity, such immunity was not "perpetual." *Id.* The Court of Appeals held that once DOT had notice the intersection was hazardous, it was no longer immune from liability. 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997). On appeal, the Supreme Court affirmed as modified, adopting the trial court's ruling that the immunity provision regarding signs and signals was the more specific one applicable to the case, such that a jury issue was presented as to whether SCDOT was liable. 333 S.C. at 468-469, 511 S.E.2d at 357-358 (1999). Accordingly, the *Giannini* Court found that the trial court properly denied SCDOT's motions for directed verdict and JNOV on the issue of whether it breached a duty to the plaintiffs in failing to install median barriers after notice of cross over accidents along that stretch of roadway. 664 S.E.2d at 454.

Incredibly, here, Defendant was unable to testify when the Project's new culvert was finally installed, but it was not fully installed by at least 2017. (DOT Dep. p. 37, ¶¶6-13; p. 50, ¶¶9-15). However, in 2017, Defendant admitted it had the information necessary in 2013 to determine (in accordance with its Addendum) that the existing culvert prior to the initiation of the Project could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on Plaintiff's property. (*Id.* p. 36, ¶¶1-5). Defendant admitted the existing culvert was undersized according to its own standard. (*Id.* p. 11, ¶¶17-20) ("The existing culvert was undersized.") Despite this knowledge, Defendant admitted there was never any consideration given to install a new culvert, much less the one that was supposed to be installed during Stage I of the Project. (*Id.* p. 41, ¶¶24 – 42, ¶5; p. 12, ¶¶6-21).

Defendant's failures in this aspect do not end there. Not only was Defendant aware that the existing culvert was undersized when it began designing and construction on the Project, Defendant knew or should have known that the existing roadway served as an outlet for water, even at 25-year rainfall levels. (*Id.* p. 27, ¶¶15-19). Defendant knew this was unsafe. (*Id.* p. 28, ¶¶4-6) ("Q: And the standard should be a hundred-year rain event; is that correct? A: Right."). Despite its own models indicating overflow, Defendant took no steps to speak to Plaintiffs or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (*Id.* p. 35, ¶¶1-4; p. 53, ¶¶2-11). Defendant did not even consider contacting them whatsoever. (*Id.*, p. 53, ¶¶17-19).

As Gregorie's report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to Plaintiffs' property both showed rainfall events

greater than 10-year but less than 25-years. **(See Ex. 2, 20).**³ Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, Defendant knew the existing culvert adjacent to Plaintiffs' property would likely affect their home. This fact is not only disturbing given the enormous size of Defendant's roadway maintenance in this State but shows the conscious and reckless disregard Defendant had for Plaintiffs' rights. For that reason, by Defendant's own admission, it had information in 2013 and prior to the construction of the Project that the existing culvert was a hazard, which no longer provided it immunity, and Plaintiffs' claim for negligence in this aspect should proceed to a jury. *Wooten*, 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997).

Next, Defendant is not entitled to summary judgment because it has not established there is no genuine issue of material fact as it relates to its defense of discretionary immunity. Section 15–78–60 of the South Carolina Code sets forth forty exceptions to this waiver of immunity, including the discretionary immunity exception. See S.C. Code Ann. § 15–78–60 (2005 & Supp.2015). Section 15–78–60(5) provides that a “governmental entity is not liable for a loss resulting from: (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.” S.C. Code Ann. § 15–78–60(5) (2005). Our Supreme Court has repeatedly explained that “the burden of establishing a limitation on liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.” *Pike v. S.C. Dep’t of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

³ Defendant has produced no contradicting evidence, from expert testimony or otherwise, concerning these rainfall figures.

“To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice.” *Id.* “Furthermore, ‘the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.’” *Id.* at 230, 540 S.E.2d at 90–91 (quoting *Foster v. S.C. Dep’t of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

Not only have Plaintiffs presented overwhelming evidence that Defendant failed to weight any considerations or alternatives to its decision to delay installation of the new culvert (prior to the 2015 rain event or after the 2015 rain event), Defendant failed to weigh any competing considerations or alternatives in its decisions that traffic should not be rerouted to install the culvert sooner, and to consider the simultaneous existence of the existing US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction[.]” (**Aff. Gregorie, 3) (attached hereto as Exhibit 3).**

Therefore, here, like the case of *Summer v. Carpenter*, Plaintiffs have presented evidence that Defendant failed to consider critical stages of construction for the Project, and, ultimately, failed to consider anything, much less competing considerations or alternatives. 328 S.C. 36, 492 S.E.2d 55 (1997). In *Summer*, the Supreme Court determined (in a legal malpractice action concerning an attorney’s failure to sue the DOT before the statute of limitations ran) that the defendant presented evidence which

indicated (1) the design used for the intersection was common and (2) while respondent's expert would have selected another design, the chosen design was not wrong. 328 S.C. 46. The Supreme Court determined that this evidence did not establish the defendant considered various design options for the intersection and then selected the chosen design plan after carefully weighing competing considerations. *Id.* Accordingly, the Supreme Court held that the trial judge erred in concluding the Highway Department would have been immune from liability under the discretionary exception to the Act as a matter of law. *Id.* For these reasons, Defendant has not met its burden that it is entitled to discretionary immunity, and because there is a genuine issue of material fact concerning its discretionary decision making, or lack thereof, Defendant's motion should be denied.

Finally, Defendant asserts it is entitled to summary judgment because Plaintiffs' expert, Jason Gregorie, P.E., did not testify that the Project and its construction proximately caused the accident. **(Def.'s Mem. 4-5)**. The *Giannini* Court disagreed. 664 S.E.2d at 454.

In *Giannini*, the plaintiffs presented the deposition testimony of a highway transportation engineer. *Id.* The plaintiffs' expert testified that it was feasible to install three-cable median barriers prior to the car accident, and that such a barrier would have entrapped or redirected the tires of a car hitting it. *Id.* When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified,

"I think it is highly likely that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And although there may have been some subsequent crash, it would not have

been the crash that occurred. The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

The *Giannini* Court found that this evidence was sufficient to submit the issue to the jury, and any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury. *Id.* at 454-55 (citing *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility)). For this reason, any perceived defects in Gregorie's testimony are certainly ripe for impeachment or consideration by the jury, but do not warrant summary judgment.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court deny Defendant's Motion for Summary Judgment in its entirety.

HOPKINS LAW FIRM, LLC

s/ J. Clay Hopkins

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Attorneys for the Plaintiffs

February 4, 2020

Pawleys Island, South Carolina

1 PROJECT SUMMARY

1.1 Introduction

The purpose of this addendum is to provide a detailed investigation of the performance of the existing crossline located at approximately Sta. 1270+00 of the US 378 Widening Project in Florence County. This addendum is being prepared pursuant to complaints that extensive flooding to the upstream property owner after both the 2015 and 2016 floods was due to an inadequate replacement culvert. The crossline in question is approximately 0.2 miles east of S-34 (S. Friendfield Road).

It is our understanding that the existing culvert was still in place during both flooding events while the new crossline was under construction. At this time, existing conditions should be understood to mean the conditions prior to construction of the new culvert and road alignment. The existing culvert is a 5 ft. wide by 5 ft. tall reinforced box culvert and is 48 feet long. An existing hydraulic model was created using the HEC RAS River Analysis System software to assess the performance of the existing conditions. This model was based on the survey of the subject area, hydraulic conditions observed in the field, and land conditions determined from relevant topographic maps and aerial photographs.

The existing conditions model showed that the 5ft x 5ft box culvert was undersized for the design discharges and would require upsizing to meet the current hydraulic requirements of the Department. The analysis showed that the culvert would overtop for discharges associated with the 25-year return interval and greater. The minimum elevation at which the existing road would overtop was estimated at 59.55 feet. Based on the available survey, the lowest elevation of the upstream structure is approximately 57.8 feet. This suggests that the structure could be impacted by a flood associated with the 25-year return interval, and potentially the 10-year interval.

The proposed conditions model showed that a 10ft wide by 8ft tall reinforced concrete box culvert is sufficient to convey the design discharges and meet the Department's hydraulic requirements. The new culvert provides approximately three times the flow area that the existing culvert provides. A comparison of the results from both models indicates the new culvert will result in a reduction in water surface elevations upstream of the crossing for floods up to the 100-year event.

The results for the existing model have been included as part of this addendum.



**APPLIED
BUILDING
SCIENCES**

Sent via email to: clay@hopkinsfirm.com

February 22, 2019

Mr. J. Clay Hopkins, Esquire
Hopkins Law Firm, LLC
Post Office Box 1885
Pawleys Island SC, 29585

**RE: Marlowe Property
2479 West Highway 378 Hannah
Pamplico, South Carolina 29583
In the matter of: James and Loris Marlowe vs. SCDOT
ABS Project No. 900.18039**

Dear Mr. Hopkins:

Pursuant to your request, personnel of Applied Building Sciences, Inc. (ABS) conducted an engineering evaluation of the above referenced property. The primary purpose of the evaluation was to assess the cause and extent of flood damage to the property.

DESCRIPTION AND BACKGROUND

The subject property is an approximately 0.59-acre residential parcel containing a one-story single-family dwelling and several detached accessory structures (**Photo 1, Photo 2, Photo 3, Photo 4**). It is located on US Highway 378 in Pamplico, Florence County, South Carolina. The single-family dwelling (the subject structure) has a superstructure consisting of a wood-framed roof, bearing walls, and floor system. The substructure consists of a crawl space over what is assumed to be a shallow foundation system. An attached carport is constructed over a concrete slab on-grade. The exterior walls of the subject structure are clad with brick veneer. The roof is built in a gable configuration and is clad with asphalt composition shingles. The Florence County Geographic Information System (GIS) and publicly available tax records indicate that the subject structure was originally constructed circa 1967; therefore it is approximately 52-years old. Reportedly, the current homeowner, Mr. James Marlowe, purchased the property in approximately 2002 and occupied the residence with his family until flood damages rendered it uninhabitable. For reference purposes in this report, the front elevation of the subject structure faces US Highway 378 to the south and the rear elevation faces wooded land to the north.

As reported by Mr. Marlowe, the subject property and structure were inundated by floodwaters during storm events that occurred in October 2015 and October 2016. Both events caused severe damage to the property, rendering the subject structure uninhabitable and requiring substantial repairs. Contemporaneous with the flood events, a South Carolina Department of Transportation (SCDOT) roadway and bridge construction project was underway adjacent to the subject property. The construction project, known as "Widening & Three Bridge Replacements on US 378 Section 1 & 2," (the Project) generally involved the widening and vertical and horizontal realignments of approximately 8.65-miles of US

Highway, installation of three new bridges, and installation of new drainage infrastructure along the roadway and at stream crossings (**Photo 5**).

According to Mr. Marlowe, the Project not only widened the roadway in front of his residence, but also significantly increased the elevation of the finished road surface. Mr. Marlowe reported that he believed that the elevation of the new road, in combination with construction modifications to the creek crossing adjacent to his property, negatively affected the overland flow and drainage patterns on his property which caused the inundation of the subject structure during the two events.

For reference purposes in this report the new four-lane roadway created as a result of the Project is referred to as the “new” roadway, while the original two-lane roadway that existed prior to the Project is referred to as the “existing” roadway. The terms “road,” “roadway,” and “highway” are interchangeable for purposes of this report.

The Lynches River is a winding river located approximately 2,100-ft to the southwest of the subject property. The Lynches River is identifiable on maps and flows generally from northwest to southeast. A smaller unnamed stream borders the subject property to the east and crosses under US 378 adjacent to the subject property (**Figure 1**). This unnamed stream generally flows from north to south and appears to eventually reach the floodplain of the Lynches River after crossing under US 378. For reference purposes in this report, this unnamed stream is referred to as the “subject stream” or the “stream.”

Lastly, according to the applicable NFIP Flood Insurance Rate Map, the subject property is located in Zone X, which is considered an area of minimal flood hazard (NFIP, 2014). The nearest Special Flood Hazard Area, Zone AE, is located approximately 1,000-ft to the south of the subject property, in the floodplain of the Lynches River.



Photo 1 – Partial view of the front (south) elevation of the subject structure. Photo taken by ABS dated 12/13/2018.



Photo 2 – View of the subject property and subject roadway. Photo taken by ABS dated 2/5/2019.

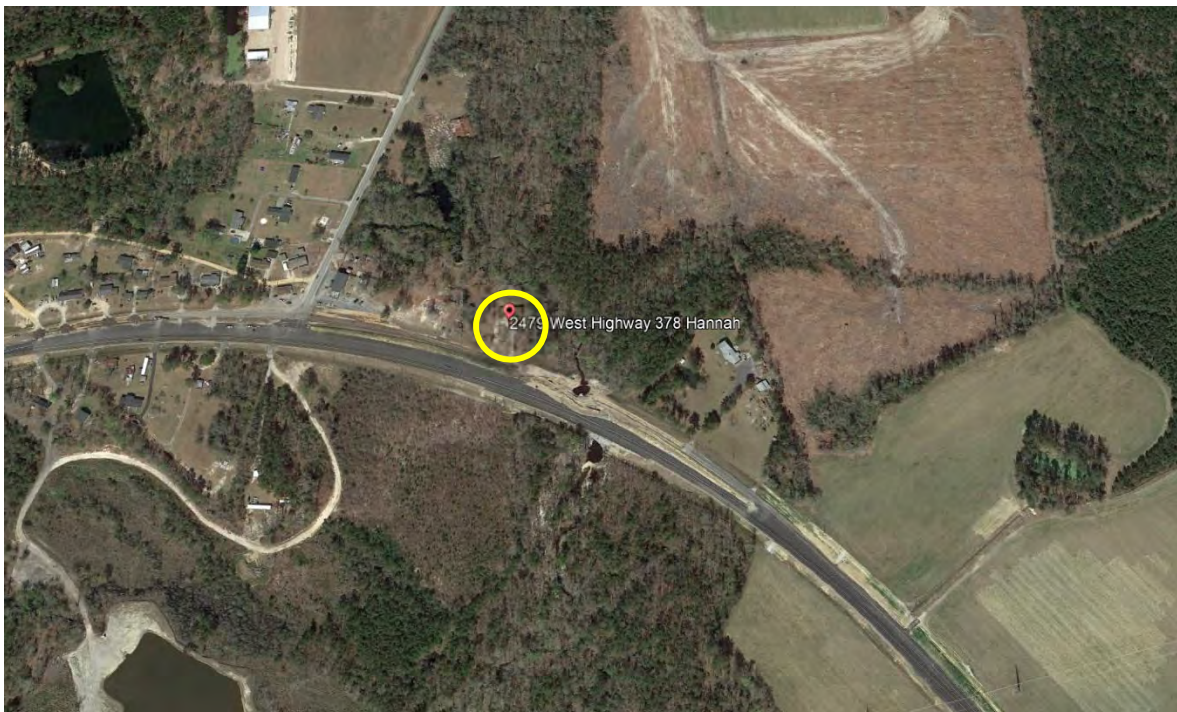


Photo 3 – Aerial image of the subject property (circled) and surrounding vicinity. Source: Google Earth. Image date 3/10/2017.

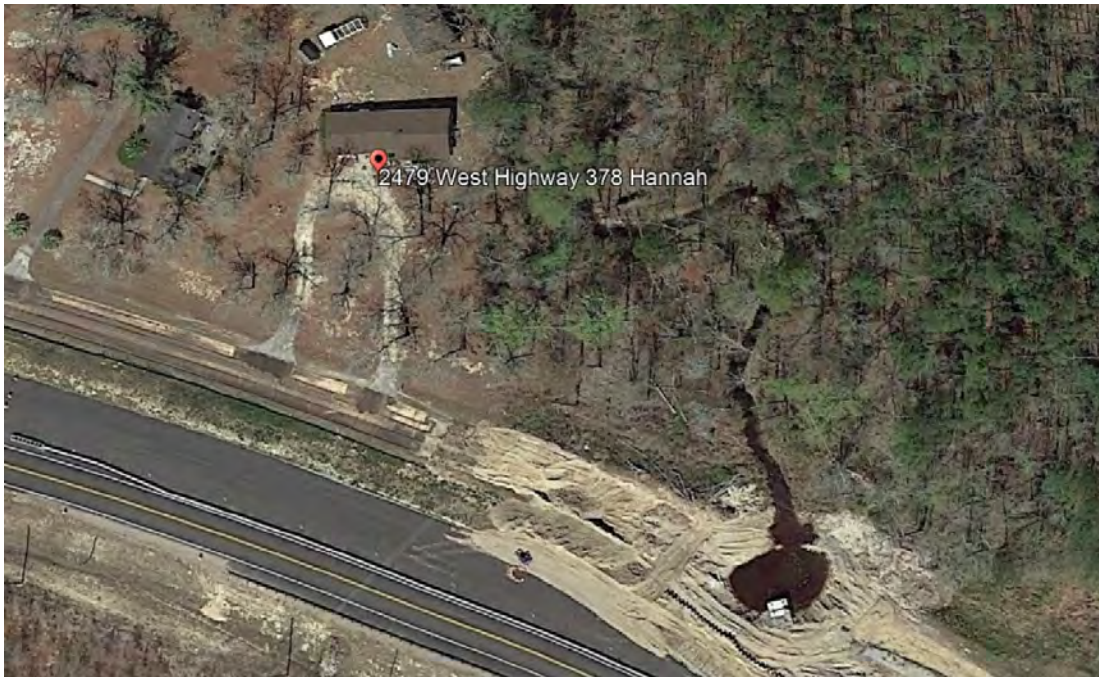


Photo 4 – Closer aerial view of the subject property. Source: Google Earth. Image date 3/10/2017.



Photo 5- View of the new road, the four-lane US 378, as seen just to the southeast of the subject structure. The subject structure is visible in the right-hand edge of the photo (arrow). Photo by ABS taken 12/13/2018.

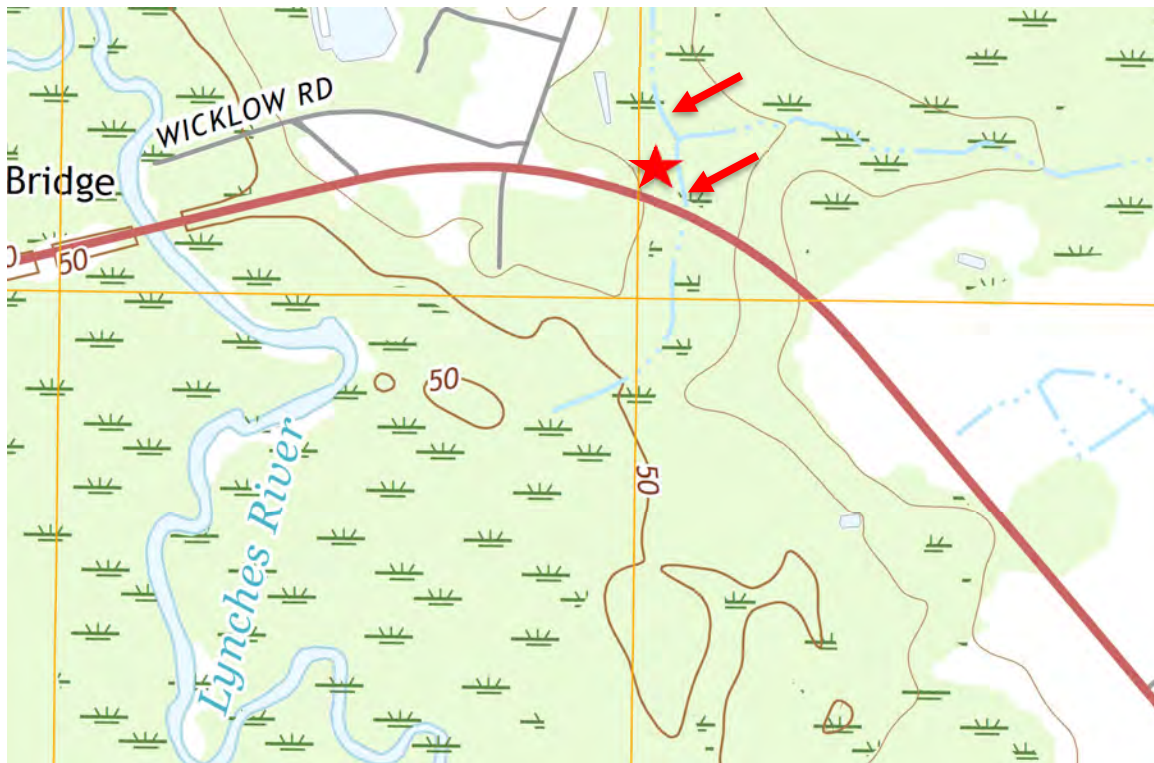


Figure 1 – Excerpt of USGS Topographic Quadrangle map with the location of the subject property (red star) and subject stream (red arrows) indicated. Source: USGS Scranton Quadrangle, 7.5 Minute Series, 2017.

TASKS BY ABS

The following is a summary of the evaluation tasks conducted by ABS to-date.

1. Receipt of case documents in October 2018.
2. Site visit by Jason D. Gregorie, PE, CFM of ABS on December 13, 2018.
3. Interview of the homeowners, Mr. and Mrs. Marlowe.
4. Review of the received case documents, including the summons and complaint and photos taken by the Marlowe's.
5. Review of the construction documents for the Project.
6. Three-dimensional (3-D) measurements and spatial documentation of the subject property using laser scanning on February 5, 2019.
7. Map research.
8. Climatic data research and hydrologic review.
9. Analysis and generation of this report.

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State of South Carolina (2018). Amended Complaint for: James Marlowe and Lori Marlowe v. South Carolina Department of Transportation, Southern Asphalt, Inc., and United Infrastructure Group, Inc. Filed Aug 22, 2018.

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OBSERVATIONS

I conducted a visual survey of selected areas of the subject property in the presence of the homeowners, Mr. and Mrs. Marlowe, and you on December 13, 2018. Stephanie Borzendowski, PhD of ABS conducted laser scan spatial documentation of selected areas of the subject property on February 5, 2019. The following is a summary of the most pertinent observations. Representative photos are included herein. Some photos have been resized or cropped to fit inside this report.

1. During my site visit and interview with Mr. Marlowe I obtained the following information. Mr. Marlowe stated that his property suffered severe damage from flooding during October 2015 and October 2016 as a result of storm events that occurred while the adjacent Project was underway. He stated that the new roadway was widened (to four-lanes) and was significantly higher in elevation than the existing (two-lane) roadway (**Photo 6, Photo 7**). He said that during October 2015 the existing road was left in-place and the new roadbed had been constructed adjacent to and higher than the existing road. Mr. Marlowe stated that as he and his family were evacuating during the rapidly rising floodwaters in October 2015, he observed the floodwaters reaching the carport slab, the top step of the front stoop, and the top of the existing road surface. He stated that prior to the construction of the new road, he believed that floodwaters would have overtopped the existing road surface. However, he indicated that the new elevated road impeded the drainage and flow of floodwaters from his property. He said that floodwaters eventually rose to the bottom of the windows in his home, resulting in about 18-inches of water inside the home above the finished floor, rendering the building a total loss. Mr. Marlowe also stated that he believed that neither the new headwalls nor the new large box culvert at the adjacent stream crossing had been installed at the time of the 2015 and 2016 floods. He said that steel sheet piles were installed sometime before the October 2016 storm event to support earthwork at the stream crossing.

Mr. Marlowe said that he obtained financing and began repairs to his home necessitated by the 2015 storm event. While those repairs were substantially underway or had been completed, his home flooded again in 2016, causing damage to the repaired materials and rendering the house uninhabitable. The house has yet to be repaired as a result of this last event.



Photo 6 – This construction photo depicts the new roadbed substantially higher in elevation than the existing road in front of the Marlowe property, looking east. Photo provided by Hopkins Law Firm.



Photo 7 – This photo taken during construction depicts the new roadbed substantially higher than the existing road in front of the Marlowe property, looking west. Photo provided by Hopkins Law Firm.

2. Interior observations of the subject structure revealed evidence of a severely flood-damaged structure with partial clean-up in-progress (**Photo 8, Photo 9, Photo 10, Photo 11, Photo 12, Photo 13, Photo 14, Photo 15, Photo 16, Photo 17**). Damage interior gypsum wallboard (GWB) at the base of walls and damaged floor finishes

had been removed by the time of the site visit. The exterior wall sheathing was observed to be wood-based fiber board. Floodwater stain marks were observed on the interior surface of the exterior wall sheathing, on wall studs, on cabinets, and on door panels. The water stain marks were measured to extend 15- to 17-inches above the floor.



Photo 8 – Interior conditions at the subject structure. Photo by ABS taken 12/13/2018.



Photo 9 – Interior conditions at the subject structure. Photo by ABS taken 12/13/2018.



Photo 10 – Interior conditions at the subject structure. Photo by ABS taken 12/13/2018.



Photo 11 – Water stain mark on a glass door panel. Photo by ABS taken 12/13/2018.



Photo 12 – Water stain mark on an interior door panel. Photo by ABS taken 12/13/2018.



Photo 13 – Interior conditions at the subject residence with the waterline stain indicated. Photo by ABS taken 12/13/2018.



Photo 14 – Waterline stain mark on the inside of the fiber board exterior wall sheathing at approximately 16- to 17-inches above the subfloor. Photo by ABS taken 12/13/2018.



Photo 15 – Interior conditions at the subject structure. Photo by ABS taken 12/13/2018.



Photo 16 – Flood-damaged interior materials placed in a debris pile outside. Photo by ABS taken 12/13/2018.



Photo 17 – Damaged contents displaced to the outside. Photo by ABS taken 12/13/2018.

3. In the shed (an accessory structure) located to the rear of the subject structure, the waterline staining on the interior wall surfaces was measured to be 6'-0" to 6'-4" above the ground surface. Waterline staining on a second accessory structure also to the rear of the subject structure was observed to extend several feet above the ground.



Photo 18 – Waterline staining on the rear shed was measured to extend 6'-0" to 6'-4" above the ground surface. Photo by ABS taken 12/13/2018.



Photo 19 – Waterline staining on the door of an accessory structure. Photo by ABS taken 12/13/2018.

4. Visually, it is noticeable that the new road is significantly elevated above the first floor of the subject structure and the adjacent grade of the subject structure. Measurements were collected using a Faro Focus 3D X 330 Laser Scanner to determine the height of the subject structure relative to the new roadway. The results are provided in (**Table 1**).

Table 1 – Elevation of the Marlowe Residence relative to the new road.

Location	Elevation*
US 378 pavement near the north edge of the southern Marlowe driveway.	0.0'
Grade adjacent to the Marlowe residence.	-7.8'
Top of front stoop, Marlowe residence.	-6.4'
Roof eave, Marlowe residence.	+1.8'

*Note: Reference datum is TBM.



Photo 20 – View of the general topography of the site, which slopes down from the new road to the subject property. The subject property is located to the left hand of the photo. Photo by ABS taken 12/13/2018.



Photo 21 – View of the subject structure and neighboring structure relative to the new road. Photo by ABS taken 12/13/2018.



Photo 22 – When standing on the opposite side of US 378 from the subject property, only the roof is visible. The majority of the first story of the subject structure is located below the elevation of the new road. Photo by ABS taken 12/13/2018.

5. The culvert inlet with headwalls of the subject stream crossing with US 378 is located approximately 360-ft to the south of the subject residence. The culvert was observed to be a 10-ft wide reinforced concrete box culvert. The water elevation inside the culvert at the inlet was measured to be approximately 2'-6" deep above the inlet invert. The bottom of the culvert was observed to contain sedimentation. Evidence of a highwater mark on the culvert walls was noted to be approximately 4'-8" above the inlet invert. The headwalls were noted to be flared, extending more than 16-ft beyond the culvert inlet. The culvert outlet was observed to be a similar configuration to the inlet and appears to deposit into a downstream pond.



Photo 23 – View of the culvert inlet as seen from the Marlowe driveway. Photo by ABS taken 12/13/2018.



Photo 24 – Closer view of the culvert inlet at the subject stream crossing with US 378. Photo by ABS taken 12/13/2018.

HYDROLOGIC DATA

Many parts of South Carolina experienced heavy precipitation and flooding during the October 2015 storm, which occurred from October 1 to October 5, 2015. A year later, portions of the state were affected by Hurricane Matthew's landfall near Cape Romain National Wildlife Refuge on October 8, 2016. Therefore, precipitation data was obtained from the nearest Community Collaborative Rain, Hail & Snow Network (CoCoRaHS) stations within a 40-mile radius (the region) of the subject property (**Figure 2**) corresponding to these two storm events.

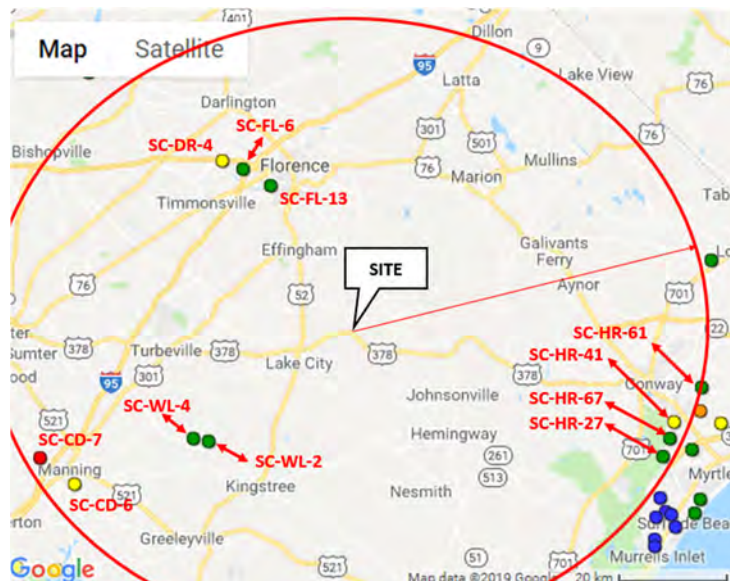


Figure 2 - CoCoRaHS weather stations within 40-mile radius of the subject property. Image source: Google Maps and CoCoRaHS.

The peak 24-hour precipitation at each weather station for both the October 2015 and October 2016 storm was compared to the maximum point precipitation frequency (PF) for the Florence Regional Airport provided by National Oceanic and Atmospheric Administration (NOAA) (**Table 2, Table 3**) and a return period¹ was correlated. Furthermore, the four consecutive 24-hour precipitations at the CoCoRaHS stations were compared to the 4-day PF estimates provided by NOAA for the Florence Regional Airport (**Table 4, Table 5**).

The data shows that the October 2015 storm event was a greater precipitation event than the October 2016 storm event. The October 2016 storm event was of shorter duration and resulted in significantly less total rainfall than the October 2015 storm event.

The data analysis shows that for the October 2015 storm:

- The amount of recorded precipitation varied greatly across stations in the region;
- The two stations closest to the subject property recorded a peak 24-hour precipitation of 5.96-inches to 6.52-inches, which corresponds to a return interval of greater than 10-years but less than 25-years;
- The greatest 24-hour precipitation recorded in the region was 12.03-inches, corresponding to a return interval of greater than 200-years but less than 500-years;
- The two stations closest to the subject property recorded a 4-day precipitation of 12.76-inches to 14.16-inches, corresponding to a return interval of between 200- to 500-years; and
- The greatest 4-day precipitation recorded in the region was 23.35-inches, corresponding to a return interval of greater than 1,000-years.

The data analysis shows that for the October 2016 storm event (Hurricane Matthew):

- The amount of recorded precipitation varied across stations in the region;
- The two stations closest to the subject property recorded a peak 24-hour precipitation of 6.24-inches to 6.30-inches, which corresponds to a return interval of greater than 10-years but less than 25-years;
- The greatest 24-hour precipitation recorded in the region was 10.00-inches, corresponding to a return interval of greater than 100-years but less than 200-years;
- The station closest to the subject property with four consecutive days of data available recorded a total of 11.37-inches, corresponding to a return interval of between 100- to 200-years; and
- The greatest 4-day precipitation recorded in the region was 13.7-inches, corresponding to a return interval of between 200- to 500-years.

¹ Return period, or return interval, is defined as the theoretical average number of years between occurrences of a hydrologic event with a specified magnitude or greater (Akan, 2003).

Table 2: CoCoRaHS October 2015 Event 24-Hour Precipitation Data

CoCoRaHS Station #	Distance Relative to Site (mi.)	Peak Date	24 hr Precipitation (in.)	Return Interval ²
SC-FL-13	18.2 NW	10/3/2015	5.96	10 yr - 25 yr
SC-FL-6	18.6 NW	10/3/2015	6.52	10 yr - 25 yr
SC-WL-2	19.9 SW	10/4/2015	11.5	200 yr - 500 yr
SC-WL-4	20.7 SW	10/4/2015	12.03	200 yr - 500 yr
SC-DR-4	23.5 NW	10/3/2015	6.9	25yr - 50 yr
SC-CD-6	35.2 SW	10/4/2015	9.15	100 yr - 200 yr
SC-CD-7	37.3 SW	10/11/2015	5.48	10 yr - 25 yr
SC-HR-41	37.6 SE	10/11/2015	2.43	< 1yr
SC-HR-67	37.6 SE	10/5/2015	9.18	100 yr - 200 yr
SC-HR-27	37.6 SE	10/1/2015	2.74	< 1yr
SC-HR-61	39.8 SE	10/5/2015	10.82	200 yr - 500 yr

2. Source: NOAA (2017)

Table 3: CoCoRaHS October 2016 (Hurricane Matthew) 24-Hour Precipitation Data.

CoCoRaHS Station #	Distance Relative to Site (mi.)	Peak Date	24 hr Precipitation (in.)	Return Interval ²
SC-FL-13	18.2 NW	10/8/2016	6.24	10 yr - 25 yr
SC-FL-6	18.6 NW	10/8/2016	6.3	10 yr - 25 yr
SC-WL-2	19.9 SW	10/8/2016	9.75	100 yr - 200 yr
SC-WL-4	20.7 SW	10/8/2016	7.25	25 yr - 50 yr
SC-DR-4	23.5 NW	10/9/2016	8.21	50 yr - 100 yr
SC-CD-6	35.2 SW	10/8/2016	10.00	100 yr - 200 yr
SC-CD-7	37.3 SW	N/A	N/A	N/A
SC-HR-41	37.6 SE	9/30/2016	0.45	< 1yr
SC-HR-67	37.6 SE	10/8/2016	7.24	25 yr - 50 yr
SC-HR-27	37.6 SE	10/9/2016	6.27	10 yr - 25 yr
SC-HR-61	39.8 SE	10/8/2016	6.51	10 yr - 25 yr

2. Source: NOAA (2017)

Table 4: CoCoRaHS October 2015 Event 4-Day Precipitation Data

CoCoRaHS Station #	Distance Relative to Site (mi.)	Peak Range	4-Day Precipitation (in.)	Return Interval ²
SC-FL-13	18.2 NW	10/2/2015-10/5/2015	14.16	200 yr - 500 yr
SC-FL-6	18.6 NW	10/3/2015-10/6/2015	12.76	200 yr - 500 yr
SC-WL-2	19.9 SW	10/2/2015-10/5/2015	19.99	> 1000 yr
SC-WL-4	20.7 SW	10/2/2015-10/5/2015	23.35	> 1000 yr
SC-DR-4	23.5 NW	10/3/2015-10/6/2015	18.3	> 1000 yr
SC-CD-6	35.2 SW	10/2/2015-10/5/2015	17.6	500 yr - 1000 yr
SC-CD-7	37.3 SW	N/A	N/A	N/A
SC-HR-41	37.6 SE	N/A	N/A	N/A
SC-HR-67	37.6 SE	10/2/2015-10/5/2015	15.91	500 yr - 1000 yr
SC-HR-27	37.6 SE	N/A	N/A	N/A
SC-HR-61	39.8 SE	10/2/2015-10/5/2015	17.19	500 yr - 1000 yr

2. Source: NOAA (2017)

Table 5: CoCoRaHS October 2016 (Hurricane Matthew) 4-Day Precipitation Data.

CoCoRaHS Station #	Distance Relative to Site (mi.)	Peak Range	4-Day Precipitation (in.)	Return Interval ²
SC-FL-13	18.2 NW	N/A	N/A	N/A
SC-FL-6	18.6 NW	10/7/2016-10/10/2016	11.37	100 yr - 200 yr
SC-WL-2	19.9 SW	10/7/2016-10/10/2016	13.7	200 yr - 500 yr
SC-WL-4	20.7 SW	N/A	N/A	N/A
SC-DR-4	23.5 NW	10/7/2016-10/10/2016	12.71	200 yr - 500 yr
SC-CD-6	35.2 SW	10/7/2016-10/10/2016	11.3	100 yr - 200 yr
SC-CD-7	37.3 SW	N/A	N/A	N/A
SC-HR-41	37.6 SE	N/A	N/A	N/A
SC-HR-67	37.6 SE	10/7/2016-10/10/2016	12.26	100 yr - 200 yr
SC-HR-27	37.6 SE	10/7/2016-10/10/2016	12.69	200 yr - 500 yr
SC-HR-61	39.8 SE	10/7/2016-10/10/2016	11.42	100 yr - 200 yr

2. Source: NOAA (2017)

CONSTRUCTION DOCUMENTS REVIEW

On the plans, the subject structure is labeled as lot 116 and is located at approximately Station (Sta.) 1267+00 along the new road alignment. The plans acknowledge the existence of the stream adjacent to the subject property (located at Sta. 1270+00). At the stream crossing with US 378, the plans detail an existing 48-ft long, 6-ft x 5-ft reinforced concrete (RC) box culvert which is to be removed and replace with a new 164-ft long, 10-ft x 8-ft RC box culvert (**Figure 3**Error! Reference source not found.).

The SCDOT Hydraulic Design Manual indicates that the existing 6-ft x 5-ft culvert was insufficient to carry the design flows. The new culvert was designed to carry flow from the 50-year storm. An addendum by the SCDOT to the Hydraulic Design Manual was provided in 2017. The addendum to the report was prepared to address the complaints of flooding to a property upstream of the culvert. Because of the subject property's location relative to the culvert, it is likely that the property mentioned in the addendum is the subject property. It should be noted that the addendum reports that the existing 6-ft x 5-ft culvert was in-place during both the October 2015 and October 2016 storm events. Furthermore, the addendum indicates that a computer model of existing conditions demonstrated that the existing culvert would reach capacity when subjected to a storm with a 25-year or greater return interval.

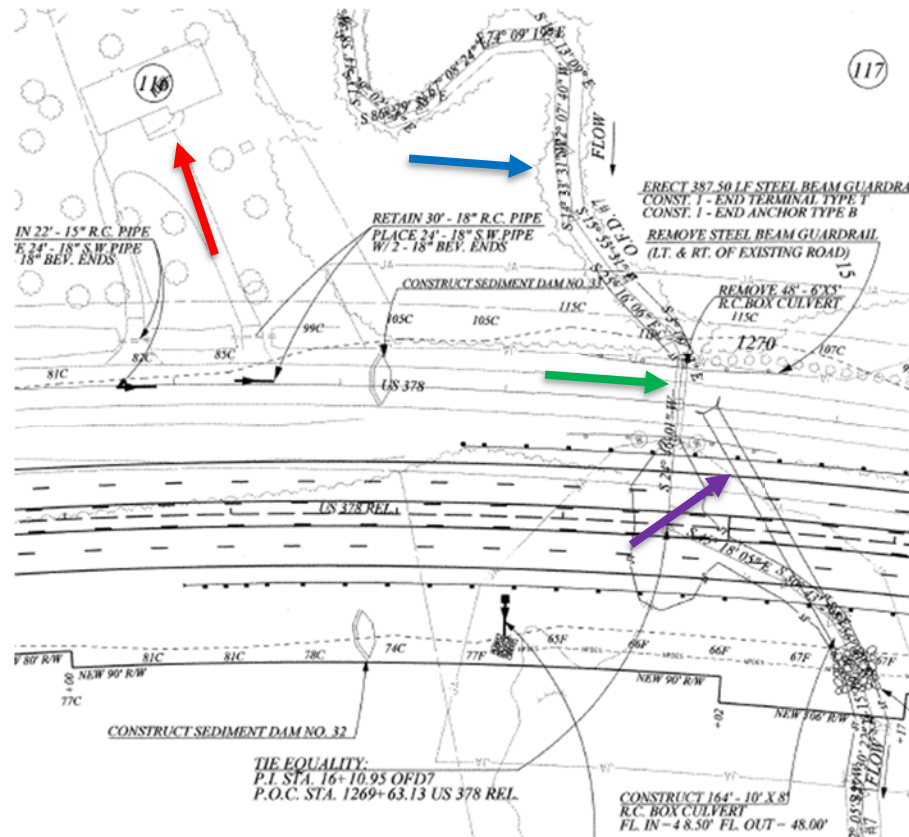


Figure 3: Excerpt from the Plans. The subject property (red arrow), stream (blue arrow), existing 6'x5' box culvert to be removed (green arrow) and new 10'x8' box culvert (purple arrow) are all indicated.

REVIEW OF ADDITIONAL PHOTOS PROVIDED TO ABS

ABS reviewed digital photos provided by Hopkins Law Firm which depict various stages of construction in the vicinity of the subject property. The following photos were of particular note:

1. **Photo .facebook_1507060356294** depicts turbulent stream water between the existing road and new road that is indicative of floodwaters that are impeded through the incomplete installation of the new box culvert and the stream transition between the existing and new road. The photo depicts slope failures along the existing and new road banks along the stream. No temporary sheet pile shoring is present to protect the earthen banks .
2. **Photo IMG_3005** shows excavation work occurring at the culvert crossing under the existing road, sheet pile shoring installed on the slope of the new road at the new culvert crossing, and at least five (5) uninstalled new box culvert sections stored on top of the new road.

3. **Photo IMG_3003** depicts turbulent stream waters between the existing road and new road. The water flow appears to be impeded as evidenced by the turbulent nature.
4. **Photos IMG_3105, IMG_3106, and IMG_3107** taken in a series depict at least five (5) sections of uninstalled new precast box culvert sections stored on top of the new road. Slope failure with soil and rock mass capable of filling or significantly impeding the stream flow is visible around the end of the sheet pile shoring between the existing road and new road.

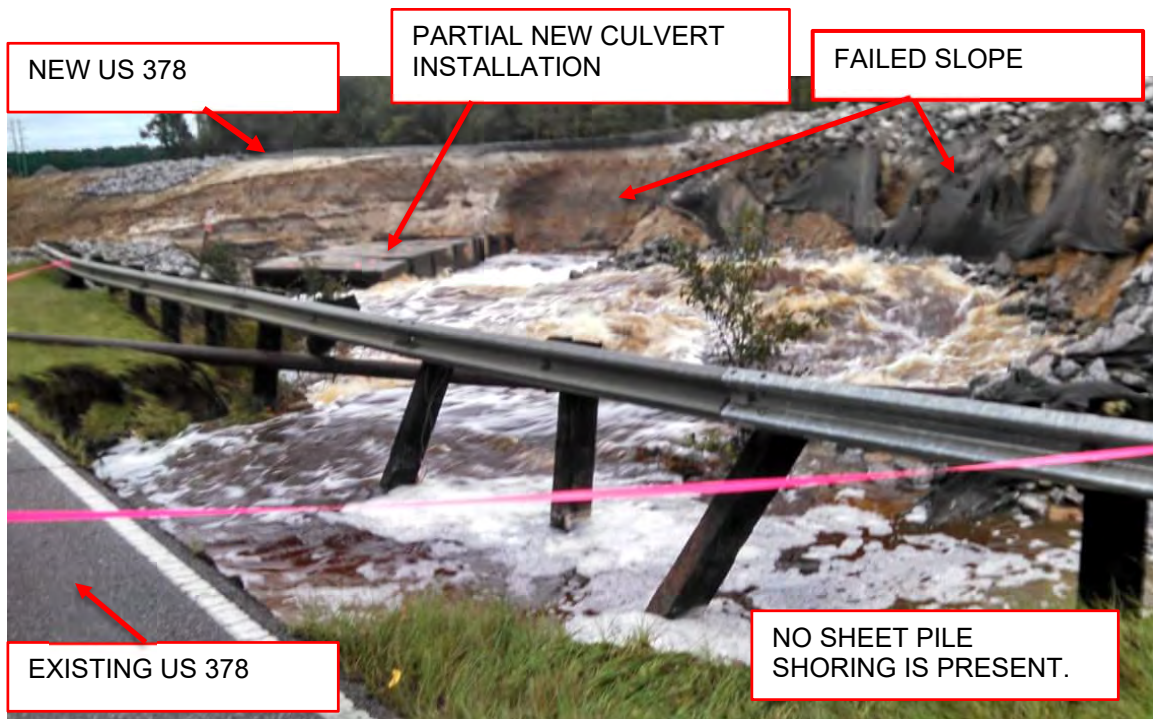


Photo .facebook_1507060356294 with connotations by ABS.

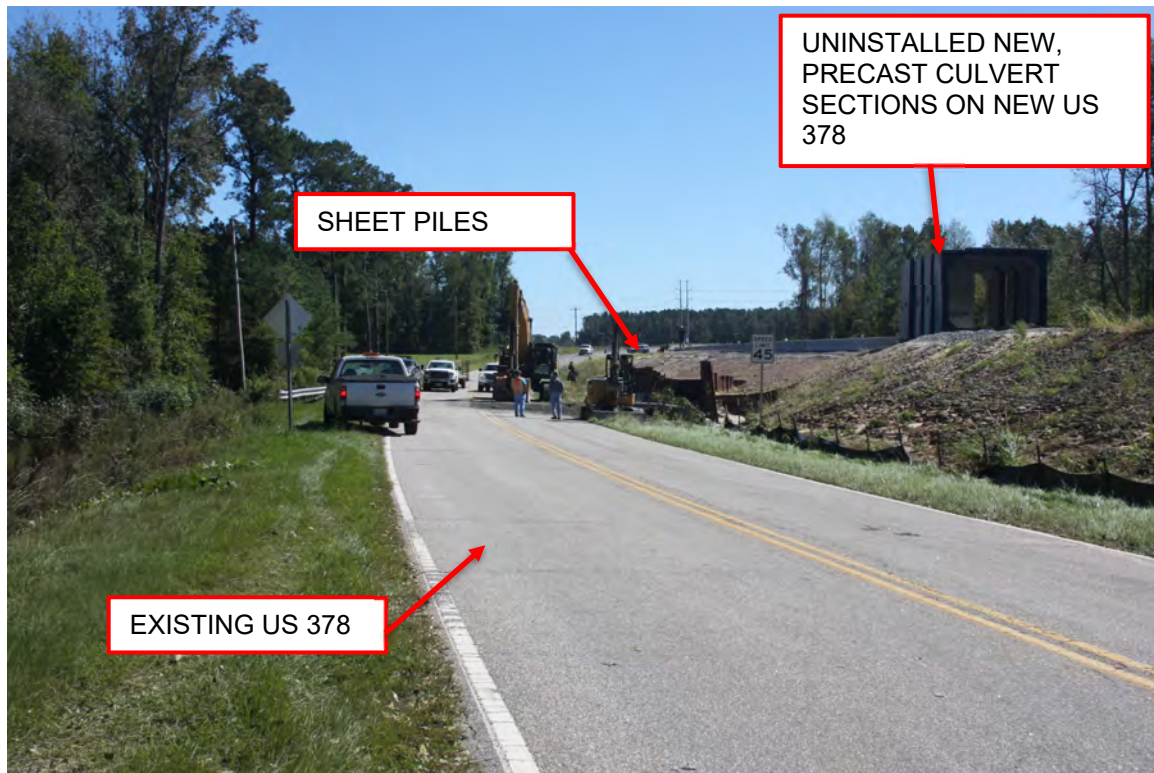


Photo IMG_3005 with connotations by ABS.



Photo IMG_3003 with connotations by ABS.



Photo IMG_3105 with connotations by ABS.



Photo IMG_3106 with connotations by ABS.



Photo IMG_3107 with connotations by ABS.

CONCLUSIONS AND RECOMMENDATIONS

The subject property suffered severe flooding that resulted in substantial damage to the subject structure during both the October 2015 and October 2016 storm events. Based on the information reviewed, the construction of the Project was active in the area of the subject property leading up to both storm events. Also, the existing terrain in the vicinity of the subject property and drainage patterns of the subject property were significantly altered by the Project by the time of both storm events.

For the evaluation, ABS considered multiple possible causes and factors associated with the flooding of the subject property. The evidence supports that despite the significance of the two storm events, factors related to the Project also played a role in the inundation of the subject property. These factors are discussed below.

When the new road was constructed at a significantly higher elevation than the existing road, it negated the existing road serving as an overflow outlet. Although US Highways, given their importance to the civil transportation system, including as evacuation routes from the coast, are not designed to serve as a stream or river overflow, the evidence supports that this nevertheless may have been the case for the existing road. This may have afforded the subject property some level of flood relief prior to construction of the Project. As a result of the construction of the new road at a higher elevation and the new culvert (which was designed for the flow of the 50-year storm event), it is possible that runoff will now be temporarily impounded on the subject property for significant or historic storm events.

Based on a review of the provided photos taken during construction, it appears that the culvert crossing, which serves as the primary flow outlet, was partially functional due to the contractor's sequencing and shoring installation. The photos depict turbulent stream water between the existing road and new road with flow impeded by the in-progress work and stream transition between roads; box culvert sections not in their final installed position; slope failures due to nonexistent and ineffective sheet pile shoring; and evidence of soil and rock mass movement into the stream. The provided photos depict areas of earthwork that were not sufficiently sheeted to prevent soil slides and cave-ins of the banks along the stream. In essence, the evidence supports that the culvert was at a reduced hydraulic efficiency due to the construction, which may have contributed to the depth of flooding at the subject property during the two storm events.

Lastly, additional study and modeling are necessary to quantify the flood risk at the subject property. Although the applicable FIRM (dated 2014) provides that the subject property is located in an area of minimal flood risk (Zone X), it is possible that an updated Flood Insurance Study (FIS) with a transect (a cross section) through the subject property will result in a designation of increased flood risk, which would have both building code and insurance implications. Additional engineering study is necessary to quantify this.

CLOSING

This report has been prepared based on the information available at the time of writing. Should additional information become available at a later date, ABS reserves the right to supplement or amend this report.

If you should have any questions, please do not hesitate to contact me.

Sincerely,
APPLIED BUILDING SCIENCES, INC.



Jason D. Gregorie, PE, CFM



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RECORD ON APPEAL 108

been employed by ABS since 2006. I regularly practice in the areas of forensic engineering, civil engineering, structural engineering, flood damage assessments, and floodplain management. I have been qualified by U.S. District Court (Southern District of Florida) in the fields of civil and structural engineering and in South Carolina state court on topics of structural engineering. I presently serve as chair of the American Society of Civil Engineers Committee on Forensic Investigations. My experience includes more than 15 projects evaluating the cause and extent of flood damage to properties. I have education, training, and experience on topics at issue in this case.

3. I conducted a forensic engineering investigation at the plaintiffs' property (the "Marlowe Property") and produced a report dated February 22, 2019 (the "ABS Report").

4. It is my belief that during the construction of the highway project at issue in this case, there was a period of time in which both roadbeds of the new US378 and existing US378 existed simultaneously next to each other.

5. Since publication of the "ABS Report," additional information has become available to me through the December 5, 2019 joint deposition testimony of Mr. Stanley Roof, Jr. and Mr. Willie McConnell, SCDOT's 30 (b) (6) designation. The following testimony is significant to me:

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6 Q. Well, I mean, you wrote the report,
7 Mr. Stanley. I'm asking you what your report says.

8 A. As the existing -- our report shows that
9 the existing conditions which are shown to be the
10 conditions with just the roadway, the existing
11 roadway, that that's what the -- that's what the
12 25-year event -- it would not convey the 25-year
13 event.

14 Q. I understand that completely, sir. What my
15 question is, is based on your existing conditions
16 model did it include the higher elevation of the
17 roadway that was being installed at the same time?

18 A. It did not.

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2 Q. When you wrote your June of 2017 addendum
3 did you ever consider the fact that this new roadway
4 could potentially be a block for overtopping?

5 A. We did not.

6 Q. Is there a reason you did not?

7 A. No reason.

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17 Q. Were you ever asked to consider whether the
18 existence of the existing roadway and the simultaneous
19 building of a new roadway would in fact create a choke
20 point?

21 A. No.

22 Q. After 2015 -- same question. After the
23 rain event in 2015 were you ever asked to consider
24 whether the construction and installation of the
25 culvert was creating a choke point on the property?

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1 A. Not to my knowledge.

2 Q. After 2016 were you ever asked to consider
3 the same question?

4 A. No. We were just informed that it was
5 flooding.

6. Therefore, I offer the following supplemental opinions:
- a) Interim critical stages of a construction project should be considered when designing.
 - b) The simultaneous existence of the existing US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction, were interim critical stages of the project with respect to drainage and hydraulics.
 - c) The design of the subject project failed to account for these interim critical stages of construction with respect to drainage and flooding implications. As a result, this was a substantial contributor to the flood damages to the Marlowe Property.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

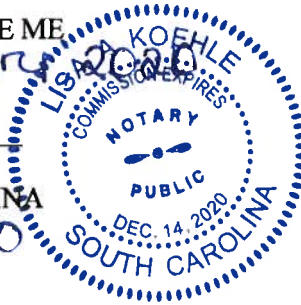
Jason D. Gregorie

Jason D. Gregorie, PE, CFM. REWC

SWORN TO AND SUBSCRIBED BEFORE ME

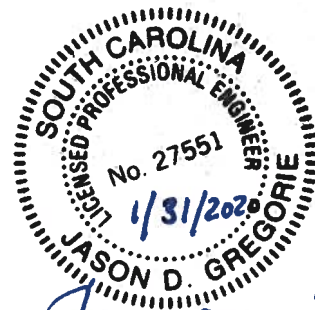
THIS 31st DAY OF January 2020

Lisa A. Koehle



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 12/14/2020



Jason D. Gregorie



Deposition of:
Stanley Roof, Jr. Willie McConnell

December 5, 2019

In the Matter of:
**James Marlowe, Et Al Vs. SCDOT, Et
Al.**

[A. William Roberts, Jr & Assoc.](#)

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1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

JAMES MARLOWE and LORI MARLOWE, individually
and as Next Friend of K.P., H.M., and B.M.,
Minors under the age of eighteen (18) years,
Plaintiffs,

vs. CASE NO. 2017-cp-21-01168

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,
SOUTHERN ASPHALT, INC., and UNITED
INFRASTRUCTURE GROUP, INC.,
Defendants.

DEPOSITION OF: SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION 30(b)(6)

BY: STANLEY L. ROOF, JR.
WILLIE E. McCONNELL

DATE: December 5, 2019

TIME: 11:00 a.m.

LOCATION: SC Department of Transportation
955 Park Street
Columbia, South Carolina

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: MINDY VISLAY

A. WILLIAM ROBERTS, JR., & ASSOCIATES
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A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO

Page 2

2

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR PLAINTIFF

3 JAMES MARLOWE and LORI MARLOWE,
4 individually and as Next Friend of
5 K.P., H.M., and B.M., Minors under the
6 age of eighteen (18) years:

7 HOPKINS LAW FIRM

8 BY: J. CLAY HOPKINS

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10 Pawleys Island, South Carolina 29585

11 843-314-4202

12 clay@hopkinsfirm.com

13 ATTORNEYS FOR DEFENDANT

14 SOUTH CAROLINA DEPARTMENT OF
15 TRANSPORTATION:

16 THOMPSON & HENRY, P.A.

17 BY: JOHN B. McCUTCHEON, JR.

18 1300 Second Avenue

19 Conway, South Carolina 29528

20 843-248-5741

21 jmccutcheon@thompsonlaw.com

22 ALSO PRESENT:

23 Brian D. Dix, SCDOT

24 James Marlowe

25 Lori Marlowe

(INDEX AT REAR OF TRANSCRIPT)

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO

Page 3

1 STANLEY L. ROOF, JR., and WILLIE E. McCONNELL,
2 Being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. HOPKINS:

5 Q. Good morning, gentlemen. We met a moment
6 ago off the record. My name is Clay Hopkins. I
7 represent the Marlowes in a lawsuit they brought
8 against the Department of Transportation, and I
9 understand you both are here to give a deposition as
10 30(b)(6) representatives for the DOT; is that right?

11 MR. ROOF: Yes.

12 MR. McCONNELL: Yes.

13 BY MR. HOPKINS:

14 Q. Okay. I've never done this -- as we just
15 talked about -- with two people, so I'm going to
16 direct my questions and kind of my statements, but
17 it's meant for both of you. All right?

18 I'm required to go over a few rules with you to
19 begin with. I'm sure that Mr. Jack has gone over them
20 at length with you, but just bear with me. I have to
21 repeat them. Okay?

22 There's really two main important rules for today,
23 and they're both for our court reporter. The first is
24 she cannot take down two people talking at once or
25 three people or four people talking at once, so if you

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1 would, would you allow me to get my question out, and
2 then I think what's going to happen, as we talked
3 about, is Jack is going to figure out who should
4 answer the question, and then I'll let you explain
5 your answer as long as it takes. Okay?

6 MR. ROOF: All right.

7 MR. McCONNELL: All right.

8 BY MR. HOPKINS:

9 Q. The next point for her is that she can't
10 take down nonverbal responses. You're both answering
11 verbally right now, but from time to time, if we get
12 in the flow of things, you might find yourself just
13 nodding to an answer. If I say is that a yes or a no,
14 I'm not being rude. I'm just trying to make sure it's
15 clear for our transcripts. Okay?

16 MR. ROOF: Okay.

17 MR. McCONNELL: Okay.

18 BY MR. HOPKINS:

19 Q. And I'm usually pretty quick with these. I
20 don't think we're going to be here very long. We
21 don't have too many subjects to talk about, but if you
22 need to take a break, just let us know, and we'll go
23 off the record and let you use the restroom, get some
24 water, whatever you need to do. Okay?

25 MR. ROOF: Okay.

1 MR. McCONNELL: Okay.

2 BY MR. HOPKINS:

3 Q. The other thing is from time to time I may
4 ask a question that's longwinded or that y'all may not
5 understand that I understand. If it's a question that
6 you don't understand or that I didn't make sense with,
7 would you just ask me to repeat it, rephrase it, do
8 something with it?

9 MR. ROOF: Yes.

10 MR. McCONNELL: Yes.

11 BY MR. HOPKINS:

12 Q. And if you answer a question I'll assume
13 that you understood it. Is that fair?

14 MR. ROOF: Yes.

15 MR. McCONNELL: Yes.

16 BY MR. HOPKINS:

17 Q. All right. Could you state your full names
18 for the record.

19 MR. McCUTCHEON: Before you do that, let me
20 make a statement for the record.

21 We have agreed that since Mr. Hopkins is after two
22 areas, one of which is construction, and one of which
23 is design of roadway, we have agreed to and are in
24 agreement for Mr. Hopkins to ask the question, and
25 then I as the attorney for the DOT will make a

1 determination as to which one of them I think it
2 should be directed to.

3 For purposes of the record, I would also like --
4 the documents that are sitting in front of these two
5 people are the design documents and the plan sheets.
6 These have been furnished to -- previously furnished
7 to Mr. Hopkins. He has those. What I'd like to do
8 is, I want him to retain them, but I want you to mark
9 them as exhibits. Mark one of them --

10 Do we need to mark them, Clay? No. Let's don't
11 mark them.

12 What's sitting in front of them are plan sheets
13 and the design documents that they're going to be
14 referring to, and with that we can go forward.

15 MR. HOPKINS: Okay. I'm in agreement with
16 all that.

17 BY MR. HOPKINS:

18 Q. Could you each state your full name for the
19 record, please.

20 MR. ROOF: Stanley Louis Roof, Jr.

21 MR. McCONNELL: Willie Earl McConnell, Jr.

22 BY MR. HOPKINS:

23 Q. All right. Mr. Stanley, could you tell me
24 your address, please.

25 A. (By Mr. Roof) 336 Ranger Road, Leesville,

1 South Carolina.

2 Q. All right. Mr. Willie, your address?

3 A. (By Mr. McConnell) 6 Providence Plantation
4 Court, Columbia, South Carolina.

5 Q. All right. I'm not going to get into too
6 much detail. Do y'all have any family members or
7 acquaintances or any social friends that live in the
8 Florence County area?

9 MR. ROOF: No.

10 MR. McCONNELL: No.

11 BY MR. HOPKINS:

12 Q. Have you ever lived in Florence County?

13 MR. ROOF: No.

14 MR. McCONNELL: No.

15 BY MR. HOPKINS:

16 Q. And obviously I understand that y'all have
17 been identified and have worked on a project that was
18 developed and completed in Florence County.

19 Do you regularly work on projects in Florence
20 County, or was this a one-off, or can you tell me
21 about the frequency with which you do projects in
22 Florence County.

23 MR. ROOF: I do do projects in Florence
24 County on a regular basis.

25 MR. McCONNELL: I do projects on a regular

1 basis.

2 BY MR. HOPKINS:

3 Q. As a part of those projects do y'all do any
4 field site visits, testing, things like that that
5 require you to go to Florence County?

6 MR. ROOF: Yes.

7 MR. McCONNELL: Yes.

8 (PLF. EXHIBIT 1, Notice of Taking
9 Deposition of 30(b)(6) Representative of Defendant
10 South Carolina Department of Transportation, was
11 marked for identification.)

12 BY MR. HOPKINS:

13 Q. I'm going to get into -- I've marked this
14 as Exhibit 1. It's the 30(b)(6) notice. Again, I'm
15 sure Mr. Jack has gone over this with you, but this is
16 the notice that we're here to talk with you about.
17 Y'all have been identified as witnesses that can
18 testify to the areas identified in this notice. Do
19 you understand that?

20 MR. ROOF: Yes.

21 MR. McCONNELL: Yes.

22 BY MR. HOPKINS:

23 Q. And I understand, Mr. Stanley, you're going
24 to testify -- or you're prepared to testify on behalf
25 of the DOT as it relates to certain design questions

1 or design elements of my questions; is that correct?

2 A. (By Mr. Roof) Yes. The hydraulic portion
3 of it.

4 Q. And Mr. Willie, you're here to talk about,
5 as a representative, the construction issues related
6 in this notice as well?

7 A. (By Mr. McConnell) Work zone issues.

8 Q. Okay. I'm going to ask, have -- well, have
9 y'all taken a look at this notice? Have you seen this
10 notice before?

11 MR. McCUTCHEON: They haven't seen it, but
12 I went over the topics with them.

13 BY MR. HOPKINS:

14 Q. Okay. Let me go through these topics just
15 to make sure that we've got everything straight.

16 Our first topic is DOT policies and procedures
17 related to the planning, site selection, sequencing,
18 construction and installation of the new culvert for
19 the portion of the 378 widening project located
20 adjacent to the Marlowes' property, and so I
21 understand, Mr. Stanley, you're going to talk about
22 the design questions related to that topic; is that
23 correct?

24 A. (By Mr. Roof) Yes.

25 Q. And, Mr. Willie, what will you be

1 testifying to related to that topic?

2 A. (By Mr. McConnell) The work zone
3 sequencing.

4 Q. Is there anybody at the DOT who knows more
5 about this topic and the design and the workplace
6 sequencing than the two of you?

7 MR. ROOF: No.

8 MR. McCONNELL: No.

9 BY MR. HOPKINS:

10 Q. I'm going to kind of fast-track this. I
11 don't want to go through all eight of them, but if
12 you've seen them, and Mr. Jack made you aware of the
13 topics, as we sit here today can y'all think of or do
14 you know if there is a DOT employee or representative
15 that is more knowledgeable in the areas of design and
16 the workplace sequencing as it relates to these eight
17 topics in the deposition notice?

18 MR. ROOF: No.

19 MR. McCONNELL: No.

20 BY MR. HOPKINS:

21 Q. Okay. And you two understand that you're
22 testifying on behalf of the DOT, correct?

23 MR. ROOF: Yes.

24 MR. McCONNELL: Yes.

25 BY MR. HOPKINS:

1 Q. And that your answers are binding on the
2 Department of Transportation?

3 MR. ROOF: Yes.

4 MR. McCONNELL: Yes.

5 BY MR. HOPKINS:

6 Q. Let's jump right into the culvert.
7 Mr. Stanley, can you tell me about what your role was
8 regarding the new culvert for the 378 widening
9 project?

10 A. We sized the culvert according to our
11 hydraulic design requirements and completed all of
12 the -- all of the detailed reports that we're required
13 to do for DHEC and for the department.

14 Q. And can you tell me why there was going to
15 be a new culvert placed at this location?

16 A. Because we were widening the road.

17 Q. Is that simply it, that the road was
18 widening so it required a new culvert, or is there
19 some scientific basis for it?

20 A. The existing culvert was undersized.

21 Q. And what information was that based on at
22 the time you were designing the culvert?

23 A. It was based on the flows that we had
24 calculated coming in in the upstream drainage area and
25 also the way the two channels, the upstream and

1 downstream channels lined up after the widening, we
2 would need -- in order to make sure the culvert was
3 operating as efficiently as possible, we would need to
4 line up the downstream portion of the culvert with the
5 stream after it was widened.

6 Q. Okay. I think I understand that. In terms
7 of the design of the culvert, do you know for purposes
8 of the project at what point in the project the
9 culvert was supposed to be installed?

10 A. I do not.

11 Q. Do you know the answer to that, Mr. Willie?

12 A. (Mr. McConnell) Repeat -- can you rephrase
13 that for me?

14 Q. Yes, sir. In terms of maybe sequencing for
15 the project, at what point in the project was the new
16 culvert supposed to be installed at the location?

17 A. On the plans we show it's stage one and
18 stage two is when it's coming in in place.

19 Q. In terms of sequencing or stages is that
20 the beginning?

21 A. Stage one, yes, towards the beginning.

22 Q. Do you know when it was installed?

23 A. I do not.

24 Q. Okay. Do you know whether it was installed
25 at stage one or stage two?

1 A. I do not.

2 Q. Okay.

3 MR. McCUTCHEON: I will state for the
4 record that it was built in the appropriate stage.
5 The stage it was built in -- it was incorporated in at
6 stage one in the plans. There's no way to
7 determine -- the plans nor any planning indicates any
8 specific dates. It's just in stages. Does that make
9 sense?

10 MR. HOPKINS: Got it.

11 BY MR. HOPKINS:

12 Q. I guess my same question -- scratch that.
13 At what -- if the culvert wasn't installed until the
14 end of 2016 or the beginning of 2017, Mr. Willie, do
15 you know what -- and based on your knowledge and
16 experience with the project and being the DOT's
17 representative for these topics, what stage was being
18 undergone at that point?

19 A. I do not know what stage it would have
20 been.

21 (Court reporter request for clarification.)

22 MR. McCONNELL: I do not know what stage we
23 were in at that time.

24 BY MR. HOPKINS:

25 Q. And this might be for Mr. Stanley. In

1 terms of what Mr. Willie's talked about, that the
2 culvert was supposed to be built and installed in
3 stage one and stage two, is there a reason for that?
4 What's the design purpose for building and installing
5 in stage one and stage two?

6 A. (By Mr. Roof) They would have to keep
7 water flowing. You can't build a -- you can't keep
8 traffic going on one side of the road and build a
9 culvert all at the same time.

10 Q. Okay. And when you say traffic on one side
11 of the road, you would be talking about the existing
12 Highway 378?

13 A. Right.

14 Q. And, so, I guess, if I'm understanding your
15 answer to be that now the new widening was being built
16 to the side of the existing 378; is that correct.

17 A. Uh-huh.

18 Q. Is that a yes?

19 A. Yes.

20 Q. So, in terms of that, while it's being
21 built over to the side of the existing 378 was the
22 design or the plans to place the culvert in while all
23 that's going on?

24 A. Place the culvert where?

25 Q. In its intended location, I guess.

1 A. On the new section?

2 Q. Yes, sir.

3 A. Yes.

4 Q. Okay. So, if I'm understanding correctly,
5 there's still an existing 378 with the existing
6 culvert that we know is too small for the new project,
7 correct?

8 A. Right.

9 Q. And then the roadway is being built
10 immediately to the side of that existing 378, and is
11 your testimony that the culvert is being built and
12 installed at the same time?

13 A. I can't say -- I can't say how they did it.
14 I mean, that's a contractor's call on how they did it.

15 Q. So your testimony here today on behalf of
16 the DOT in terms of design is that the contractor
17 makes the decision on when to place the culvert in?

18 A. Correct.

19 Q. But DOT's design called for it, as Mr.
20 Willie testified, for it to be built and installed in
21 stage one and stage two?

22 A. Yes.

23 Q. So why would -- why would DOT have that
24 plan in place to just allow the contractor to make the
25 decision?

1 A. I just provide a design and the size for
2 the culvert. I can't answer why the DOT does this
3 process.

4 Q. Okay. So, in terms of your design, do you
5 tell or do you have a plan or does the design call for
6 an install date based on whether it's in the staging
7 or sequencing or a specific date?

8 A. I have not provided that information on any
9 project that I've done.

10 Q. I understand. Well, let me ask it this way
11 then. What role does DOT have in the design of the
12 culvert and its installation, then, if it's just up to
13 the contractor?

14 A. We provide the size on the plans.

15 Q. Okay.

16 A. We don't -- I can't comment on why we -- I
17 can't comment on what they -- why we do a process of
18 letting the contractor install it. I don't make those
19 decisions. I just provide -- I do my job, it's to
20 provide a size for the culvert.

21 Q. Okay. In terms of the install date --
22 well, kind of to preface that, we know the existing
23 culvert was too small for the new design of the
24 project, correct?

25 A. For the existing conditions, I would say

1 that the new culvert was -- I mean not the new
2 culvert. The old culvert. The existing culvert was
3 not adequate.

4 Q. And then even after that we now know that
5 the existing culvert was not adequate for even the
6 existing roadway, correct?

7 MR. McCUTCHEON: Object to the form. You
8 may answer if you can.

9 MR. ROOF: Can you repeat that question?
10 BY MR. HOPKINS:

11 Q. Yes, sir. Now we know that the existing
12 culvert was not even adequate for the existing
13 roadway, correct?

14 MR. McCUTCHEON: Same objection.

15 MR. ROOF: You're saying that the existing
16 culvert -- I'm not understanding your question.

17 BY MR. HOPKINS:

18 Q. All right. I'll get to it later. In terms
19 of that design that we talked about, how many designs
20 did you consider before going with the culvert that's
21 installed now?

22 A. I would say we looked at several different
23 sizes, like a ten-by-six, ten-by-fives. We went
24 through -- we've got a program that we can run
25 different sizes through.

1 Q. Can we agree that the DOT did not conduct a
2 floodway analysis prior to your design of the culvert?

3 A. No. We did conduct one.

4 (PLF. EXHIBIT 2, Hydraulic Design Study
5 US-378 Widening Project, Section 2, Florence County,
6 SC, 1.4 Floodway Data, was marked for identification.)
7 BY MR. HOPKINS:

8 Q. Okay. I'm going to show you what I've
9 marked as Exhibit 2. I think it's in here. It is.
10 It's right there for you to look at as well, but I'm
11 going to provide it to you. Okay? Take a look at it,
12 and let me know when you're ready to discuss that
13 document.

14 A. Okay.

15 Q. And this was completed as a part of the
16 project plan in August 2013, correct?

17 A. Yes.

18 Q. And if you'll go with me to the last
19 paragraph. This is under section 1.4, floodway data.
20 I'll read it. It says, "Since there's no prior study,
21 a floodway analysis was not performed." Did I read
22 that correctly?

23 A. Yes.

24 Q. And your testimony here today is that there
25 was a floodway analysis performed; is that right?

1 A. There's two different types of floodways.
2 One's a zone A which doesn't have a detailed study
3 done on it. This section at the time that we did this
4 project was in a zone A. We are only required to
5 prove that we are not increasing the 100-year water
6 surface elevation upstream of our new structure by
7 what the current conditions are.

8 Q. And I appreciate that, Mr. Stanley. That
9 wasn't my question, though. My question was, you're
10 telling me now despite what this document says when it
11 was written in August 2013 that there was a floodway
12 analysis performed. I'm just asking when it was
13 performed, who performed it and any evidence of it,
14 because I've not seen any evidence of it.

15 A. We conducted a run -- there was not a
16 floodway on this section. So we have not done a
17 floodway analysis. Let me clear that up. We have
18 looked at the current conditions, the existing
19 conditions, and we have ensured that our 100-year
20 elevations for the proposed conditions for the
21 ten-by-seven -- or the ten-by-eight culvert we
22 installed are not exceeding what the existing
23 conditions are.

24 Q. Okay. Mr. Stanley, I appreciate that. I'm
25 asking you to tell me is this document, as we sit here

1 today, is that a correct statement or is that not a
2 correct statement? "A floodway analysis was not
3 performed."

4 A. It was not performed.

5 Q. So we can agree this document is accurate?

6 A. Yes.

7 Q. And we can agree there was not a floodway
8 analysis performed at that time that this was written
9 in August of 2013?

10 A. We did not perform a floodway analysis
11 because there was no floodway to analyze.

12 Q. Okay. And then -- I mean, I think I'm
13 assuming, but can we agree that you had already
14 designed the culvert at that point; is that right?

15 A. Yes.

16 Q. And, so, can we agree that you had designed
17 the new culvert without any floodway analysis being
18 performed?

19 MR. McCUTCHEON: Object to the form, asked
20 and answered at least three times.

21 MR. ROOF: I guess I'm having a hard time
22 understanding. It's for a zone A. For a zone AE we
23 would have to do a floodway analysis. There was no
24 floodway on this stream. There were -- there was a
25 FEMA zone A. We did what we were required to do for a

1 FEMA zone A. So, no, I did not complete a floodway
2 analysis. I completed what we were required to do for
3 a FEMA zone A section.

4 BY MR. HOPKINS:

5 Q. Okay. I think I understand what you're
6 telling me. I'm just asking you. The document says
7 no floodway analysis was performed. So, based on that
8 you submitted a design for the new culvert without a
9 floodway analysis being performed for whatever reason
10 that you're testifying about. I understand that.

11 A. Yes.

12 Q. Okay. After the 2015 and 2016 storm events
13 that occurred on the widening project at the Marlowes'
14 property was there any floodway analysis performed at
15 that time?

16 A. No.

17 Q. Okay. Do you know why?

18 A. Because we had completed everything that we
19 needed to complete on the project.

20 Q. Okay. Do you know what sort of studies
21 were performed at that time in 2017 by the DOT?

22 A. We provided an addendum to the report to
23 show what the existing conditions were.

24 Q. Okay. And, so, is that what you're
25 testifying about, the existing condition analysis that

1 you performed?

2 A. Yes.

3 Q. I'm sorry. I said I wouldn't cut you off.
4 I apologize.

5 A. We were just adding that to the report to
6 show that we were not increasing the 100-year event.

7 Q. And, so, what I'm trying to ask, and I
8 think now we have a clearer idea of it, that was not
9 performed until 2017; is that accurate?

10 A. We had that information. We did not have
11 it in the report.

12 Q. Where was that information? Can I find it?
13 Is it available to me?

14 A. It was in our HECRAS runs. The computer
15 program. H-E-C-R-A-S.

16 Q. And those models, are those the -- I guess
17 the testing that you would have conducted back then,
18 that would be based on the new culvert; is that right?

19 A. We analyze the existing culvert at the time
20 that we did this and we did the proposed culvert.

21 Q. Okay. Let's talk about the existing
22 culvert for a second.

23 (PLF. EXHIBIT 3, Hydraulic Design Study
24 US-378 Widening Project, Section 2, Florence County,
25 SC, 2.2.3 Box Culvert Design, was marked for

1 identification.)

2 BY MR. HOPKINS:

3 Q. I marked this as Exhibit No. 3. It's page
4 5 in here, the box culvert design. Take a look at it
5 and let me know when you're ready to talk about it.

6 MR. McCUTCHEON: Which one -- let me see
7 the document. Is this yours?

8 MR. HOPKINS: This is my exhibit. That's
9 y'all's.

10 MR. McCUTCHEON: Do they have page numbers
11 on them?

12 MR. HOPKINS: It's page 5 at the bottom,
13 but it's not -- it's like page --

14 MR. McCUTCHEON: What is the date of that
15 one?

16 MR. ROOF: This one?

17 MR. HOPKINS: 2013.

18 MR. McCUTCHEON: Okay. Go ahead.

19 MR. ROOF: Okay.

20 BY MR. HOPKINS:

21 Q. You're ready to talk about it?

22 A. Yes.

23 Q. So the box culvert design -- well, let me
24 ask this: Did you write this portion of the report?

25 A. Yes.

1 Q. And it says that confirmation was made
2 during a field inspection of the crossing. Did you
3 perform that field inspection?

4 A. Yes.

5 Q. The next paragraph says, "Due to the
6 channel alignment through the new road section the
7 existing box culvert cannot be extended." Did I read
8 that correct?

9 A. Yes.

10 Q. What is meant by channel alignment?

11 A. How the upstream portion of the channel
12 aligns with the downstream.

13 Q. Can I take that to mean that the channel
14 alignment was going to change based on the new road
15 section?

16 A. Yes.

17 Q. Okay. Did the DOT ever consider placing
18 the culvert in a different location than the one it
19 ultimately ended up in?

20 A. No.

21 Q. Okay. Why?

22 A. We can't move -- I mean, we have to place
23 it where the stream is. We're not allowed by
24 environmental laws to move the stream.

25 Q. Okay. But, I mean, your report, or at

1 least the portion that you wrote and then the DOT
2 provided says that the channel is going to be changed,
3 essentially; is that correct?

4 A. Correct.

5 Q. So you can't change where the culvert is
6 going to be placed, but you can ultimately change the
7 stream. Is that what I'm understanding your testimony
8 to be?

9 A. When you widen a roadway, and you cover up
10 the stream or where the existing stream is, we have to
11 move the culvert to where the -- we haven't changed
12 the stream. They've -- if the culvert goes -- if the
13 existing culvert goes out and then turns directly
14 left, and we're covering that up, then we have to
15 align the culvert to where the existing stream is
16 downstream. We have not changed the channel.

17 Q. Okay. I understand. The third paragraph,
18 let me read it for a second. "The resident
19 construction engineer for Florence County indicated
20 that he had never seen the roadway overtopped at this
21 location."

22 Did I read that accurately?

23 A. Yes.

24 Q. Who would be the resident construction
25 engineer for Florence County?

1 A. I do not recall who it was at that time.

2 Q. Would it have been Jamie Poston?

3 A. I can't say. I don't know if it was him or
4 not.

5 Q. Okay.

6 MR. HOPKINS: Jack, do you know?

7 MR. McCUTCHEON: When?

8 MR. HOPKINS: At the time I guess this was
9 written. 2013.

10 MR. McCUTCHEON: When it was written?

11 MR. HOPKINS: Yes, sir.

12 MR. McCUTCHEON: I don't know the answer to
13 that. Jamie Poston was the resident construction
14 engineer. I can find out when he was.

15 MR. HOPKINS: That's all right.

16 MR. McCUTCHEON: You deposed him. You
17 could have found out.

18 BY MR. HOPKINS:

19 Q. Let me ask you this, Mr. Stanley. Why was
20 that sentence included in your report?

21 A. Because we usually look at past floods for
22 a site and try to get as much information as we can
23 for it.

24 Q. Is whether the existing roadway had ever
25 allowed water to overflow across it important in your

1 analysis and your design?

2 A. It helps us to see if our existing
3 condition model is accurate.

4 Q. Okay. And as we -- I just want to
5 understand your testimony. You're saying just the
6 fact that whether water has previously crossed over
7 the roadway as a form of an outlet can influence your
8 existing conditions model?

9 A. It doesn't influence it. It just kind of
10 makes us help us calibrate it to make sure it's right.
11 We were showing it was overtopping here. We talked
12 with the personnel in the field. Based on this at the
13 time that we had this information they said it was
14 not.

15 Q. I want to parse some of that out. You said
16 you were showing it was overtopping. What do you mean
17 by that?

18 A. We were showing it overtopping for the
19 25-year event.

20 Q. You mean the model was?

21 A. Our model was. Yes.

22 Q. Is that the model that you performed in
23 2013 or later?

24 A. 2013.

25 Q. Okay. So, at that time you had an

1 indication that the roadway was an outlet for water in
2 that area for a 25-year rain event, correct?

3 A. Correct.

4 Q. And the standard should be a hundred year
5 rain event; is that correct?

6 A. Right.

7 Q. For the design of the culvert?

8 A. Correct.

9 Q. Okay. So, I want to ask. You said that
10 you had talked to -- I guess was it field personnel
11 who told you that it may have been overtopping?

12 A. At that time I hadn't talked with anybody
13 that said it was overtopping.

14 Q. Okay. I think I understand what you were
15 saying just a moment ago, but I might have mixed up
16 what you actually said. At the time your model was
17 showing overtopping, but nobody had told you it was
18 overtopping?

19 A. Right.

20 Q. Okay. Did you ever talk to the Marlowes
21 and ask them whether it overtopped?

22 A. We did not.

23 Q. They lived there, correct?

24 A. Correct.

25 Q. Is there a reason you didn't speak to them?

1 A. At the time when we're doing our field
2 inspections, if there's somebody there we would.

3 Q. Let me ask you this: If you had evidence
4 at that time beyond just your model showing
5 overtopping, how would that have influenced the design
6 of the new culvert?

7 A. It would not have influenced it at that
8 time because we had to -- we were -- we had to design
9 it for the hundred year event to make sure we were not
10 increasing the upstream water surface elevation over
11 what the existing conditions were.

12 Q. Okay. I understand. Can we agree that the
13 new roadway was built up higher than the existing
14 roadway?

15 A. Yes.

16 Q. Okay. Would that have been a factor in
17 your consideration whether there was overtopping at
18 the previous site?

19 A. Again, we designed -- it would not, because
20 we were designing the new culvert to pass the 100-year
21 event regardless.

22 Q. Okay. Do you sometimes in your -- I guess
23 in your field studies or your field testing for
24 designs do you speak with property owners if they are
25 there?

1 A. Yes.

2 Q. Did you ever try to contact the Marlowes?

3 A. I do not recall.

4 (PLF. EXHIBIT 4, Hydraulic Design Study
5 US-378 Widening Project, Section 2, Florence County,
6 SC, Project Summary 1.1 Introduction, was marked for
7 identification.)

8 BY MR. HOPKINS:

9 Q. I'm going to show you Exhibit 4. This is
10 part of the addendum from 2017. Let me find a page
11 number for everybody. Let's see -- it's page 15 in
12 the book.

13 Again, Mr. Stanley, just let me know when you're
14 ready to discuss it.

15 A. Okay.

16 Q. You're ready?

17 A. Yes.

18 Q. Okay. Did you write this?

19 A. Yes.

20 Q. So you wrote: The purpose of this addendum
21 is to provide a detailed investigation of the
22 performance of the existing crossline located at
23 approximately -- I think that's an abbreviation for
24 station -- 1270 plus 00 --

25 A. Correct.

1 Q. -- of the US 378 widening project in
2 Florence County. This addendum is being prepared
3 pursuant to complaints that extensive flooding to the
4 upstream property owner after both the 2015 and 2016
5 floods was due to an inadequate replacement culvert.

6 Did I read that correctly?

7 A. Yes.

8 Q. At this point that this was written in
9 June of 2017 do you know whether the new culvert had
10 been installed?

11 A. I do not.

12 Q. Is that reflected in your report whether it
13 was installed?

14 A. In this report?

15 Q. Yeah. The next paragraph.

16 A. It was -- at the time we knew that it
17 was -- a portion of the new culvert was constructed.
18 I didn't know how much.

19 Q. Okay. I'll read the next paragraph. It
20 says, "It is our understanding that the existing
21 culvert was still in place during both flooding events
22 while the new crossline was under construction."

23 Did I read that accurately?

24 A. Yes.

25 Q. So, back in June of 2017 you wrote that the

1 existing culvert was still in place at least in 2015
2 and October of 2016, correct?

3 A. Correct.

4 Q. At that point do you know when -- I guess,
5 Mr. Willie, you might know this question -- when the
6 project had begun?

7 A. (By Mr. McConnell) I do not know when the
8 project had begun.

9 Q. Okay. Would it be safe to say in 2015 and
10 2016 that the project had started?

11 MR. McCUTCHEON: I'll stipulate to that for
12 the record.

13 MR. HOPKINS: Okay. Thank you.

14 BY MR. HOPKINS:

15 Q. Mr. Willie, in 2017 the project was
16 underway, correct?

17 MR. McCUTCHEON: I'll stipulate to that,
18 too.

19 BY MR. HOPKINS:

20 Q. I'm going to go to the third paragraph.

21 "The existing conditions model showed that the
22 five foot by five foot box culvert was undersized for
23 the design discharges and would require upsizing to
24 meet the current hydraulic requirements of the
25 department. The analysis showed that the culvert

1 would overtop for discharges associated with the
2 25-year return interval and greater."

3 Did I read that correctly?

4 A. Yes.

5 Q. So, in 2017 you included in the report the
6 statement that the culvert would overtop. That wasn't
7 included in the 2013 report, right?

8 A. Correct.

9 Q. So, now reading this does this reflect your
10 recollection or your memory on why you didn't include
11 it in the 2013 report?

12 A. Because we didn't have that information at
13 the time.

14 Q. You told me -- you testified previously
15 that the model indicated it was overtopping.

16 A. Yes.

17 Q. Okay. Did you do anything in addition to
18 the model in 2017 as part of your analysis?

19 A. Did I do anything in addition?

20 Q. Yes, sir.

21 A. Can you repeat that again?

22 Q. So my understanding is that in 2013 you ran
23 your model which indicated that there was overtopping
24 with the existing culvert, and that you talked to
25 whoever the resident construction engineer -- it might

1 be Mr. Poston at that time who said there was no
2 overtopping, and that's the only statement that you
3 included in the report at that time. Is that
4 accurate?

5 A. Correct.

6 Q. In this one you say the analysis showed
7 that the culvert would overtop for discharges
8 associated with the 25-year return interval and
9 greater. I want to know if you did anything in
10 addition to just the model or speaking with the
11 resident construction engineer.

12 A. Back 2013 or 2017?

13 Q. 2017.

14 A. In 2017? The only thing we did was -- I
15 think they had some surveys, some more detailed survey
16 data of their house, and we just looked at what our
17 hundred year elevations were based on that more
18 accurate survey data.

19 Q. Did you speak with the Marlowes in 2017?

20 A. I did not.

21 Q. But at least in your report you indicated
22 that you had been receiving -- or the department had
23 been receiving complaints from the property owner,
24 correct?

25 A. Correct.

1 Q. But you didn't consider speaking with the
2 property owner to prepare or draft or finalize your
3 report; is that what you're telling me?

4 A. No.

5 Q. Okay. The next thing you wrote is, "The
6 minimum elevation at which the existing road would
7 overtop was estimated at 59.55 feet."

8 Can you explain that to me?

9 A. That was the low point of the road.

10 Q. So that's the lowest the road is?

11 A. At the existing conditions.

12 Q. Existing conditions in June of 2017. Would
13 that include the new roadway or is that just the old
14 existing roadway?

15 A. That's just the existing conditions as
16 stated in the previous.

17 Q. Okay. "Based on the available survey, the
18 lowest elevation of the upstream structure is
19 approximately 57.8 feet."

20 What do you mean by that?

21 A. I think that's where the corner of the
22 house elevation was on the survey.

23 Q. So when you put structure in here you mean
24 their house?

25 A. Right.

1 Q. Okay. "So this suggests that the structure
2 could be impacted by a flood associated with the
3 25-year return interval and potentially the ten-year
4 interval." Did I read that correctly?

5 A. Correct.

6 Q. And then your last paragraph, "The proposed
7 conditions model showed that a ten-foot wide by
8 eight-foot tall reenforced concrete box culvert is
9 sufficient to convey the design discharges and meet
10 the department's hydraulic requirements."

11 Did I read that accurately?

12 A. Yes.

13 Q. "The new culvert provides approximately
14 three times the flow area that the existing culvert
15 provides. A comparison of the results from both
16 models indicates the new culvert will result in a
17 reduction of water surface elevations upstream of the
18 crossing for floods up to the hundred-year event."

19 Did I read that accurately?

20 A. Yes.

21 Q. At that time can we agree that the new
22 culvert had not been installed?

23 A. Completely? Are you asking me -- I don't
24 understand the question.

25 Q. Okay. I guess based on your answer you're

1 telling me that the culvert had been installed in some
2 form at that point?

3 A. That was my understanding.

4 Q. Okay. But not completely?

5 A. Correct.

6 Q. Okay. But at this time in June of 2017,
7 which is nine, ten months after the Hurricane Matthew
8 event of 2016, the new culvert has still not been
9 installed, correct? Completely?

10 A. I can't say for certain what portion that
11 they had, if it -- I can't say -- I can't say if they
12 had the complete thing installed at that time right
13 now.

14 Q. Well, at least in 2016, based on your
15 report, it had not been completely installed --

16 A. Correct.

17 Q. -- correct? Can you tell me what reason
18 the DOT had for not completely installing the culvert
19 after 2015?

20 A. I can't say.

21 Q. Mr. Willie, can you tell me?

22 A. (Mr. McConnell) I can't say.

23 Q. Do you know whether the department
24 considered installing the culvert completely after
25 2015?

1 A. I don't know if they considered it.

2 Q. Were there any considerations -- as we sit
3 here today do you have any evidence that any
4 consideration was made to install the culvert fully
5 after 2015?

6 A. I don't know.

7 Q. And at least in 2016 -- well, I'm going to
8 mark this as Exhibit 5.

9 (PLF. EXHIBIT 5, Photographs 3003 and 3005,
10 Page 25 of 28, were marked for identification.)

11 MR. HOPKINS:

12 Q. This is a part of a report that an expert
13 Jason Gregory prepared with pictures provided by my
14 clients the Marlowes, and he provided some bubbling
15 with some indications on there. I just want to talk
16 about the pictures if that's okay.

17 I'll represent to you that my clients took these
18 pictures in 2016. At that point in 2016 can we agree
19 that the new roadway is being built at a higher
20 elevation than the existing roadway?

21 MR. McCUTCHEON: So stipulated.

22 BY MR. HOPKINS:

23 Q. Okay. And, so, we know, then, in June of
24 2017, Mr. Stanley, that even the old box culvert was
25 not sufficient to protect the structure from a 25-year

1 or potentially a ten-year interval storm event for the
2 Marlowes, correct?

3 A. I can't comment on whether it was or not.
4 I have no data to show what a model would show with
5 half of a culvert built.

6 Q. Well, I mean, you wrote the report,
7 Mr. Stanley. I'm asking you what your report says.

8 A. As the existing -- our report shows that
9 the existing conditions which are shown to be the
10 conditions with just the roadway, the existing
11 roadway, that that's what the -- that's what the
12 25-year event -- it would not convey the 25-year
13 event.

14 Q. I understand that completely, sir. What my
15 question is, is based on your existing conditions
16 model did it include the higher elevation of the
17 roadway that was being installed at the same time?

18 A. It did not.

19 Q. Okay. Is there a reason for that?

20 A. We don't model -- we don't model -- we
21 model the proposed conditions and the existing
22 conditions.

23 Q. Well, can we agree at the time you wrote
24 the June 2017 addendum this was the existing
25 condition, right?

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1 A. I didn't have survey data on that, so --

2 Q. Did you go out and do another field site
3 test or inspection before you wrote this addendum?

4 A. Not at the time this addendum was written.

5 Q. Okay. So can we agree that your addendum
6 does not include the minimum elevation of the new
7 roadway built in directly beside the existing roadway?

8 A. Yes.

9 Q. Okay. Are you saying that this does not
10 qualify as an existing condition under the
11 department's policies?

12 A. Not what we call existing conditions.

13 Q. Okay.

14 (PLF. EXHIBIT 6, Photograph, Page 24 of 28,
15 was marked for identification.)

16 BY MR. HOPKINS:

17 Q. This is from the same report. It's another
18 picture that my client took, and, as you can see, it
19 shows --

20 MR. McCUTCHEON: Is that Gregory's report?

21 MR. HOPKINS: It is. Yes, sir. It's page
22 25.

23 BY MR. HOPKINS:

24 Q. The picture shows a washout and water being
25 blocked by the new roadway; is that accurate?

1 A. Yes.

2 Q. When you wrote your June of 2017 addendum
3 did you ever consider the fact that this new roadway
4 could potentially be a block for overtopping?

5 A. We did not.

6 Q. Is there a reason you did not?

7 A. No reason.

8 Q. Did you ever consider it at all in any
9 report that you drafted or any design that you made
10 for this project?

11 A. No.

12 Q. So at least in June of 2017 we know the
13 existing condition model that you prepared which
14 doesn't include the new height of the roadway that the
15 property could be affected by a ten-year interval
16 storm, correct? I'm just reading from your report.

17 A. Not based on the models that we had. Based
18 on the existing conditions, which are without the new
19 construction starting, that's what I'm stating here.

20 Q. Okay. So, then, based on that answer we
21 can agree that the culvert had not been completely
22 installed at the time you wrote this report?

23 A. Correct.

24 Q. Okay. What I'm asking and what I really
25 want to know from either of you is were there ever any

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1 considerations made by the department to install or
2 have the contractor install the culvert at a sooner
3 date?

4 MR. ROOF: Not by me.

5 MR. McCONNELL: Not by me.

6 (PLF. EXHIBIT 7, NOAA Table 2, Table 3 and
7 Table 4, were marked for identification.)

8 BY MR. HOPKINS:

9 Q. This is page 21 of Mr. Gregory's report.
10 It includes some NOAA data that he collected for the
11 2015 and 2016 rain events, and if you look at it, he
12 prepared a table, and on the table he showed the
13 nearest rain collection site to the Marlowes' property
14 that we're talking about. Does that appear to be
15 accurate? You can see he goes by the length from
16 their property.

17 A. (By Mr. Roof) I don't know where 18.2
18 northwest is. I mean, I can't say based on looking at
19 this document if that's the closest.

20 Q. Okay. What I'll represent to you is the
21 NOAA does not have a rain collection site on the
22 Marlowes' property. They have locations, and these
23 are the locations that are located within the nearest
24 point of the Marlowes' property and he collected the
25 data from those two rain events.

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1 MR. McCUTCHEON: Let me object to
2 Mr. Hopkins testifying and asking my witness to assume
3 something, and I don't think that's proper. I'm going
4 to let him go ahead and answer it if he can.

5 Go ahead.

6 MR. ROOF: I can't say that is the closest
7 based on my knowledge at this time.

8 BY MR. HOPKINS:

9 Q. I understand. Do you have any evidence
10 there's a closer NOAA collection site?

11 A. I do not.

12 Q. Did you ever collect any of this NOAA site
13 data for the 2015 or 2016 rain events?

14 A. I did not.

15 Q. Okay. So if you look in the 2015 rain
16 event, the nearest marker is 18.2 miles from their
17 house. It collected 5.9 --

18 MR. McCUTCHEON: Hold on just a minute.
19 I'm objecting to any questions dealing with something
20 out of his report that this gentleman has not had a --
21 that -- you're pitting one witness against another,
22 for one thing. What Mr. Gregory puts in his report
23 may or may not be correct, and I don't think it's
24 appropriate for you to ask him to interpret what's in
25 his report, and I object to this line of questioning.

1 MR. HOPKINS: Okay. Well, I am pitting the
2 witnesses against each other, but I provided these
3 documents to the DOT. They're testifying on behalf of
4 the DOT.

5 MR. McCUTCHEON: I don't care whether you
6 provided them or not, Mr. Hopkins.

7 MR. HOPKINS: They've had an opportunity to
8 look at the documents in preparation for their
9 deposition, and all I'm asking is what the document
10 says. I'm not asking him to interpret it or give me
11 any sort of analysis based on it.

12 MR. McCUTCHEON: I will stipulate for the
13 record that the stuff that is attached to
14 Mr. Gregory's deposition is what Mr. Gregory testified
15 about. What I'm objecting to is you asking my
16 gentlemen to assume and corroborate that his
17 information is correct. That's the problem I have,
18 Mr. Hopkins. I will stipulate for the record that
19 those documents are attached to Mr. Gregory's report
20 for whatever they may be, but to ask this gentleman
21 whether they're correct or not, he can't say that, and
22 I think that's improper.

23 MR. HOPKINS: I'm not asking him if it's
24 correct.

25 MR. McCUTCHEON: Yes, you are.

1 MR. HOPKINS: I'm asking him what the
2 document says.

3 MR. McCUTCHEON: I've already stipulated as
4 to what the document says.

5 MR. HOPKINS: Okay. Well, I'm going to ask
6 my questions. Your objection is noted. You can have
7 a standing objection to any question I ask.

8 MR. McCUTCHEON: No. I'm not having a
9 standing objection. I'm going to make an objection --

10 MR. HOPKINS: You can object to every
11 question I ask.

12 MR. HOPKINS:

13 Q. Well, second of all -- you've already
14 testified, Mr. Stanley. Mr. Willie, have you ever
15 collected or retrieved or been asked to retrieve any
16 rain collection data from the NOAA as it relates to
17 the Marlowes' property for 2015 or 2016 rain events?

18 A. (By Mr. McConnell) No.

19 Q. The first site 18.2 miles away that
20 Mr. Gregory says is 18.2 miles away collected what
21 Mr. Gregory says is 5.96 inches of rain in a 24-hour
22 period, and Mr. Gregory put that that is for a
23 ten-year to 25-year rain event. Does that appear to
24 be what the document says? I'm not asking you to
25 agree with his statements, but is that what the

1 document says?

2 A. (By Mr. Roof) Yes.

3 Q. Okay. And you've already testified that
4 the existing conditions in June of 2017 would -- the
5 property structure, the Marlowes' property structure,
6 could be affected at least by a 25-year return
7 interval and potentially a ten-year interval; is that
8 correct?

9 A. I stated with the existing conditions,
10 which are the existing culvert in place, that's
11 exactly what I said in my report that that's the
12 conditions. I have no idea what's happening with
13 partial -- with half of a culvert being in place or
14 anything else. So, as it stands, the existing
15 conditions, yes, that's what I was saying.

16 Q. Let me ask it this way: Were you ever
17 asked to do any sort of further analysis on the
18 property prior to this June of 2017 addendum?

19 A. No.

20 Q. Who asked you to prepare this?

21 A. Nobody asked me to prepare it. We had
22 information that it had flooded, and we wanted to look
23 at what was going on just to -- I mean, we just wanted
24 to provide -- with our reports we usually do not
25 provide the existing conditions in there. We wanted

1 to make sure because we had this issue here that we
2 were providing the existing conditions for that -- for
3 the -- for the roadway before we started construction.

4 Q. I understand. Is there anything that you
5 can think of that prevented you from performing this
6 investigation in 2015 after the rain event in 2015?

7 A. Anything that prevented me from -- I wasn't
8 asked to do it. I mean --

9 Q. I think that begs my earlier question. Who
10 asked you to do this June of 2017 report?

11 A. Nobody asked me. We just provided it in
12 there because we knew there were issues at this site.

13 Q. Would you agree with me there was an issue
14 at this site after the 2015 rain event?

15 A. At that time, I can't say.

16 Q. Well, I just showed you --

17 A. I know I was contacted after 2016.

18 Q. Who contacted you is what I'm asking.

19 A. It was -- I think the program manager let
20 me know that there were issues there.

21 Q. Who was that?

22 A. Brian Dix.

23 Q. What did he tell you?

24 A. That there was flooding at this location.

25 Q. Okay. Did he tell you who he heard that

1 from?

2 A. He did not.

3 Q. Did he ask you to prepare this report?

4 A. He did not.

5 Q. Did Mr. Dix ever approach you after the
6 rain event in 2015 and tell you there were issues with
7 the property?

8 A. Not to my recollection.

9 Q. Did he ever approach you after -- well,
10 scratch that. Do you recall when he approached you
11 about the issues from 2016 was it in June or was it
12 sometime prior to that?

13 A. I want to say it was around June when we
14 did the report when I looked at it.

15 Q. Can you think of any reason that you could
16 not have performed this investigation or further
17 analysis before June of 2017?

18 A. I cannot.

19 Q. In your design of the new culvert did you
20 ever consider whether -- scratch that. In your
21 position here with the DOT or on behalf of the DOT, if
22 I use the term choke point, what would that mean to
23 you?

24 A. At the DOT?

25 Q. Yes, sir.

1 A. I mean, I've never heard -- I haven't heard
2 the term used. I mean, it would just be a -- it would
3 be something that was causing a backup.

4 Q. Okay. Like we had in Exhibit 6?

5 A. I mean, I can't say. I wasn't there. I
6 mean --

7 Q. And I understand what you're saying and
8 what you're testifying about. I'm asking based on
9 kind of the loose definition that you gave me of what
10 you mean by a choke point would this meet that
11 standard?

12 A. I don't know what the standard is for a
13 choke point.

14 Q. Do you think this is a choke point based on
15 what you just told me a choke point was?

16 A. I don't know.

17 Q. Were you ever asked to consider whether the
18 existence of the existing roadway and the simultaneous
19 building of a new roadway would in fact create a choke
20 point?

21 A. No.

22 Q. After 2015 -- same question. After the
23 rain event in 2015 were you ever asked to consider
24 whether the construction and installation of the
25 culvert was creating a choke point on the property?

1 A. Not to my knowledge.

2 Q. After 2016 were you ever asked to consider
3 the same question?

4 A. No. We were just informed that it was
5 flooding.

6 Q. Did Mr. Dix ever use the term choke point
7 with you?

8 A. No.

9 Q. Do you know when the completion of the
10 installation of the culvert was?

11 A. I do not.

12 Q. Do you know, Mr. Willie --

13 A. (By Mr. McConnell) No, I do not.

14 Q. -- when the completion was?

15 A. I do not.

16 Q. As a part of the addendum, Mr. Stanley, I
17 saw a lot of graphs, and then I think there's a lot of
18 pages of handwritten calculations. Are those your
19 calculations?

20 A. (By Mr. Roof) On the addendum?

21 Q. Yeah.

22 A. I don't see any handwritten calculations on
23 the addendum.

24 Q. Okay. Yeah, this may not -- is that part
25 of the addendum?

1 A. No.

2 Q. Okay. Did you do those handwritten
3 calculations?

4 A. Alex Weaver who works for me did them.

5 Q. Can you tell me what those calculations are
6 for?

7 A. Which specific ones are you wanting to know
8 about? For ditches?

9 Q. Yeah. You know, I think they say calculate
10 Q in the ditch or in the cross stream or downstream.
11 And, listen, I'm not an engineer.

12 A. For our location?

13 Q. Yeah. Like calculate Q. I guess what
14 would Q be in the calculations for this?

15 A. It would be the flow.

16 Q. Okay.

17 MR. HOPKINS: Let's take a short break.
18 I'll talk to my clients. I think I'm pretty much
19 done, but let me make sure I haven't missed anything.

20 (A short recess was taken.)

21 BY MR. HOPKINS:

22 Q. At any point do either one of you know at
23 any point during the construction project, or the
24 widening project, whether there was any consideration
25 given to rerouting traffic so that the culvert could

1 be completely installed?

2 MR. ROOF: I do not know that.

3 MR. McCONNELL: I do not know that.

4 BY MR. HOPKINS:

5 Q. Are you aware that on the same project, the
6 378 widening project, traffic was being rerouted and
7 diverted at a location just a few miles away from the
8 Marlowes' property?

9 MR. ROOF: I was not aware.

10 MR. McCONNELL: I'm not aware.

11 BY MR. HOPKINS:

12 Q. As a part of your analysis in developing
13 your June 2017 addendum, Mr. Stanley, were you asked
14 to collect the NOAA rainfall data?

15 A. (Mr. Roof) No.

16 Q. Did you ever consider collecting that data?

17 A. I did not.

18 Q. Do you know whether Mr. Dix collected that
19 data?

20 A. I do not.

21 Q. Have you ever seen any rainfall data as it
22 relates to the Marlowes' property other than what I've
23 shown you here today?

24 A. No.

25 Q. Have you, Mr. Willie?

1 A. (By Mr. McConnell) No.

2 Q. Again, talking about the landowners, did
3 you ever speak to any adjacent property owners and ask
4 them whether they had ever seen any overtopping of
5 that portion of the project?

6 A. (Mr. Roof) Not that I recall.

7 Q. And can we agree -- I think I asked you
8 this, but in June of 2017 when you prepared your
9 addendum you again did not ask the Marlowes whether
10 they had ever experienced any overtopping?

11 A. Not at that time, no.

12 Q. And even though you were made aware that
13 they were complaining about the project at that time,
14 did you speak with them at all about any concerns they
15 had or any facts that they could provide to you?

16 A. I was not in contact with them.

17 Q. Did you ever consider contacting them as
18 part of preparing your addendum?

19 A. I did not.

20 Q. Is it your testimony, Mr. Willie, that
21 Southern Asphalt is responsible for any and every
22 aspect of construction of the project?

23 A. (Mr. McConnell) Repeat that.

24 Q. Is it your testimony that Southern Asphalt
25 who was the contractor for this project was

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1 responsible for each and every aspect of construction?

2 A. I cannot say.

3 Q. Okay. What I mean by my question is, does
4 DOT still continue to monitor and maintain the project
5 while it's being constructed?

6 MR. McCUTCHEON: I will so stipulate that
7 they do that.

8 MR. HOPKINS: Those are all my questions,
9 gentlemen. I appreciate your time today. Mr. Jack
10 may have some follow-up.

11 MR. McCUTCHEON: I have a few questions.

12 CROSS-EXAMINATION

13 BY MR. McCUTCHEON:

14 Q. I'm looking at Plaintiff's Exhibit No. 4
15 which is a project summary, and I want to ask you a
16 couple questions, sir.

17 The existing box culvert was a five feet by
18 five feet box culvert; is that correct?

19 A. (By Mr. Roof) Yes.

20 Q. And you've stated in this document that
21 with that there that this property would have been --
22 would have been affected by a flood associated with a
23 25-year event, correct?

24 A. Yes.

25 Q. Is that what it says?

1 A. Yes.

2 Q. All right. And then, if you go down to the
3 last paragraph -- and I think Mr. Hopkins asked you
4 about these two paragraphs -- you've put in here a
5 comparison of the results to indicate that the new
6 culvert will result in a reduction of water surface
7 upstream to the crossing for floods up to a hundred
8 year event; is that correct?

9 A. Yes.

10 Q. And is it your testimony that the culvert
11 was designed to accommodate up to a hundred year
12 flood?

13 A. Yes.

14 Q. Let me ask you a question. What happened
15 in 2015 to make it flood the first time?

16 A. We had a large storm event.

17 Q. Was it commonly and affectionately referred
18 to as the thousand year flood?

19 MR. HOPKINS: Object to the form.

20 MR. McCUTCHEON: What's wrong with the
21 form?

22 MR. HOPKINS: I mean, I don't know if it's
23 commonly referred to as that or not.

24 BY MR. McCUTCHEON:

25 Q. Well, I'll take the commonly out. Was that

1 referred to as the one thousand year flood event?

2 A. Yes.

3 Q. How do you design a box culvert that will
4 accommodate a thousand year flood event?

5 A. We cannot.

6 Q. Can anybody do that?

7 A. It would have to be huge.

8 Q. All right. What happened then in 2016?

9 A. We had another large storm event.

10 Q. Was that Hurricane Matthew?

11 A. Yes.

12 Q. And how do you design a box culvert that
13 would take care of that?

14 A. It would take a large one.

15 Q. All right. And both of those events, did
16 they not -- all right. Let's assume -- we know that
17 it flooded the first time and it was a thousand year
18 flood. Correct? Is that right?

19 A. Yes.

20 Q. Well, in order for -- either one of those
21 events, to have stopped this property from flooding,
22 what size culvert would you have to install there?

23 A. I couldn't say right here. It would have
24 to be large.

25 Q. How large?

1 A. I mean, I don't know.

2 Q. You would agree with me, did you not, that
3 those two events exceeded even the hundred year event?
4 If you don't know, that's fine.

5 A. I don't know.

6 Q. Okay. He also asked you about -- are roads
7 designed so that when you have major flood events that
8 simply the water overtopping the road is going to keep
9 structures from getting flooded?

10 MR. HOPKINS: Object to the form.

11 BY MR. McCUTCHEON:

12 Q. Sir, you can answer.

13 A. Are they designed to -- what now? Say that
14 again.

15 Q. Mr. Hopkins has asked you a lot of
16 questions in a series of questions about whether or
17 not that this road had been overtopped before. You
18 heard those?

19 A. Correct.

20 Q. What difference does that make in your
21 design of structures for culverts, whether it overtops
22 the road or not?

23 A. We try to design our culverts so it doesn't
24 overtop.

25 Q. Okay. But the one that was there, the

1 overtopping that we're talking about occurred when the
2 one that was there for the two-lane road?

3 A. Correct.

4 Q. It ain't got nothing to do with the new
5 four-lane road, does it?

6 A. Correct.

7 Q. He also asked you about rainfall totals.
8 You didn't go out and ask for any, did you?

9 A. I did not.

10 Q. Okay. Do you know whether or not anybody
11 on behalf of the DOT has since asked for some?

12 A. I do not.

13 Q. Okay.

14 MR. McCUTCHEON: I don't have any further
15 questions.

16 REDIRECT EXAMINATION

17 BY MR. HOPKINS:

18 Q. It wasn't even a consideration on your part
19 or Mr. Dix's part when he asked you in June of 2017 to
20 write up your addendum to collect rainfall data, was
21 it?

22 A. I was not involved with any rainfall data
23 at that time.

24 Q. And I'm not asking you to agree with the
25 numbers or accept the numbers, but if in 2015 in a

1 24-hour precipitation there had been on the closest
2 site to the Marlowes' a ten to 25-year interval amount
3 of rain at that place, the existing culvert would not
4 have even been sufficient for that according to your
5 2017 addendum, correct?

6 A. I can't say. I mean, it depends on where
7 the rainfall falls. I mean, if it falls upstream,
8 that could be correct. It if falls -- if you've
9 got -- if it's outside of the drainage area, you know,
10 I can't say for sure.

11 Q. I totally understand. I appreciate that.
12 What I'm asking, though, is that at least in 2017
13 you've now included in your addendum that the property
14 in the existing conditions would be impacted by a
15 25-year return interval. Can we agree on that?

16 A. Yes.

17 Q. If that is not important, why did you
18 include it in this addendum?

19 A. Because that is what the existing
20 conditions model that we had stated.

21 Q. And, so, you had the same information in
22 2013, correct?

23 A. Correct.

24 Q. You ran the model. You told me that.
25 Right?

1 A. Yes, sir.

2 Q. But you didn't include any of this
3 information in your 2013 report, did you?

4 A. We did not.

5 Q. Mr. Jack asked what difference does
6 overtopping make or what affect does it have, what
7 difference does it make. If it's not important, why
8 was it included in your 2013 report?

9 A. Because we're looking for problem areas.
10 I'm looking for an area that's flooded previously.

11 Q. And can we agree that if there is
12 overtopping of that area, although roadways are not
13 designed for that to be an outlet, that could be an
14 additional outlet for the water to escape from the
15 property, correct?

16 A. Yes.

17 Q. So, in 2017 your existing conditions model
18 says that there's at least almost two whole feet of
19 difference between the existing roadway and the lowest
20 elevation of the Marlowes' structure. Can we agree on
21 that?

22 A. Yes.

23 Q. And we can also agree, then, based on the
24 picture I showed you in Exhibit 5, depending on
25 whenever this dirt had been placed to build the new

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1 roadway there is an additional elevation for water to
2 escape from the Marlowes' property, correct?

3 A. Yes.

4 Q. And although we had some debate about what
5 a choke point is, I think we can agree this picture
6 reflects a choke point?

7 MR. McCUTCHEON: Object to the form.

8 MR. ROOF: I can't say.

9 BY MR. HOPKINS:

10 Q. Okay. Just based on your observation of
11 this photo, Mr. Stanley, does it look like water was
12 approaching or had overflowed the existing roadway,
13 the existing US-378, and is now being stopped by the
14 soil fill for the new roadway?

15 A. Are you asking me if it's overtopping in
16 that?

17 Q. Yes, sir.

18 A. It does not appear to be overtopping right
19 there.

20 Q. This is the existing 378?

21 A. Right.

22 Q. This is the new roadway. You're saying it
23 does not look like it overtopped the existing 378?

24 A. Are you asking in that picture is it
25 overtopping?

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1 Q. Does it appear that it did overtop the
2 existing roadway?

3 MR. McCUTCHEON: Object to the form of the
4 question.

5 MR. ROOF: Based on the picture I can't
6 tell you yes or no.

7 BY MR. HOPKINS:

8 Q. How do you think that water got there just
9 based on your observation of the picture?

10 A. How did this water get there?

11 Q. Yes, sir.

12 MR. McCUTCHEON: Object to the form of the
13 question. You may answer.

14 MR. ROOF: It passed through the culvert.

15 BY MR. HOPKINS:

16 Q. So you're saying that this is the
17 collection of the old culvert and now water has built
18 up there?

19 A. If it has to pass under the road to get to
20 that point, yes, I'm saying that.

21 Q. Well, your testimony and Mr. Willie's
22 testimony has been that the new culvert is being
23 installed in addition to this existing culvert being
24 there until it can be finally completed. So why then
25 if you're looking at this picture and seeing water

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1 went through the old culvert is it not going out the
2 new culvert?

3 A. It should be going out the new culvert.

4 Q. Okay. Why is it not then?

5 A. I do not know.

6 MR. HOPKINS: Okay. Those are all the
7 questions I have.

8 MR. McCUTCHEON: Hang on just a second.
9 I have no further questions.

10 COURT REPORTER: Mr. McCutcheon, will you
11 be ordering a copy of the transcript, sir?

12 MR. McCUTCHEON: Yes. I want big and
13 little. I don't need the electronic.

14 (The witnesses, after having been advised
15 of their right to read and sign this transcript, waive
16 that right.)

17 (Deposition was concluded at 12:22 p.m.)
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CERTIFICATE OF REPORTER

I, Mindy Vislay, Court Reporter and Notary
Public for the State of South Carolina at Large, do
hereby certify that the foregoing transcript is a
true, accurate, and complete record.

I further certify that I am neither related to
nor counsel for any party to the cause pending or
interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 15th day of December, 2019 at
Indian Land, Lancaster County, South Carolina.

Mindy L Vislay

Mindy Vislay,
Court Reporter
My Commission expires
August 29, 2027

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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign
require rejection of the deposition in whole or in
part.

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

JAMES MARLOWE AND LORI MARLOWE,

Plaintiffs,

vs. CASE NO. 2017-CP-21-01168

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
(SCDOT), SOUTHERN ASPHALT, AND UNITED
INFRASTRUCTURE,

Defendants.

DEPOSITION OF: LORI MARLOWE

DATE: October 17, 2018

TIME: 11:54 a.m.

LOCATION: Orr, Elmore & Ervin
504 S. Coit Street
Florence, South Carolina

TAKEN BY: Counsel for the Defendant SCDOT

REPORTED BY: KAREN M. ERNST, CSR
Court Reporter

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ALSO PRESENT:

JAMES DAVID MARLOWE

(INDEX AT REAR OF TRANSCRIPT)

LORI MARLOWE

being first duly sworn, testified as follows:

EXAMINATION

BY MR. McCUTCHEON:

Q. Mrs. Marlowe, you and I met off the record, but for the record, I am Jack McCutcheon, and I represent the DOT.

Did you hear all of the previous instructions and stuff that I told your husband about don't do this and don't do that and this and that and the other so I don't have to go through that again?

A. Yes.

Q. And you understand that?

A. Yes, sir.

Q. All right. Now, you are the wife of this young gentleman? And I use the term young because I'm old. You're his wife, correct?

A. Yes.

Q. And I purposely didn't ask him because I didn't want to embarrass him. What day were you married to that young gentleman?

A. June the 25th, 2005.

Q. June the 25th?

A. Uh-huh.

1 Q. Of when?

2 A. 2005.

3 Q. And where did that marriage take place?

4 A. Lee's Wedding Chapel in, I think it's a
5 Florence address.

6 Q. Okay. And how long had you known him
7 before you got married?

8 A. For several years. I don't remember.

9 Q. Okay. And how did you know him?

10 A. I met him through the cousin of my
11 ex-husband.

12 Q. You met him through the cousin of your
13 ex-husband?

14 A. Yes, sir.

15 Q. Okay. Well, let's explore that a
16 little bit. Where did you grow up, Mrs. Marlowe?

17 A. Timmons ville.

18 Q. Timmons ville?

19 A. Yes, sir.

20 Q. And this young gentleman over here is
21 your second marriage?

22 A. Yes, sir.

23 Q. And you hadn't had a third because he's
24 still sitting here.

25 A. That's right.

1 Q. And it looks like y'all are talking to
2 each other.

3 You were married one time before?

4 A. Yes.

5 Q. And what was your husband's name?

6 A. Samuel David Poston.

7 Q. Samuel David Poston?

8 A. Yes. From Johnsonville.

9 Q. From where?

10 A. Johnsonville.

11 Q. Do the two of you still speak to each
12 other?

13 A. When we have to.

14 Q. When you have to.

15 But you don't --

16 A. Conversate on a regular basis.

17 Q. Right. And you're not friends anymore.

18 If you have to say something to him, then you'll
19 say something to him?

20 A. We can be polite.

21 Q. And you can both agree to disagree?

22 A. True.

23 Q. Okay. And when did you marry

24 Mr. Poston? A year will be fine if you can give me
25 a year.

1 A. 2001.

2 Q. 2001, the Space Odyssey came out.

3 And when were you divorced?

4 A. Officially 2003.

5 Q. Okay. Any children by that marriage?

6 A. Kayla Poston.

7 Q. Okay. And that's the nice looking
8 young lady that was sitting behind you?

9 A. Yes.

10 Q. How old is Kayla?

11 A. Kayla is 16.

12 Q. 16?

13 And you only had the one child with
14 Mr. Poston?

15 A. Yes.

16 Q. And you said you grew up in
17 Timmons ville?

18 A. Yes.

19 Q. Did you go to high school in
20 Timmons ville?

21 A. No, sir. I went to Hudgens Academy in
22 Lynchburg.

23 Q. Hudgens Academy. What is that?

24 A. It is no longer operational, but it was
25 located in the Shiloh community right off I-95 in

1 Lynchburg.

2 Q. Was it private?

3 A. Yes.

4 Q. And did you graduate from that
5 academy --

6 A. I did.

7 Q. -- or did you go to high school
8 somewhere else?

9 A. No. I completed all of my years of
10 school there.

11 Q. All right. And any schooling beyond
12 high school?

13 A. Yes. I attended Florence-Darlington
14 Tech with an associate's degree in nursing.

15 Q. That's a two-year degree?

16 A. Yes, sir.

17 Q. An associate degree?

18 A. Yes, sir.

19 Q. When did you complete that?

20 A. 2000.

21 Q. The year of 2000?

22 A. Yes, sir.

23 Q. And did you work at the same time you
24 were going to Florence-Darlington Tech or not?

25 A. Yes. I worked on a PRN basis through

1 Carolinas Medical System.

2 Q. That's Carolinas Hospital?

3 A. It is now, yes. But the Carolinas
4 Medical System is actually the physician's division
5 part of that.

6 Q. Okay. And you worked for them. And
7 PRN means as needed?

8 A. Yes, sir. Sorry.

9 Q. Well, I know all about that because I
10 defend doctors and hospitals when they get sued.
11 In one regard I'm the good guy. In this one, I'm
12 not the good guy.

13 And how long did you work for them?

14 A. I worked with them, like I say, through
15 college and stayed on with them even after I
16 graduated college working with a couple of the
17 practices on an as-needed basis. That then
18 transformed into a full-time position with them
19 somewhere in the neighborhood of the year 2000.
20 And 2001, I would have been working full time with
21 them.

22 Q. And when you say them, that's the --

23 A. That's Carolinas Medical Alliance,
24 yeah, the medical system. Their particular
25 physician that I worked with at that time was

1 Wilner, Miller, and Brazil.

2 Q. Wilmer?

3 A. W-i-l-n-e-r.

4 Q. Miller?

5 A. Miller, yes, sir.

6 Q. And Brazil?

7 A. They were all three together in a
8 practice at that time.

9 Q. Where was that practice located?

10 A. It was in the Medical Mall B over at --

11 Q. Carolinas Hospital?

12 A. Uh-huh.

13 Q. And how long did you work for Carolinas
14 Medical Alliance?

15 A. To be honest, I don't remember the
16 year, but it would have been until the year that
17 Dr. Wilner took over Dr. Thomason's private
18 practice. And when he took over Dr. Thomason's
19 private practice, I moved with him to work in that
20 practice.

21 Q. Dr. Thomas (sic)?

22 A. Uh-huh.

23 Q. Do you know his first name? If you
24 don't, that's fine.

25 A. I don't.

10

1 Q. Where is he located?

2 A. Dr. Thomason is no longer practicing.

3 Q. Thomason?

4 A. Thomason, yes, sir.

5 He was retiring due to medical reasons
6 at the time, and that's why Dr. Wilner was taking
7 over his practice.

8 Q. And you worked with Dr. Wilner for how
9 long?

10 A. I worked with him until probably 2003
11 or 4.

12 Q. Okay. And then where did you go to
13 work?

14 A. Then I went to work with Carolinas Home
15 Health.

16 Now, the whole time that I worked full
17 time, I was working part time with Carolinas Home
18 Health also.

19 Q. What exactly is that?

20 A. That is where nurses go into the home
21 to care for patients to provide skilled care when
22 they need something.

23 Q. How long did you work with them?

24 A. That was a full ten years.

25 Q. Ten years?

11

1 A. Yeah. And, like I say, that would
2 fluctuate from a PRN position, then I was full time
3 for a while, then I went back PRN. So my jobs
4 overlapped over the years really.

5 Q. Did you work anywhere else?

6 A. When our son was born, I was laid off,
7 and I stayed home for a little while. And when I
8 went back to work, I actually found a job at
9 Florence OB-GYN Associates. They were an
10 independent practice. That would have been
11 Dr. Rainwater, Clary, and Chapman. And when
12 Dr. Rainwater and Clary joined McLeod, I went with
13 them to join McLeod.

14 Q. Okay. And are you still working now?

15 A. I'm not currently working now.

16 Q. All right. When did you cease working?

17 A. I got sick in November of 2017, so I
18 have not been back to work since then.

19 Q. All right. You got sick in November of
20 2017?

21 A. Yes.

22 Q. Sick how?

23 A. I thought I was having a flare up of my
24 asthma. Medicines were not working, and we
25 proceeded to do some further testing. And the

12

1 first part of December is when I was diagnosed with
2 my Stage IV lung cancer diagnosis.

3 Q. December of 2017?

4 A. '17, uh-huh.

5 Q. I notice in some of the paperwork,
6 particularly the Summons and Complaint --

7 A. Uh-huh.

8 Q. -- it alleges in the Complaint that as
9 a result of these two floods, that you had flare
10 ups of IBS.

11 A. True.

12 Q. Irritable bowel syndrome?

13 A. True.

14 Q. PID, pelvic inflammatory disease?

15 A. That was a diagnosis that I had
16 previous, but to my knowledge, that is not the
17 diagnosis I was given during this timeframe.

18 Q. All right. And I know you're not a
19 medical doctor, but you're a nurse?

20 A. Yes, sir.

21 Q. What do you think caused your flare up
22 of the IBS?

23 A. The extreme amount of stress, the
24 strenuous stress, in addition to normal everyday
25 stress of going to work every day and the logistics

1 of things.

2 Q. And when did that start to occur? Can
3 you tell me when it started?

4 A. I mean, it would have been after we had
5 to, you know, leave the home -- leave our home and
6 move into my parents' home.

7 Q. Can you be a little more specific as to
8 what exactly was happening?

9 A. With my IBS flare ups, I have a
10 tendency to have extreme abdominal pain and
11 diarrhea as well as nausea and vomiting. Until
12 this situation, I had never been for this long of a
13 period of time without being able to eat with being
14 nauseated to the point of just -- I mean, it went
15 on for months and months.

16 Q. Had you had flare ups prior?

17 A. I had had one flare up prior where I
18 had been hospitalized and put on IV fluids in order
19 to give my bowel time to rest and recuperate.

20 Q. Can you tell me who your doctor was?

21 A. Lane Wilner.

22 Q. Lane Wilner?

23 A. Yes, sir.

24 Q. Is he still around?

25 A. He is.

14

1 Q. Is he still practicing?

2 A. I think he is working as a hospitalist
3 at Carolinas, but I'm not 100 percent for sure.

4 Q. And he was with the group that you told
5 us about a moment ago?

6 A. Yes.

7 Q. And is that group still in business?

8 A. No, sir.

9 Q. Was it taken over by some other group,
10 or do you know?

11 A. I think that just slowly as they moved
12 onto their own, you know, ways, that the hospital
13 probably found physicians to fill in their spots.

14 Q. The flare up be that you had prior to
15 these events, was that the one with Dr. Wilner --

16 A. Yes.

17 Q. -- who treated you?

18 A. Yes.

19 Q. And can you explain to me what
20 happened?

21 A. Just when you get so sick from, you
22 know, having diarrhea for days and nauseated for
23 days, I mean, it's almost like having the flu, a
24 severe case of the flu that you can't get over.

25 Q. What caused it?

1 A. At that time when I had the original
2 flare up, I don't remember what was going on in my
3 life. I don't remember exactly what happened. I
4 had a lot of trouble with it right after my divorce
5 or as I was getting divorced, you know, not being
6 able to eat and being extremely nauseated a lot.
7 Like I say, this is --

8 Q. Can you list for me -- prior to this
9 incident, can you list for me or tell me the names
10 of physicians that you were treated by?

11 A. Dr. Lane Wilner was internal medicine,
12 so he was my --

13 Q. Lane Wilner?

14 A. Yes. He's my main physician. I also
15 saw the gastroenterologist, which was Dr. Razick.

16 Q. Dr. what?

17 A. Razick.

18 Q. R-a-z-i-k (sic)?

19 A. Uh-huh.

20 Q. He's at McLeod?

21 A. Yes, sir. No, he's at Carolinas.

22 Q. Carolinas now? I think he was at --

23 A. He did go to both hospitals at the
24 time, but that practice has split.

25 Q. All right. Anyone else?

1 A. Those are the only two that I saw prior
2 to --

3 Q. Okay.

4 A. -- getting sick this last time.

5 Q. And Razick was a gastroenterologist,
6 correct?

7 A. Correct.

8 Q. All right. How about the doctors that
9 you have seen after these two events?

10 A. Right. After these two events, I also
11 saw Dr. Wilner and Dr. Razick again.

12 Q. Wilner, Razick.

13 A. And then I began seeing Lindsey
14 Kaufmann, which is a physician's assistant at MUSC.

15 Q. Lindsey Kaufmann?

16 A. Yes.

17 Q. Is that K or C?

18 A. K.

19 Q. K-o-f-f-h-a-n?

20 A. K-a-u --

21 Q. Oh, K-a-u.

22 A. Yeah, m-a-n (sic).

23 Q. Kaufmann, okay.

24 And how often are you seeing her? Are
25 you seeing her now?

17

1 A. I have not seen her in the last couple
2 of months, but up until the last couple of months,
3 I was seeing her regularly like every three months
4 or so.

5 Q. And what was she treating you for?

6 A. She was treating me for the irritable
7 bowel syndrome.

8 Q. All right. And you hadn't seen her in
9 the last two months?

10 A. Correct.

11 Q. Is she a physician at MUSC?

12 A. She's a physician's assistant. She's a
13 PA at MUSC, yes.

14 Q. All right. Any other doctors or PAs
15 other than the ones you've told me about?

16 A. No.

17 Q. And just so I'm clear, prior to this
18 incident, you had one flare up of your irritable
19 bowel syndrome. Now, did you tell me what you
20 think caused that?

21 A. I think that was contributed or, you
22 know, left over from the divorce --

23 Q. The divorce?

24 A. -- proceedings and things.

25 Q. And then the others was as a result of

18

1 the stress generated by these two events?

2 A. Yes.

3 Q. The two floods; is that correct?

4 A. That's what I believe.

5 Q. All right. Now, I also noticed that it
6 indicates that, is it Kayla --

7 A. Yes.

8 Q. -- that's seeing somebody?

9 A. Yes.

10 Q. Who is she seeing?

11 A. She has seen Dr. Brandie Reynolds in
12 Pamplico.

13 Q. Brandie?

14 A. Yes, sir.

15 Q. Is that a woman?

16 A. Yes.

17 Q. Brandie Reynolds?

18 A. Reynolds.

19 Q. What kind of physician is she?

20 A. She's a medical physician, medical
21 doctor.

22 Q. And what is she seeing Dr. Reynolds
23 for?

24 A. Kayla has seen Dr. Reynolds for
25 headaches and stomach issues of nausea.

1 Q. Has the doctor told you what she thinks
2 causes that?

3 A. She has not. We're still working on,
4 you know, good sleep habits and those sorts of
5 things.

6 Q. Do you think it's related to these
7 events, or do you know?

8 A. I don't know.

9 Q. Okay. So you don't know one way or the
10 other?

11 A. Not for Kayla I don't.

12 Q. All right. Now, let's back up, if we
13 can. And I believe I forgot to ask other than
14 those already named by your husband and yourself,
15 do you have any other relatives in Florence County
16 over the age of 18 that we have not discussed?

17 A. Are you asking because of for witness
18 purposes --

19 Q. No. No.

20 A. -- or just --

21 Q. The reason I'm asking this is is if and
22 when we have to go into a Florence County courtroom
23 and try this case, I don't want any of your aunts
24 and uncles and --

25 A. I understand.

1 Q. -- boyfriends and any of that stuff on
2 the jury. That's why I'm asking those questions
3 rather than prying into your personal life.

4 A. The only reason I ask for clarification
5 is because that would be a lengthy list.

6 Q. A lengthy list?

7 A. Yes.

8 Q. Well, let's do it this way.

9 A. Okay.

10 Q. Why don't you just give me some last
11 names --

12 A. Okay.

13 Q. -- without naming each one of them.

14 A. That's fine. Severance.

15 Q. Severance?

16 A. Yes.

17 Q. S-e-v-e-r-a-n-c-e?

18 A. That's correct.

19 Q. Okay.

20 A. Langston.

21 Q. Langston. Okay.

22 A. And Matthews.

23 Q. Matthews?

24 A. Yes.

25 Q. And they all live where?

1 A. They are my daddy's family, sister's
2 family, that sort of thing.

3 Q. The Severance --

4 A. And the Witherspoons. I'm sorry.
5 Witherspoons.

6 Q. You ain't got no Witherspoons that live
7 in Horry County, do you?

8 A. No. Oh, yes, one.

9 Q. Who?

10 A. Billy.

11 Q. Billy Witherspoon?

12 A. Yes.

13 Q. I know him well. He was my -- this
14 world is getting smaller and smaller. He was my
15 scout master.

16 A. Oh, wow.

17 Q. What's the one beyond regular scouts?
18 Shoot. I forgot. Anyway, yeah, he was my scout
19 master.

20 A. Okay.

21 Q. So you also have Witherspoons in
22 Florence County.

23 A. Yes.

24 Q. The Severances, what part of Florence
25 County do they live in?

1 A. They live here locally off of Alligator
2 Road, that general area. Severance Welding & Steel
3 Fabrication is my family.

4 Q. Okay. Langston.

5 A. Langston is Karen and Glen Langston
6 over in Olanta.

7 Q. Olanta. Okay.

8 And Matthews?

9 A. Matthews is Lynette and Junior Matthews
10 off of Oliver Road. It's right here close in
11 Florence.

12 Q. And then Mr. Billy. Mr. Billy is not
13 with us anymore, is he?

14 A. No.

15 Q. He's deceased.

16 A. Uh-huh.

17 Q. He was a great guy.

18 His wife is still living, though, isn't
19 she?

20 A. Uh-huh, I think so.

21 Q. All right. So we've got all the
22 relatives and all that good stuff.

23 A. Okay.

24 Q. I meant to ask him, and I forgot. Have
25 you ever been convicted of a crime?

1 A. No.

2 Q. Have you ever been -- I don't need
3 that.

4 MR. McCUTCHEON: Can I just ask him off
5 the record?

6 (Off-the-record conference.)

7 BY MR. McCUTCHEON:

8 Q. Those things are all asked for jury
9 purposes. They'll be asking my people that when we
10 come around to talk to them.

11 Now, let's back up to 2015.

12 A. Okay.

13 Q. And 2015, October 2 through 6, of 2015,
14 is what I'm going to refer to as the first flood --

15 A. Okay.

16 Q. -- okay? Prior to that time, were you
17 having any medical issues prior to October the 2d
18 through the 6th, prior to that?

19 A. No. I had bouts of depression after
20 the children were born, those sorts of things.

21 Q. Okay. Post partum --

22 A. Yeah.

23 Q. -- depression?

24 A. Yeah.

25 Q. But nothing serious?

1 A. No.

2 Q. All right. I would assume you remember
3 the first flood.

4 A. Yes.

5 Q. What do you remember about it? I know
6 this is hard, so... It's okay. Take your time.

7 A. The biggest thing that sticks out in my
8 mind is just trying to grab as much as we could,
9 our belongings --

10 Q. Okay.

11 A. -- to save as much as we could before
12 we left.

13 Q. Okay. And I'm not going to go through
14 a long litany of stuff between the first one and
15 the second one.

16 A. That's all right.

17 Q. But there was also a second flood,
18 correct?

19 A. Yes. Yes. The second flood, for
20 obvious reasons, because we had just -- we had just
21 gotten home. We had only been home about four
22 weeks -- or, no, excuse me, somewhere in the
23 neighborhood of eight weeks maybe.

24 Q. When you say gotten home, you mean
25 after --

1 A. We had reconstructed the house or, you
2 know, put it back together. And our goal was to
3 try to move back home before the kids went back to
4 school so that Sunday night before school started
5 on Monday, we had managed to get mattresses and put
6 them on the floor, so we were able to use those,
7 and we were kind of camping in our house, so to
8 speak. So, like I say, we got to stay there.

9 It was in the neighborhood of about
10 eight weeks before we knew that the next storm was
11 coming. Jaime was on night shift yet again, so
12 what we did was we moved the mattress -- by that
13 time we had managed to get beds to actually put the
14 mattresses on. So we took the mattresses off of
15 the beds and stacked them up on the kitchen tables,
16 had taken the new recliner and put it up on top of
17 the coffee table, you know, those sorts of things.
18 So we just lifted everything as high off the ground
19 as we could. And Jamie left to go to work, and I
20 took the children and went back to my momma and
21 daddy's.

22 Q. Okay. So the first flood was in 2015.

23 A. '15, yes, sir.

24 Q. October the 2d through the 6th. And
25 after that, I think your husband said that y'all

1 did a lot of the work. You got assistance from
2 FEMA. You took out a loan, those kinds of things,
3 and you got the house back to livability; is that
4 correct?

5 A. Yes.

6 Q. All right. And you had lived in there
7 for approximately eight weeks; is that correct?

8 A. Correct.

9 Q. And then, unfortunately, storm No. 2
10 came through. And what happened as a result of
11 that?

12 A. The water ended up in the house again.
13 And that time it was just a few inches shy of where
14 it had been with the first flood.

15 Q. Okay.

16 A. As the best of my recollection, the
17 first time was somewhere in the neighborhood of
18 18 inches, and the second time was somewhere in the
19 neighborhood of 15 to 16 inches.

20 Q. All right. So it was a little bit
21 less.

22 A. Yes.

23 Q. But now you do not live in the house
24 now.

25 A. No, we do not.

27

1 Q. And you have rented a house?

2 A. Yes.

3 Q. And the rental payments are \$400 a
4 month?

5 A. Correct.

6 Q. Where is that house in relation to
7 your --

8 A. That house is about five minutes closer
9 to Lake City, so it's about five minutes further
10 away from our original home.

11 Q. Okay. And who owns that house?

12 A. Brandon Poston.

13 Q. Is he related to you?

14 A. He is not.

15 Q. Was he?

16 A. No.

17 Q. He wasn't related to the Poston guy?

18 A. No.

19 Q. Okay. And you've been living there
20 since the second flood?

21 A. No. We actually moved in with my
22 parents again --

23 Q. Okay.

24 A. -- for the second time.

25 As time drug on, and it just became

1 more stressful on everybody being all in one house,
2 we began looking for somewhere to rent.

3 Q. Okay.

4 A. Brandon Poston is a preacher of one of
5 the local churches close to our house. And as he
6 would ride by our house and had seen it had
7 flooded -- I had never even met him before the
8 house flooded. He just saw our mess, and he was
9 being nice and stopped, and then he would stop
10 regularly and more often. And so when he came into
11 possession of this house, he said, well, you know,
12 we would love to have y'all live here in order to
13 help us out. You know, we could make rent to them,
14 and they could use that rent to pay on the payment
15 of the house.

16 Q. All right. And how long did you live
17 with your parents?

18 A. We lived with my parents until October
19 of '17.

20 Q. '17?

21 A. Right.

22 Q. And when you moved into this other
23 house, did the stress level go down?

24 A. Considerably.

25 Q. No offense to your family.

1 A. No, none taken.

2 Q. But it went down considerably?

3 A. Considerably.

4 Q. And was it while you were living in
5 your parents' house that you had the flare ups of
6 the irritable bowel syndrome, or was it both times,
7 both places?

8 A. Both times, both incidents. Like I
9 say, it drug on for months. It almost never let up
10 during that two years.

11 Q. Did you have to stop work because of
12 it?

13 A. To be honest, I missed many days of
14 work. It actually was to the point that my office
15 manager sat me down and told me, she said, you've
16 got to do something. That was when I started
17 reaching out to MUSC for help for additional
18 treatment because my employer was saying you've got
19 to do something or you're not going to be here much
20 longer.

21 Q. And tell me again who you see at MUSC.

22 A. Lindsey Kaughmann.

23 Q. L-i-n-d-s-e-y?

24 A. Yes.

25 Q. Caughman, C-a-u-g-h-m-a-n (sic)?

1 A. Yes.

2 Q. And is she in Charleston?

3 A. Yes.

4 Q. What kind of physician is she?

5 A. Gastroenterology.

6 Q. And are you seeing her now?

7 A. Yes. I'm still a current patient. I
8 have not had a recent follow up in the last three
9 months.

10 Q. And what exactly is she treating you
11 for?

12 A. For irritable bowel syndrome.

13 Q. Okay. Have you ever been told that you
14 had or have PID, pelvic inflammatory --

15 A. Once many years ago. And to be quite
16 honest, when I saw the specialist -- that was a
17 nurse practitioner in a local office that diagnosed
18 that, and when they sent me to the specialist, I
19 was told that that was not an accurate description.

20 Q. Okay. Cool. I believe you.

21 Now, let's talk about after the first
22 flood.

23 A. Okay.

24 Q. And you moved in with your parents.

25 A. Yes.

1 Q. Then you moved into the rental house,
2 correct?

3 A. Not after the first flood.

4 Q. All right. You moved into the rental
5 house after the second occasion.

6 A. Yes.

7 Q. Okay. Now, as far as the first flood
8 is concerned, your husband has told us -- and I'll
9 ask you -- apparently you lost lots and lots of
10 stuff.

11 A. Yes.

12 Q. And we have been presented with a
13 document dated 10-18, 2017, and it's called a Loss
14 Spreadsheet - Dropbox. Are you familiar with that?

15 A. Yes.

16 Q. It was previously marked as Defendant's
17 Exhibit No. 1 in your husband's deposition, and we
18 will incorporate it into this deposition with the
19 same number (Referenced from James Marlowe's
20 Deposition).

21 Let me show you this, ma'am --

22 A. Yes.

23 Q. -- and ask if you can tell me what that
24 is.

25 A. This is my best attempt at trying to

1 keep track of the things that we identified as
2 losses.

3 Q. All right. Now, is that from both
4 floods or just one flood?

5 A. This is mostly just from the first. As
6 Jamie said, a lot of these big ticket items, we
7 never replaced them the second go around, so I
8 never actually completed a second separate
9 spreadsheet for the second time that the house was
10 flooded.

11 Q. All right. Do the numbers in there
12 correspond to what you lost? Are there additional
13 monies?

14 A. These monies that are here are where I,
15 you know, searched to just try to find numbers to
16 attach to the items that we lost.

17 Q. Okay.

18 A. We did not -- for reasons of storage
19 and space constraints, we weren't able to replace
20 things.

21 Q. I understand.

22 A. These are just things that, yes, they
23 were a mess, and we had to put them in the back of
24 the truck, and we hauled them off to the dump.

25 Q. So I guess my question is -- and I'm

1 not clear on this quite yet -- do the numbers
2 contained in there represent the losses from both
3 floods?

4 A. No.

5 Q. No. All right.

6 The numbers in there are represented by
7 which flood?

8 A. The first one.

9 Q. The first one.

10 A. Yes, sir.

11 Q. All right. And the numbers in there
12 are contained on the last page, I think? And it's
13 in yellow?

14 A. Yes, sir.

15 Q. And that number is what?

16 A. \$37,749.65.

17 Q. Okay. Now, is there a document that
18 represents what you lost as a result of the second
19 flood?

20 A. I have not created one of those yet.

21 Q. All right.

22 A. Yes.

23 Q. Can you give me a ballpark figure as to
24 what you think that number would be, an estimate?

25 A. It would be a complete guesstimate.

1 Q. That's fine. Right now we're just
2 guessing, and I'll take a guess.

3 A. I would venture to say it was somewhere
4 in the neighborhood of the same price as this,
5 maybe more. And the reason I say that is because
6 we had just replaced the flooring. We had just
7 replaced all sorts of things that, you know...

8 Q. Okay. So you're saying that generally,
9 generally in the same neighborhood as this one,
10 which is 37,749.65. So if we took that number and
11 doubled it --

12 A. Doubled it.

13 Q. -- then that would be somewhat
14 realistic as to what you have lost?

15 A. I think so.

16 Q. All right. And I'm trying to remember.

17 MR. McCUTCHEON: Off the record for a
18 minute.

19 (Off-the-record conference.)

20 MR. McCUTCHEON: Back on the record.

21 BY MR. McCUTCHEON:

22 Q. Have you provided your medical bills to
23 Mr. Hopkins?

24 A. Not that I remember. I did not.

25 Q. All right. Do you have your medical

1 bills?

2 A. I would have to look for them.

3 Q. All right. Can you look for whatever
4 medical bills you have?

5 Now, we have some medical records, I
6 think, don't we?

7 MR. GARRAUX: Uh-huh.

8 THE WITNESS: You should. I do
9 remember signing the releases.

10 BY MR. McCUTCHEON:

11 Q. We do have medical records, but I don't
12 remember seeing any medical bills.

13 MR. GARRAUX: No. I have just records.

14 MR. McCUTCHEON: I didn't think so.

15 MR. HOPKINS: I have billing from
16 everybody but McLeod Health. And I'll send that to
17 y'all you right now.

18 MR. McCUTCHEON: I don't see want it
19 now. Then I've got to look at it now. You send it
20 to me later.

21 MR. HOPKINS: I'll send it later.

22 MR. McCUTCHEON: Because I don't want
23 to have no more questions about that. And I know
24 she doesn't.

25 BY MR. McCUTCHEON:

1 Q. Now, let's go back. How are you doing
2 now with your IBS?

3 A. That is much better.

4 Q. Much better?

5 A. Yes.

6 Q. Do you still have it?

7 A. Well, that's difficult to say because
8 of the fact of the new chemotherapy that I'm taking
9 produces all sorts of things. But let me say my
10 stress is much less. My stress, in the grand
11 scheme of things, is much less, so...

12 Q. Well, let's put it this way. I know
13 it's hard to differentiate one stress from another
14 stressor --

15 A. Right.

16 Q. -- but as far as this is concerned,
17 your stress level is what, way down?

18 A. I would say it's way down.

19 Q. All right. But the stress from the
20 other is not way down.

21 A. No.

22 Q. Obviously not.

23 A. Right.

24 Q. And if you want somebody to talk to, I
25 have a law partner who was diagnosed with Stage IV

1 breast cancer, let's see, 14 years ago.

2 A. Wow.

3 Q. So there's hope, darling.

4 So the stress level now would probably
5 be more attributable to your medical condition --

6 A. Absolutely.

7 Q. -- rather than, you know... And as I
8 told your husband, you're in my prayers because
9 I've been through this with her, I've been through
10 it with several friends, and I wish you nothing but
11 the best.

12 A. Thank you.

13 Q. And I wish that you and I didn't have
14 to be sitting across this table, and I know you do.

15 A. Yes.

16 Q. Now, I've got a stack of documents
17 here, ma'am, that I need to talk about a little bit
18 since I was advised that you're the money person in
19 the family. These were provided to us by
20 Mr. Hopkins. And it says Wells Fargo Regular
21 Savings. With one exception, it runs from -- wait
22 a minute -- it runs from July 1, 2015, through
23 October 31st of 2016. All right. Let me show you
24 this packet of documents --

25 A. Uh-huh.

1 Q. -- and you tell me what that is
2 (Referenced from James Marlowe's Deposition).

3 A. This was or is, because it still
4 exists, the account that I used in order to try to
5 keep the money related to the house separate from
6 our own --

7 Q. Okay.

8 A. -- daily finances.

9 Q. That makes sense.

10 All right. And is that why --

11 A. That explains why the account is like
12 it is. It was originally an account that I had set
13 up for Kayla in hopes of putting some money aside
14 for college. It didn't exactly work out that way,
15 but I still had that account opened and easily
16 accessible to me and easy to move money back and
17 forth between a checking account and this savings
18 account --

19 Q. Right. So that's why it's called --

20 A. -- because I had a checking account
21 there also.

22 Q. -- what it's called.

23 A. That's why, yes, uh-huh.

24 Q. But you're not using her money.

25 A. No.

1 Q. I didn't think -- I didn't think you
2 were, but I had to ask.

3 A. No. I understand.

4 Q. All right. Let me hold it just a
5 second. And it starts -- and I'll tell you the one
6 that I'm missing, and I don't know whether you can
7 find it or not. I'm missing one -- is December,
8 December of 2015.

9 A. Okay.

10 Q. I didn't find.

11 A. Okay. That's fine. I can download it
12 again. I'm sure it's still available. It should
13 be.

14 Q. I'm almost sure that's the one that's
15 missing. But just so I don't have to go through --
16 and this is -- it has the appearance of being a
17 bank statement.

18 A. Essentially.

19 Q. Essentially.

20 A. Uh-huh.

21 Q. And it shows deposits, and it shows
22 withdrawals.

23 A. Uh-huh.

24 Q. And in the first one, it shows a
25 beginning balance of \$431 and some change; is that

1 correct?

2 A. Yes.

3 Q. Now, why did you set -- this was set up
4 as your daughter's account, and that's why it was
5 set up under the Uniform Gift to Minor's Act.

6 A. Uh-huh.

7 Q. UGMA.

8 A. Yes.

9 Q. Correct?

10 A. Yes.

11 Q. And that was a balance. And then I
12 notice if you turn to the second sheet, it shows a
13 lot of deposits.

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes. I'm sorry.

17 Q. And where would the money have come
18 from to make those deposits?

19 A. So these first -- because this first --
20 maybe the --

21 Q. Do you know what it means when it says
22 mobile transfer?

23 A. That's what I was looking. I usually
24 try to make a note out to the side why I was moving
25 it or why I would take it out.

41

1 Q. Well, if you don't know, that's fine.

2 A. And I don't know the specifics.

3 Q. That's fine.

4 A. These initial first deposits, obviously
5 these were done before the house flooded. Those
6 \$100 increments would have been her child support
7 checks.

8 Q. Okay. I got you. So those are before.

9 A. So those are before the house flooded.

10 Q. Okay. And that's in July.

11 The next one -- I'm sorry, the one
12 we're missing -- well, I'll get to that in a
13 minute.

14 The next one I have is October 1, 2015,
15 through October 31. And it shows the beginning
16 balance of 1400 bucks, and then it shows a deposit
17 of \$22,000 and some change. And apparently those
18 are FEMA money, in addition to some other monies --

19 A. Yes, uh-huh.

20 Q. -- that were put in there?

21 A. Exactly, uh-huh.

22 Q. All right. You have to say yes.

23 A. Yes. Sorry.

24 Q. She has to put it down.

25 And so that one was total FEMA money of

1 22,000 -- no, not that much. One of them was
2 \$19,827.09, the second one was \$918.90; is that
3 correct?

4 A. Yes.

5 Q. And then those other mobile deposits
6 were the same thing that you were talking about,
7 child support?

8 A. Let me look at those. No. Those were
9 additional gifts and items that would have been
10 given to us to be used for our house.

11 Q. Okay. I got you.

12 A. Like I say, essentially once this
13 incident occurred, I used that account just for
14 that because as you can imagine, money gets crazy,
15 and you're trying to make sure that you keep things
16 separated so that you can know what you're dealing
17 with.

18 Q. Okay. So the next one is November 1
19 through November 30. And the beginning balance was
20 23 and some change, the ending balance was 20 and
21 some change. And it shows two --

22 A. Those are direct deposits from a
23 GoFundMe account that someone had set up for us,
24 and so it came to us in our name, and it's a direct
25 deposit from that account.

1 Q. That's not from FEMA.

2 A. No, sir.

3 Q. That's a go fund. That's another
4 account.

5 A. That's a donation, yes.

6 Q. Now, it shows -- do we have any way of
7 knowing what that \$3,000 was? Did you transfer it
8 to a checking account?

9 A. Yes. That is -- that's a withdrawal,
10 so what I would do is anytime we knew we were going
11 to Lowe's, we would kind of guesstimate how much we
12 thought we would spend because I don't have a card
13 for a savings account --

14 Q. I understand.

15 A. -- so I would take that money and
16 transfer it to the checking so that we could then
17 spend it at Lowe's or Home Depot --

18 Q. All right. So that money would have
19 been spent --

20 A. -- wherever that was applied. That
21 would have been money spent on the house, uh-huh.

22 Q. Okay. Then we have December 1, and
23 I'll just -- now, this one has -- I would assume
24 that the transfer to checking was for the same
25 reason.

1 A. Correct.

2 Q. And then these mobile deposits were
3 from this?

4 A. Just miscellaneous gifts and things.

5 Q. Okay. And then apparently in January
6 is when you took out the SBA loan?

7 A. It takes quite a while to complete all
8 that paperwork --

9 Q. Yeah.

10 A. -- but if that's where that deposit
11 went, then that's when it came in.

12 Q. It's showing a deposit of 25,000 in
13 January.

14 A. Correct, yes.

15 Q. Which then brought the total in there
16 to \$52,000 and some change?

17 A. Yes.

18 Q. Okay. And this one basically shows two
19 interest payments?

20 A. Right.

21 Q. And then I want to ask you a couple
22 things about this one. The beginning balance
23 started at 52,017.45, and it had a deposit. That's
24 the interest probably.

25 A. Right. It is.

1 Q. But then it's showing subtractions of
2 16,000 and some change, and I was curious about one
3 of them.

4 A. Okay.

5 Q. It looks like you paid off your car
6 loan right there.

7 A. Yes.

8 Q. Okay. So you paid off your car loan.
9 Now, that's not -- is that FEMA money?

10 A. No.

11 Q. Was that a car that was damaged --

12 A. No.

13 Q. -- or was that the car that you were
14 driving?

15 A. That's the car that I was driving.

16 Q. And why did you pay it out of here?

17 A. Because we needed to be able to
18 consolidate some things in order to be able to keep
19 afloat.

20 Q. All right. And then this one shows
21 \$500 to Lowe's. I'm assume that's for stuff.

22 A. Yes. Then that's the deposit on the
23 cabinets for the house.

24 Q. Septic tank.

25 A. Uh-huh. And then the final payment for

1 the cabinets.

2 Q. Final payment for the cabinets.

3 A. Yes.

4 Q. Okay. And I'm going to answer one of
5 the questions for you. The sheetrock was \$1100.

6 A. Technically, it was more than that
7 because he went and took money out of his checking
8 account to finish paying the man, and I got on him
9 about that.

10 MR. McCUTCHEON: You shouldn't have
11 done that, Boy.

12 MR. MARLOWE: I'm learning.

13 BY MR. McCUTCHEON:

14 Q. So it was more than \$1100?

15 A. Yes, sir.

16 Q. So we still don't know.

17 And these apparently -- and I need to
18 see if you can look and maybe find if there's a
19 sheet missing.

20 A. Okay.

21 Q. This one shows withdrawals.

22 A. Oh, there it is. It's on the bottom of
23 the sheet.

24 Q. Oh, I'm sorry.

25 A. That's okay. It's the air

1 conditioning.

2 Q. Air conditioning.

3 Why don't you look, dummy.

4 A. It just printed a little differently
5 for some reason.

6 Q. That's my 72-year-old brain. Sometimes
7 it functions, and sometimes it doesn't.

8 July 1, this is the end of 2016. These
9 are ATM withdrawal. I didn't ask you, but you
10 probably needed some spending money.

11 And then we've got the floor and the
12 carpet.

13 A. Yes, sir. And then there's some more
14 flooring on that side.

15 Q. Yep. 2,000 for the flooring.

16 And then in August, there appears to be
17 a somewhat large transaction. But there's one at
18 \$300.

19 A. Uh-huh.

20 Q. It doesn't say what it's for, but I'm
21 not real concerned about that.

22 A. I do remember some of these ATM
23 transactions like that were where I would withdraw
24 money in order to pay Dave for some of the time.
25 He spent a tremendous amount of time tearing out

1 stuff and teaching Jaime and I how to rebuild the
2 house.

3 Q. Well, good for him.

4 And then we have TV mounts.

5 A. Uh-huh.

6 Q. Hall bathroom.

7 A. Uh-huh. Because we went to Lowe's and
8 bought all that stuff for the hall bathroom.

9 Q. Right. And then you got mattress
10 covers.

11 A. Uh-huh.

12 Q. Checking Home Furnishings right there.

13 A. Yes.

14 Q. Okay.

15 A. I tried to make notes so that I would
16 know in the future where it went.

17 Q. I'll tell you what, you did a bang up
18 job. That's all I know. I don't think I could
19 have done that well.

20 There's nothing in that.

21 Now, it appears that in -- this one is
22 October 1, 2016, through October 31, 2016. Would
23 this have been after the second flood because it
24 shows a FEMA deposit.

25 A. Yes.

1 Q. Okay.

2 A. So that would have been the second
3 deposit for the second flood.

4 Q. All right. And it shows a deposit
5 right here from FEMA?

6 A. Yes.

7 Q. Now, the next question I have -- and I
8 can either direct it to you or to your attorney --
9 do you have the ones after that?

10 A. I can download them. We haven't spent
11 any -- we haven't done any further work on the
12 house so the money is just sitting there, so, yes,
13 I can print those months.

14 Q. Well, if you haven't spent any of it,
15 darling, you don't have to. I believe you.

16 A. No. I mean, it's there.

17 Q. All right. I believe you. So that
18 same amount is still there?

19 A. Uh-huh.

20 Q. That's fine with me.

21 Now, your husband said he talked to
22 some folks --

23 A. Uh-huh.

24 Q. -- with the DOT. Did you ever talk to
25 anybody at the DOT?

1 A. I did not.

2 Q. Did you ever talk to anybody at
3 Southern Asphalt?

4 A. I did not.

5 Q. Did you ever talk to anybody at UIG
6 Infrastructure?

7 A. I spoke with Kevin Piner on an
8 unofficial basis as a friend.

9 Q. What did he say?

10 A. His comment to me was that I needed to
11 do what was best for my family and not worry about
12 the fact that I was a friend of his and that he
13 worked for that company.

14 Q. Okay. I got you.

15 And with that, I can put two and three
16 together and figure out what all of that means.

17 How are you doing today?

18 A. Pretty good.

19 Q. Well, you got the pretty part right.

20 A. Thank you.

21 Q. You're quite welcome.

22 And once again, I told your husband and
23 I'll tell you, I certainly wish that you and I
24 weren't sitting across this table from each other,
25 and I know you don't?

1 A. Me too.

2 Q. And with both of your things going on
3 right now, you're in my prayers, and I wish you the
4 best.

5 A. Thank you.

6 Q. Thank you. I don't have anymore
7 questions.

8 EXAMINATION

9 BY MR. WILLIAMS:

10 Q. Ms. Marlowe, my name is James Williams,
11 and I represent United Infrastructure Group. I
12 don't have any questions.

13 We just spoke about -- I know you spoke
14 with Mr. Piner --

15 A. Uh-huh.

16 Q. -- unofficially. Is that, what you
17 just testified to, is that the extent of your
18 conversations with him about the flood and the
19 damages to your house and the causation and
20 basically everything related to the lawsuit?

21 A. For the most part. Like I say, you
22 know, we just talked on a social level and, you
23 know, and he had been there working, and obviously
24 with him working from the crane, he could see how
25 the water would rise and that sort of thing, but

1 that was it.

2 Q. Okay. Do you have any direct knowledge
3 of the different defendants' scope of work on the
4 road and the bridge and the culverts and the
5 design?

6 A. No, sir.

7 Q. Okay. I think that's all I have.
8 Thanks.

9 A. Thank you.

10 EXAMINATION

11 BY MR. GARRAUX:

12 Q. All right. Ms. Marlowe, I don't really
13 have many questions for you, but let me just kind
14 of glance at my notes and make sure I don't miss
15 something. I guess the first question, did
16 Mr. Marlowe own the home before you married, or did
17 y'all purchase that home together?

18 A. No. He owned it before we got married.

19 Q. And I meant to ask him this, but I
20 forgot. Do you know what the purchase price was of
21 that house?

22 A. I do not.

23 Q. And do you have an accounting as to
24 what you've purchased out of that account?

25 A. Off the top of my head, I don't know,

1 but like I said, it could easily be figured with a
2 calculator, I'm sure.

3 Q. Just by looking at the records --

4 A. Right.

5 Q. -- of the monthly statements?

6 A. I think so, yeah.

7 Q. Okay. And just to make sure, you don't
8 recall ever speaking to anyone from Southern
9 Asphalt about the project or either one of the
10 flooding events; is that correct?

11 A. No, sir. That's correct.

12 Q. All right. Those are all the questions
13 I have. Thank you.

14 EXAMINATION

15 BY MR. McCUTCHEON:

16 Q. My understanding is you're going to
17 prepare one of these?

18 A. I can. I will.

19 Q. Would you, please --

20 A. Yes.

21 Q. -- as to the second?

22 A. Yes.

23 (This page contains information to be
24 supplied by counsel and/or the deponent.)

25 BY MR. McCUTCHEON:

1 Q. And the other request that I would make
2 is can you print these into -- has any money been
3 spent?

4 A. Not that I remember off the top of my
5 head, but I can certainly -- Wells Fargo, you can
6 go online and print your own statements, and so I
7 can go in and pull those statements from those
8 previous months.

9 Q. Well, if you will just pull them, and
10 if they're not showing any payments, don't worry
11 about it.

12 A. Okay.

13 Q. I don't need them. We don't need them.
14 But if they are, just copy the ones that do.

15 A. Okay.

16 Q. Okay?

17 A. Uh-huh.

18 Q. Thank you, ma'am.

19 (This page contains information to be
20 supplied by counsel and/or the deponent.)

21 MR. WILLIAMS: I've got one more, I
22 think.

23 EXAMINATION

24 BY MR. WILLIAMS:

25 Q. I may have missed this question and

55

1 answer, and if I have, I'm sorry. You were in here
2 for your husband's deposition too, and he was asked
3 a similar question. Can you just kind of say why
4 you sued the three defendants you sued and why they
5 are defendants and what you think they did wrong?

6 A. Essentially, essentially it's just the
7 fact that we take issue with the way the roadwork
8 has been done or was implemented. That, you know,
9 in our opinion, that is what caused the water to
10 back up on the property. And when we consulted
11 with an attorney, we were then advised that this is
12 the route that we should take and the way we should
13 approach it.

14 Q. Okay. And when you say roadwork, do
15 you have anymore details of that?

16 A. When I say roadwork, I mean the highway
17 was only two lanes prior, and they drew up the
18 drawings to make it a four-lane highway. We
19 understand that it's an evacuation route so that
20 it's important, but essentially with the way the
21 roadwork was done, when they hauled the dirt in in
22 order to elevate that roadway to make sure that it,
23 you know, would be good and stable in the future in
24 an evacuation situation, that left nowhere for the
25 water to go. Because of the fact that the culvert

1 was put in in phases, essentially, the water just
2 ran deadhead into the mound of dirt where the
3 highway was going to go, and then it then had to
4 divert to get to the culvert where it needed to be
5 in order to drain. It just wasn't able to drain.

6 Q. Okay. That's it.

7 (The witness, after having been advised
8 of her right to read and sign this transcript,
9 waives that right.)

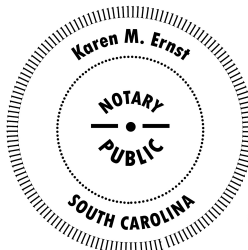
10 (The deposition was concluded at
11 12:52 p.m.)
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CERTIFICATE OF REPORTER

I, Karen M. Ernst, Court Reporter and
Notary Public for the State of South Carolina at
Large, do hereby certify that the foregoing
transcript is a true, accurate, and complete
record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 21st day of October,
2018, at Myrtle Beach, Horry County,
South Carolina.



Karen Ernst

Karen M. Ernst
Court Reporter
My Commission expires
September 2, 2025

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Deposition of:
James David Marlowe

October 17, 2018

In the Matter of:
**James And Lori Marlowe Vs. SCDOT,
Et Al.**

[A. William Roberts, Jr & Assoc.](#)

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Page 1

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF FLORENCE
JAMES MARLOWE AND LORI MARLOWE,
Plaintiffs,
vs. CASE NO. 2017-CP-21-01168
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
(SCDOT), SOUTHERN ASPHALT, AND UNITED
INFRASTRUCTURE,
Defendants.

DEPOSITION OF: JAMES DAVID MARLOWE
DATE: October 17, 2018
TIME: 9:59 a.m.
LOCATION: Orr, Elmore & Ervin
504 S. Coit Street
Florence, South Carolina
TAKEN BY: Counsel for the Defendant SCDOT
REPORTED BY: KAREN M. ERNST, CSR
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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James David Marlowe
James And Lori Marlowe Vs. SCDOT, Et Al.

Page 2 1 APPEARANCES OF COUNSEL: 2 ATTORNEY FOR PLAINTIFFS 3 JAMES MARLOWE AND LORI MARLOWE: 4 5 HOPKINS LAW FIRM 6 BY: J. CLAY HOPKINS 7 12019 Ocean Highway 8 Pawleys Island, South Carolina 29585 9 843-314-4202 10 Clay@HopkinsFirm.com 11 12 ATTORNEY FOR DEFENDANT 13 SOUTH CAROLINA DEPARTMENT OF 14 TRANSPORTATION (SCDOT): 15 THOMPSON & HENRY, P.A. 16 BY: JOHN B. McCUTCHEON, JR. 17 1300 Second Avenue 18 Conway, South Carolina 29526 19 843-248-5741 20 jmcutcheon@thompsonlaw.com 21 22 ATTORNEY FOR DEFENDANT 23 SOUTHERN ASPHALT: 24 RICHARDSON PLOWDEN 25 BY: JARED H. GARRAUX 1900 Barnwell Street Columbia, South Carolina 29201 803-253-8717 jgarraux@RichardsonPlowden.com 17 18 ATTORNEY FOR DEFENDANT 19 UNITED INFRASTRUCTURE: 20 COLLINS & LACY, P.C. 21 BY: JAMES L. WILLIAMS 22 1330 Lady Street, Sixth Floor 23 Columbia, South Carolina 29201 24 803-256-2660 25 jwilliams@collinsandlacy.com 26 27 ALSO PRESENT: 28 29 LORI MARLOWE 30 BRANDON MARLOWE 31 HAILEY MARLOWE 32 KAYLA POSTON	Page 4 1 because if we're talking at the same time, it's 2 hard for her to get it down. 3 We need to say yes and no instead of 4 uh-huh and huh-uh. It's hard to pick that up. 5 This is not an endurance contest. I'm 6 not normally a long-winded attorney, and I hope I 7 won't be today, depending on where we need to go 8 with this particular case. 9 If at any time you don't understand my 10 question, I want you to be sure and tell me that 11 you don't understand it so I can either rephrase it 12 or explain to you what I'm talking about. 13 Like I said, it's not an endurance 14 contest. If at any time you need to take a break 15 for any reason, you do not have to tell me the 16 reason. I would admonish you, however, that if we 17 take a break during this deposition, you're not 18 allowed to discuss any matter with your attorney. 19 Once it starts, it's me and you. 20 I'm not going to be ugly. I'm not 21 going to scream and shout and jump up and down and 22 fuss with you. I'm not going to do that. 23 And hopefully we can get through this, 24 and it won't take very long, okay? 25 A. Yes, sir.
Page 3 1 JAMES DAVID MARLOWE 2 being first duly sworn, testified as follows: 3 EXAMINATION 4 BY MR. McCUTCHEON: 5 Q. Good morning, Mr. Marlowe. 6 A. Good morning. 7 Q. How are you? 8 A. Wonderful. 9 Q. Okay. We know each other. We've met 10 before. My name is Jack McCutcheon. I'm an 11 attorney from Conway, South Carolina. I represent 12 the South Carolina Department of Transportation in 13 a lawsuit brought on behalf of you and your family, 14 Mr. Hopkins, and Ms. Elmore. 15 What we're here for today is to take 16 your deposition. I will be asking some questions, 17 and then these gentlemen may also have some 18 questions. 19 I'm required by the State of South 20 Carolina to give you a few rules that we have to go 21 by. Of course, obviously I'm going to be asking 22 the questions, and obviously you're going to be 23 answering the questions. For the court reporter's 24 benefit, you need to let me finish my question 25 before you answer, and I'll try to do the same	Page 5 1 Q. I need for you to state your full name 2 for the record. 3 A. James David Marlowe. 4 Q. And what is your date of birth, 5 Mr. Marlowe? 6 A. That would be March the 26th, 1978. 7 Q. And where are you living right now? 8 A. I am currently living on 760 Tyler 9 Road. 10 Q. 760? 11 A. Yes, sir. 12 Q. Tyler? 13 A. Tyler Road, T-y-l-e-r. 14 Q. And where is that? 15 A. That is in Scranton. 16 Q. Scranton? 17 And how long have you been living 18 there? 19 A. Almost a year. 20 Q. And where did you live before that? 21 A. With my mother and father-in-law in 22 Timmonsville. 23 Q. And your father-in-law's name is? 24 A. Mark Severance. 25 Q. Spell that last name, please.

James David Marlowe
James And Lori Marlowe Vs. SCDOT, Et Al.

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Page 6	Page 8
1 A. S-e-v-e-r-a-n-c-e. 2 Q. Okay. And your mother-in-law's name? 3 A. Elaine. 4 Q. Elaine. 5 And that's your mother? 6 A. Mother-in-law. 7 Q. Mother-in-law? 8 A. Yes, sir. 9 Q. Okay. And they live where, 10 Timmonssville? 11 A. Yes, sir. 12 Q. Is that in Florence County? 13 A. Yes, sir. 14 Q. And the beautiful young lady sitting 15 behind you, I assume, is your wife? 16 A. Yes, sir. 17 Q. And her name is Lori? 18 A. Yes, sir. 19 Q. And the good looking young lady with 20 the glasses on reading her book is your daughter? 21 A. Yes, sir. 22 Q. And what is her name? 23 A. Hailey. 24 Q. Spell that. 25 A. H-a-i-l-e-y.	1 Q. Poston. 2 A. Yes, sir. 3 MR. McCUTCHEON: And he can't ask for 4 your help, and you can't help him. 5 BY MR. McCUTCHEON: 6 Q. All right. And is Lori your first 7 marriage, or were you married before? 8 A. First marriage. 9 Q. Okay. Was she married before? 10 A. Yes. 11 Q. Is that where the Poston comes from? 12 A. Yes, sir. 13 Q. Okay. Now, this case is going to be 14 tried in Florence County, South Carolina. You've 15 told me about your father and mother-in-law, and 16 I've asked you about all your -- and this is the 17 lovely Kayla? 18 A. Yes, sir. 19 Q. Hey, Kayla. 20 KAYLA POSTON: Hey. 21 MR. McCUTCHEON: I'm Mr. McCutcheon. 22 BY MR. McCUTCHEON: 23 Q. I've asked you about you and your 24 family. Are your parents living? 25 A. My father is.
Page 7	Page 9
1 Q. And -- 2 A. He's down here playing a game. 3 Q. -- there's another one here. And 4 that's your son? 5 A. Yes. 6 Q. And what is his name? 7 A. Brandon. 8 Q. How old is Hailey? 9 A. 11. 10 Q. And how old is Brandon? 11 A. 6. 12 Q. 6? 13 A. (Nods head up and down.) 14 Q. And you have another daughter? 15 A. Yes, sir. 16 Q. And she's not here, but she's -- 17 MS. MARLOWE: She's on the way. 18 BY MR. McCUTCHEON: 19 Q. That's okay. What is her name? 20 A. Kayla. 21 Q. K-a-y-l-a? 22 A. Yes, sir. Poston. 23 Q. He just told you you can't talk in this 24 deposition. 25 A. Yeah. Her last name is Poston.	1 Q. Okay. And what is his name? 2 A. David Marlowe. 3 Q. And your mom is not living. She's 4 deceased? 5 A. Yes. 6 Q. Do you have any brothers and sisters 7 that live in Florence County? 8 A. No, sir. 9 Q. All right. What is your wife's 10 parents' names? Are they living? 11 A. That's the Severances. 12 Q. The Severances? 13 A. Mark and Elaine Severance are her 14 parents. 15 Q. That makes sense. Okay. 16 Does she have any brothers and sisters? 17 A. Yes. 18 Q. Your wife? 19 A. Yes. 20 Q. That live in Florence County? 21 A. Yes. 22 Q. And who are they? 23 A. Christen Cox. 24 Q. Is that a male or female? 25 A. Female.

Page 10 1 Q. Is she married? 2 A. Yes, sir. 3 Q. What's her husband's name? 4 A. Tyler Cox. 5 Q. You might wonder why am I asking you 6 all these dumb questions about who all you're 7 related to, but the reason we do that is if we have 8 to try this case, we're going to be trying it in 9 Florence County, and obviously I don't want any of 10 your aunts and uncles and friends and that kind of 11 thing on the jury. So I'm not prying into your 12 personal life or none of that. 13 And are you employed, sir? 14 A. Yes, sir. 15 Q. Where? 16 A. Nanya Plastics. 17 Q. Spell that. 18 A. N-a-n-y-a, Plastics. 19 Q. And where is that located? 20 A. Lake City, South Carolina. 21 Q. And other than the ones that we've 22 already talked about, do you have any other 23 relatives than the ones we've talked about over the 24 age of 18 that reside in Florence County? 25 A. Not that I'm aware of.	Page 12 1 A. Because she was recently diagnosed with 2 Stage IV lung cancer. 3 Q. I'm sorry to hear that, sir. 4 MR. McCUTCHEON: Ma'am, I'm sorry. My 5 prayers are with you and your family. 6 BY MR. McCUTCHEON: 7 Q. Now, in October of 2015, sir, were you 8 employed by this company? 9 A. Yes, sir. 10 Q. And was your wife practicing as a 11 registered nurse? 12 A. Yes, sir. 13 Q. And how long ago did you say it was 14 since she no longer practices RN? 15 A. She went on disability a couple months 16 ago. 17 Q. Okay. A couple months ago? 18 A. Yes, sir. 19 Q. That's fine. 20 Now, you have three children here with 21 you. The youngest one, I assume, is not in school 22 yet? 23 A. Yes, sir, he is in school. 24 Q. He is? Where does he go to school? 25 A. Hannah Pamplico.
Page 11 1 Q. Okay. That's fine. 2 How long have you worked for Nanya 3 Plastic? 4 A. 19 years. 5 Q. What do you do there? 6 A. I'm an assistant supervisor in a 7 utility operations section. 8 Q. Which is what? 9 A. We operate steam boilers. 10 Q. I'm sorry, is your wife employed 11 outside the home? 12 A. Not anymore. 13 Q. All right. Was she at one time? 14 A. She was an RN, registered nurse. 15 Q. Where? 16 A. At Florence OB/GYN or McLeod OB/GYN, I 17 should say. 18 Q. And what doctor's office is that? 19 A. That was Rainwater, Clary -- 20 Q. That's okay. 21 A. -- Litz. There's several physicians in 22 that office. 23 Q. All right. Now you say she used to 24 work there. Why does she not work there anymore? 25 Okay. That's okay. Take your time.	Page 13 1 Q. And? 2 A. Hailey. 3 Q. Hailey? 4 A. Hannah Pamplico as well. 5 Q. And? 6 A. And Kayla. She's Hannah Pamplico as 7 well. 8 Q. What grade is the little one in? 9 A. Third grade. 10 Q. Third grade? 11 And Hannah? Hannah, that's the school. 12 Hailey? 13 A. She's in sixth grade. 14 Q. And Kayla? 15 A. 11th grade. 16 Q. She's getting close to going off to 17 college. Then you'll have the empty nest syndrome. 18 Now, in October of 2015, Mr. Marlowe, 19 where were you living? 20 A. 2479. 21 Q. 2479? 22 A. West Highway 378. That's Pamplico. 23 Q. And that is beside a -- what's the name 24 of the store? 25 A. Carraway store.

Page 14

1 Q. Carraway?
2 A. Yes, sir.
3 Q. And I notice that there's a house
4 beside yours.
5 A. Yes, sir.
6 Q. Does anyone live in that house now?
7 A. No, sir.
8 Q. Who used to live in that house?
9 A. That would be Richard Carraway, his
10 house.
11 Q. Richard Carraway?
12 A. Yes, sir.
13 Q. And his house is next door to yours?
14 A. Yes, sir.
15 Q. Are there any other houses right there
16 in that vicinity or just those two?
17 A. Just -- yes, sir. My house, Richard's
18 house, and then the store, which they live upstairs
19 in that store.
20 Q. Okay. And how long have you lived at
21 this location?
22 A. Before the first flood or --
23 Q. Yes.
24 A. -- currently?
25 Q. No, I'm talking about -- well, you

Page 15

1 don't live there now, do you?
2 A. No, sir.
3 Q. I'm talking about before any of these
4 events.
5 A. Okay.
6 Q. How long had you lived in that house?
7 A. 14 years.
8 Q. 14 years?
9 A. I want to say 14, sir.
10 Q. And when did you purchase that house?
11 A. 2002.
12 Q. 2 or 3?
13 A. Maybe 3.
14 Q. Because the reason I say 2003 is that's
15 what your lawyer put in the papers. So somewhere
16 around 2002 or 2003?
17 A. I know I was looking at the house in
18 2002. The final paperwork and everything wasn't
19 finished until 2003.
20 Q. All right. And who did you purchase
21 the house from?
22 A. ERA Leatherman.
23 Q. ERA what?
24 A. Leatherman.
25 Q. Leatherman?

Page 16

1 Is that a realtor company?
2 A. Here in Florence.
3 Q. All right. Do you know who lived in
4 the house or owned the house before you purchased
5 it?
6 A. We kept getting mail, and the last name
7 was Freeman.
8 Q. Freeman?
9 A. Freeman.
10 Q. Other than that, you do not know?
11 A. No, sir.
12 Q. And do you know Mr. Carraway?
13 A. Yes, sir.
14 Q. Do you know him well?
15 A. Yes, sir.
16 Q. Is he married?
17 A. No, sir.
18 Q. Does he have any children over the age
19 of 18 that live in Florence County that you're
20 aware of?
21 A. No, sir, not that I'm aware of.
22 Q. And he runs that store?
23 A. Yes, sir.
24 Q. And I would assume that at the same
25 time that your residence flooded, his flooded also?

Page 17

1 A. No, sir.
2 Q. It did not?
3 A. No, sir.
4 Q. Okay. Do you know why? Is his higher
5 than yours?
6 A. His was a little higher --
7 Q. Okay.
8 A. -- than mine.
9 Q. And isn't there a, I call it a, branch
10 or stream that runs behind your house?
11 A. Behind and beside, yes.
12 Q. And it comes, and it runs under 378?
13 A. Yes, sir.
14 Q. And does it end on the other side of
15 378, or does it continue on to the Lynches River?
16 A. It continues to the Lynches River.
17 Q. And it's fed which way from the Lynches
18 River?
19 A. From my understanding, it's a drainage
20 system for the acreage around.
21 Q. The acreage around?
22 A. Uh-huh, yes, sir.
23 Q. You say it runs into the Lynches River?
24 A. Yes, sir.
25 Q. On which side of 378? Across 378?

Page 18

1 A. Across from my house, yes, sir.
2 Q. All right. And then it comes under
3 378, and it runs beside your house and behind your
4 house; is that correct?
5 A. The flow is from my house side under
6 378 to Lynches River.
7 Q. Oh, okay. So it flows to Lynches
8 River.
9 A. Yes.
10 Q. Not the other way around.
11 A. Yes, sir.
12 Q. Where does it go behind your house?
13 A. As far as I've walked, I know it goes
14 under Bass Road, and then if you look at any area
15 footage in the area, you'll see a swamp system.
16 Q. Swamp?
17 A. Yes.
18 Q. Okay. So there's a swamp system back
19 there?
20 A. Yes.
21 Q. And it runs from Lynches River to that
22 swamp system, if I understand what you're saying.
23 A. No, sir. It runs --
24 Q. It runs from there to Lynches River?
25 A. Yes, sir.

Page 19

1 Q. I'll get it right in a minute. I'm
2 backwards.
3 A. Yes.
4 Q. All right. So as I understand, it runs
5 from the swamp area by your house into the Lynches
6 River.
7 A. Yes, sir.
8 Q. All right. Have you ever talked to the
9 previous owner or owners of this house?
10 A. Yes.
11 Q. Who have you talked to?
12 A. I've talked to Mr. Carraway, Richard
13 Carraway.
14 Q. I'm talking about your house, not
15 Mr. Carraway's house. I'm talking about your
16 house.
17 A. I've talked to him about my house.
18 Q. Okay. Have you talked to anybody else?
19 A. In which regards?
20 Q. In regards to whether or not there's
21 ever been a flooding problem in that area.
22 A. Yes. Mr. Ken Carraway.
23 Q. Who is Ken Carraway?
24 A. That is Richard Carraway's brother.
25 Q. Where does he live?

Page 20

1 A. He lives in Pamplico as well.
2 Q. In Pamplico.
3 A. Well, just down the road from us.
4 Q. On what?
5 A. Friendfield Road.
6 Q. What?
7 A. Friendfield Road.
8 Q. Okay. How far away from you does he
9 live?
10 A. Maybe an eighth of a mile.
11 Q. Okay. Have you talked to anybody else
12 concerning your house?
13 A. Mr. Bay.
14 Q. Is that B-a-y?
15 A. Yes, sir. And I'm drawing a blank on
16 his last name.
17 Q. And who is he?
18 A. He's a resident, and he lives maybe an
19 eighth of a mile as well.
20 Q. Okay. What did you talk to these
21 gentlemen about?
22 A. Just in reference of the area, have
23 they ever experienced any flooding because --
24 Q. Do you know how long they've lived in
25 that area?

Page 21

1 A. Richard and Ken, all of their life.
2 Q. Do you know how old Richard is?
3 A. He's in his 60's.
4 Q. In his 60's?
5 A. I would say so, yes, sir, late 50's,
6 early 60's.
7 Q. And you inquired of those three
8 individuals.
9 If by some chance you remember
10 Mr. Bay's last name during the deposition or later,
11 would you let your lawyer know so he can let me
12 know, please?
13 A. Yes, sir. Sure.
14 (This page contains information to be
15 supplied by counsel and/or the deponent.)
16 BY MR. McCUTCHEON:
17 Q. And you talked to all three of these
18 gentlemen about whether or not they were aware of
19 any flooding in this area before?
20 A. Yes, sir.
21 Q. And their comment was what?
22 A. No, sir.
23 Q. No?
24 A. No.
25 Q. Did you ask them whether or not there

Page 22

1 had been any hurricanes that had come through that
2 area in their lifetime?
3 A. Yes.
4 Q. What did they say?
5 A. Hugo.
6 Q. Hugo?
7 A. Hugo was one of the worst.
8 Q. Anything else?
9 A. I'm sorry.
10 Q. That's okay.
11 A. We talked about different -- there
12 were -- several years ago, we had lots of rain. I
13 guess it was an El Nino year, and they received no
14 flooding in the area then.
15 Q. Uh-huh.
16 A. Not during Hugo or any other storm
17 related or rain related.
18 Q. All right. Do you know how much rain
19 there was in Hugo?
20 A. No, sir.
21 Q. Have you ever heard the term, sir, a
22 1,000-year flood?
23 A. Yes, sir.
24 Q. Did you ask them whether or not there
25 had ever been a 1,000-year flood in that area

Page 23

1 before?
2 A. Not 1,000-year flood. I asked them was
3 there a flood before.
4 Q. My question is have you ever heard the
5 term used before in regards to any of the flooding
6 in that area referred to as a 1,000-year flood?
7 A. No, sir.
8 Q. All right. And Hurricane Hugo, you
9 don't know how much rainfall there was?
10 A. No, sir.
11 Q. Any other named storm that you can
12 recall other than Hugo?
13 A. Not that I can recall right now.
14 Q. Okay. Are those the only individuals
15 that you have talked about with whether or not that
16 particular area ever flooded in the past other than
17 the Carroways and Mr. Bay?
18 A. Not that I can remember as of right
19 now.
20 Q. Okay. And in this particular case, you
21 have sued not only the South Carolina Department of
22 Transportation, but you've also sued Southern
23 Asphalt and United Infrastructure Group. Is that
24 your understanding?
25 A. Yes, sir.

Page 24

1 Q. Tell me in your own words why you have
2 sued the DOT.
3 A. In my own words?
4 Q. Yep.
5 A. Someone has to be held accountable.
6 Q. Why?
7 A. For my house flooding.
8 Q. Okay. Is every circumstance where, for
9 example, we just had a major flood in Horry
10 County --
11 A. Yes, sir.
12 Q. -- are you saying that somebody has to
13 be responsible for that when the hurricane came in?
14 Is that what you're saying?
15 MR. HOPKINS: Object to the form.
16 BY MR. McCUTCHEON:
17 Q. You can answer. Go ahead. You said in
18 your situation, somebody has to be responsible?
19 A. Yes, sir.
20 Q. My question is, is it not true that on
21 the first occasion when your house flooded, it was
22 referred to as the 1,000-year flood?
23 A. Yes, sir.
24 Q. Is that correct?
25 A. Yes, sir.

Page 25

1 Q. And the second time your house flooded
2 was when Matthew came through, the backside of
3 Matthew came through?
4 A. Yes, sir.
5 Q. Is that correct?
6 A. Yes, sir.
7 Q. And are you saying that because those
8 two things occurred and your lot or house flooded,
9 that somebody has to be responsible? Why do you
10 say someone has to be responsible?
11 A. Because I don't think the proper steps
12 were taken to build the road correctly or the
13 drainage tile correctly.
14 Q. Okay. All right. So it's not just the
15 fact that those two events occurred, you have a
16 problem with someone else who didn't take the steps
17 and so forth that you felt like were necessary to
18 keep that from happening?
19 A. Yes, sir.
20 Q. Is that what you're saying?
21 A. Yes, sir.
22 Q. And those concerns are the three
23 concerns that we represent; is that correct?
24 A. Yes, sir.
25 Q. One of them being the DOT, and that's

Page 26

1 who I represent.
2 Now, you would agree with me, however,
3 that the DOT and these other two concerns didn't
4 cause the 1,000-year flood nor the hurricane?
5 A. Not the flood itself and not the
6 hurricane.
7 Q. Okay. And those two created the amount
8 of water that came into this swamp area and came
9 through the branch beside your house --
10 A. Yes, sir.
11 Q. -- is that correct?
12 A. Yes, sir.
13 Q. And without those two, the water would
14 not have come?
15 A. Yes, sir.
16 Q. All right. And you say that they
17 didn't take the necessary steps, and I'm referring
18 now to the DOT. What steps did they not take, in
19 your opinion?
20 A. From my understanding, that they
21 essentially built the road up higher.
22 Q. Uh-huh.
23 A. And when they put the tiling in --
24 Q. Uh-huh.
25 A. -- the new culvert, it was not directly

Page 27

1 lined up with the old 378 tiling --
2 Q. Uh-huh.
3 A. -- so the water was now having to be
4 diverted --
5 Q. Okay.
6 A. -- which created a choke point for the
7 water.
8 Q. Okay. Now you used the term choke
9 point.
10 A. Yes, sir.
11 Q. Where did you hear that word?
12 A. That would be Mr. Dix.
13 Q. You're talking about Brian Dix with the
14 SCDOT?
15 A. Yes, sir.
16 Q. And what you're saying is before there
17 was a culvert there?
18 A. Yes, sir.
19 Q. That went under a two-lane highway?
20 A. Yes, sir.
21 Q. And it went from there, and it flowed
22 on towards the Lynches River?
23 A. Yes, sir.
24 Q. And this one, you said they put in a
25 different culvert?

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1 A. Yes, sir.
2 Q. And the water would come down, turn
3 this way, and then go under the bridge; is that
4 correct?
5 A. Yes, sir. Well, not bridge, new
6 culvert.
7 Q. New culvert?
8 A. Yes, sir.
9 Q. Under the road?
10 A. Yes, sir.
11 Q. Was the culvert that went under the
12 road bigger?
13 A. Yes, sir.
14 Q. And larger?
15 A. Yes, sir.
16 Q. Than the one that was under the two-
17 lane road?
18 A. Yes, sir.
19 Q. Now, tell me about do you remember when
20 you had this discussion with Mr. Dix?
21 A. The exact date I don't remember because
22 I was at work, and he called me on my cell phone at
23 work.
24 Q. All right. And would it have been
25 after both events?

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1 A. Yes, sir.
2 Q. That you talked to him?
3 A. Yes, sir.
4 Q. Did you ever talk to him between the
5 two events?
6 A. No, sir.
7 Q. Did you ever talk to anybody else with
8 the DOT either between the two events or after both
9 events?
10 A. Yes, sir.
11 Q. Who did you talk to?
12 A. Mr. Jamie Poston.
13 Q. And Jamie Poston is with the DOT out of
14 Florence?
15 A. Yes, sir.
16 Q. Did you know him before this?
17 A. No, sir.
18 Q. Did not?
19 What did Mr. Poston tell you?
20 A. He was just saying that we have
21 experienced a lot of rain in the area.
22 Q. Okay. And that was true, right?
23 A. Yes.
24 Q. An inordinate amount of rain?
25 A. Yes.

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1 Q. Did he say anything else?

2 A. That they were waiting on the bridge

3 crew to be able to put the new culvert in, the new

4 larger culvert.

5 Q. Okay.

6 A. Because I asked him what were they

7 doing to try to make the water situation better.

8 Q. All right. Was this after the first or

9 after both?

10 A. First.

11 Q. After the first?

12 Is that the only conversation that you

13 had with Mr. Poston?

14 A. As far as I remember, yes, sir.

15 Q. He's not any relation to you, is he,

16 not blood or marriage?

17 A. No, sir.

18 Q. I just wondered with the last name

19 Poston. There's a bunch of Postons around --

20 A. Yes, sir.

21 Q. -- that neck of the woods.

22 A. As far as I'm aware, no, sir.

23 Q. All right. So that was the only

24 conversation you had with anybody from the DOT

25 between the two floods was Mr. Poston?

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1 A. Yes, sir. As far as I recall, yes,

2 sir.

3 Q. And then after the second flood, you

4 talked with Brian Dix?

5 A. Ryan Dix.

6 Q. His name is Brian.

7 A. Brian. Okay. Sorry.

8 Q. It's Brian Dix.

9 A. Brian Dix.

10 Q. Trust me. Trust me. His name is

11 Brian.

12 A. Yes, sir.

13 Q. Did he meet with you on the property,

14 or did he talk with you by phone or how?

15 A. By phone.

16 Q. By phone?

17 Tell me about your conversation with

18 Mr. Dix.

19 A. Mr. Dix stated -- he called me at work,

20 like I previously stated. I saw a number I didn't

21 recognize, I answered it because of all the emails

22 and calls that I've been making, and we were

23 discussing the water, and, you know, I was asking

24 him what did he have planned --

25 Q. Uh-huh.

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1 A. -- for the area.

2 Q. Right.

3 A. And he said they were trying their best

4 to get the old road -- the new road in and the old

5 road torn up, and that they had created a choke

6 point for the water.

7 Q. All right. That's where you got that

8 term, right?

9 A. Yes.

10 Q. From him?

11 Anything else you remember about that

12 conversation?

13 A. Not that conversation. But I do

14 remember one conversation prior with Mr. Jamie

15 Poston before -- or during the middle of the

16 floods.

17 Q. Okay.

18 A. After the first conversation, I spoke

19 with him what we've already recorded.

20 Q. Okay.

21 A. The second conversation was, it had

22 rained a good bit, and the water had backed up to

23 my barn again --

24 Q. Okay.

25 A. -- and I forget what day I called him,

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1 but it was a Sunday. We were leaving my mom and

2 dad's house, and we came back by, and they were

3 using excavators on the other side of the road to

4 try to dig mud, sludge, whatever out where the

5 water could flow better.

6 Q. Do you know who was operating those or

7 who owned those?

8 A. No, sir.

9 Q. And what conversation did you have with

10 Jamie Poston at that time?

11 A. Just something needs to be done because

12 we've just had a little bit of rain, and the water

13 is touching my shop again.

14 Q. Now, was that between the two?

15 A. Yes, sir.

16 Q. But after your first conversation with

17 Mr. Poston. That was the second?

18 A. After the first. That was the second

19 conversation.

20 Q. All right. Any other conversations --

21 A. No, sir.

22 Q. -- with Mr. Poston?

23 A. No, sir.

24 Q. Mr. Dix?

25 A. No, sir.

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1 Q. Or anyone else that worked with the
2 DOT?
3 A. DOT?
4 Q. South Carolina Department of
5 Transportation.
6 A. Afterwards, I had one phone call.
7 Q. You're talking about after both?
8 A. After both.
9 Q. Yeah.
10 A. And this was in regards to my driveways
11 being torn up.
12 Q. Okay. Who did you have that
13 conversation with?
14 A. Mr. Will -- I can't remember his last
15 name right off.
16 Q. Will somebody?
17 A. Yes, sir.
18 Q. He was with the DOT?
19 A. Yes, sir.
20 Q. What did he tell you?
21 A. When he finally called me back, he said
22 my driveways were put back in place.
23 Q. His last name, is it Fullerton?
24 A. Yes, sir. Will Fullerton, yes, sir.
25 Q. He's also with DOT in Florence?

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1 A. Yes, sir.
2 Q. Along with Mr. Poston, correct?
3 A. (Nods head up and down.) Yes. Yes,
4 sir.
5 Q. And he said that they had been put
6 back?
7 A. That's what he told me, yes, sir.
8 Q. Well, had they?
9 A. I was in the bed for five days with the
10 flu when he called me.
11 Q. Well, did you subsequently go down
12 there and look?
13 A. Yes, sir. And they were.
14 Q. Okay.
15 A. Yes, sir. Five days --
16 Q. All right.
17 A. -- after.
18 Q. So when you had your conversation with
19 Mr. Will Fullerton --
20 A. Yes, sir.
21 Q. -- you advised him that somebody had
22 tore up your driveway?
23 A. Yes, sir.
24 Q. And he said they had been fixed?
25 A. Yes, sir.

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1 Q. And then you went down there five days
2 after that and found out that they had been fixed?
3 A. Yes, sir. I called him several days
4 into it but never got a return call.
5 Q. Okay. Anybody else you've talked to
6 with the DOT?
7 A. No, sir.
8 Q. Have you talked with anybody from
9 Southern Asphalt?
10 A. No, sir.
11 Q. Or this United Infrastructure Group?
12 A. I have one friend who works for United
13 Infrastructure.
14 Q. What's his name? I've seen the
15 subpoena.
16 A. Yes, sir. Kevin Piner.
17 Q. Kevin what?
18 A. Piner, P-i-n-e-r.
19 Q. And he works with UIG in United
20 Infrastructure Group?
21 A. Yes, sir.
22 Q. Have you had any discussions with him
23 about this lawsuit?
24 A. We have discussed that because we had
25 to name him as one of our references.

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1 Q. References for what?
2 A. Well --
3 Q. Are you talking about --
4 MR. HOPKINS: I think he means like the
5 witnesses.
6 THE WITNESS: Yep. I'm sorry. Yes.
7 As a witness, yes, sir.
8 MR. McCUTCHEON: Well, they didn't name
9 him.
10 MR. HOPKINS: I thought they did. I'm
11 sorry.
12 MR. McCUTCHEON: No.
13 MR. WILLIAMS: They identified him.
14 MR. McCUTCHEON: They identified him?
15 BY MR. McCUTCHEON:
16 Q. Okay. So Kevin Piner. What did you
17 and Mr. Piner talk about?
18 A. We just talked in general. With us
19 being, you know, friends for years, and he just --
20 he kind of -- well, he was thinking that we were
21 wronged, but...
22 Q. Wronged by whom?
23 A. The engineers.
24 Q. Engineers?
25 A. At DOT.

Page 38 1 Q. Engineers for whom? 2 A. DOT. 3 Q. Did he say how he thought you had been 4 wronged? 5 A. I'm trying to remember. I did discuss 6 with him that Jamie Poston was telling him or 7 telling me that they were waiting on them to finish 8 up. 9 Q. Okay. What did he say about that? 10 A. And he just said that there's going to 11 be a lot of finger pointing to who's at blame. 12 Q. Oh, the old finger pointers. 13 Did he say anything about Southern 14 Asphalt? 15 A. Not that I recollect. 16 Q. All right. But he did about the DOT. 17 And the only thing he told you that you 18 recall from the DOT was that Jamie Poston told you 19 that they were waiting on the bridge people to 20 finish? 21 A. Yes, sir. 22 Q. And is it your understanding that 23 Mr. Piner worked for the concern that was doing the 24 bridge, UIG? 25 A. That he worked for?	Page 40 1 designed, it wouldn't work. Is that what he told 2 you? 3 A. In so many words. 4 Q. Well, what exactly did he tell you? 5 A. There was a lot of discussion, of 6 course, about our situation of moving stuff out of 7 the house and whatnot. But just looking at the 8 design as far as the way the water had to turn and 9 go to the other culvert. 10 Q. Was the other culvert larger -- 11 A. Yes, sir. 12 Q. -- than the culvert under the two-lane 13 road? 14 A. Yes, sir. 15 Q. Were both culverts in place at the same 16 time? 17 A. For the whole period? 18 Q. During any part of it. For example, 19 were both of them there when the 1,000-year flood 20 occurred in 2015? 21 A. Yes. 22 Q. Were both of the culverts there? 23 A. A piece of it was, not the whole 24 existing culvert like today, but a piece of it was 25 there.
Page 39 1 Q. UIG. 2 A. Yes, sir. 3 Q. And he was the one that was pointing 4 fingers at the DOT, so to speak? 5 A. Not him, so to speak -- 6 Q. That's the entity. 7 A. -- but his boss. 8 Q. What's his boss' name? You don't know? 9 Did you talk to his boss? 10 A. No, sir. 11 Q. Okay. Well, how do you know what his 12 boss said? 13 A. That was from him speaking. 14 Q. Him being Kevin Piner? 15 A. Yes, sir. 16 Q. All right. Have you talked to any 17 outside engineers about the event? 18 A. The only person that I know of that 19 I've talked to that has an engineering degree would 20 be Mr. Ken Carraway, Ken Carraway. 21 Q. Okay. What did he tell you? 22 A. He just said you could look at the way 23 it was designed and tell that it wouldn't work. 24 Q. All right. So Mr. Ken Carraway told 25 you that just from looking at the way it was	Page 41 1 Q. All right. And when you say a piece of 2 it, you're saying partially under the road? 3 A. Yes, sir. 4 Q. All right. What about before the 5 second one? 6 A. Still not completely put in. 7 Q. Okay. But one part of it was? 8 A. Yes, sir. 9 Q. And during that time period, was the 10 original culvert still in place? 11 A. The existing culvert? 12 Q. Yeah. 13 A. Yes, sir. 14 Q. And it was there -- was it there during 15 both events? 16 A. Yes, sir. 17 Q. Okay. So let's go back to the first 18 one. Anybody else that you can think of right off 19 that you talked to with any of these concerns or 20 outside of these concerns about your flooding 21 issues that we haven't talked about already? 22 A. As far as people in general or people 23 in the area or -- 24 Q. Well, anybody that has information that 25 you may or may not call as a witness in this case.

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1 A. I mean, my father-in-law was there --
2 Q. Okay.
3 A. -- to help with the clean up.
4 Q. All right. Give me his name again.
5 A. Mark Severance.
6 Q. Severance?
7 A. Yes, sir.
8 And my brother-in-law, Tyler Cox.
9 Q. Tyler?
10 A. Cox.
11 Q. Cox?
12 A. Yes, sir. And there would be a Kelly
13 Gee who helped with the clean up.
14 Q. Is the last name G-e-e?
15 A. Yes, sir.
16 Q. Anybody else?
17 A. And my wife's sister, Christen Cox.
18 Q. K or C?
19 A. C-h-r-i-s-t-e-n.
20 Q. Anyone else?
21 A. There was my dad, David Marlowe.
22 Q. Okay.
23 A. There was several people throughout the
24 community there helping move stuff. My mind is
25 drawing a blank. I'm sorry.

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1 Q. That's okay. I think we've probably
2 got enough right here to keep us busy for a while.
3 Now, let's talk about the first flood.
4 Your house flooded, correct?
5 A. Yes, sir.
6 Q. How much water was in your house, the
7 depth?
8 A. 18 inches.
9 Q. 18 inches?
10 A. Yes, sir.
11 Q. Do you know what the square footage of
12 that house is?
13 A. 1450.
14 Q. 1450?
15 A. Yes, sir.
16 Q. Is it all on one level?
17 A. Yes, sir.
18 Q. Is it on a slab, or is it raised?
19 A. It's raised.
20 Q. So it has a crawl space under it?
21 A. Yes, sir.
22 Q. Where were your air conditioning units
23 and vents and so forth? Were they under it or --
24 A. Yes, sir.
25 Q. -- above it? Under?

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1 Was there a carport?
2 A. Yes, sir.
3 Q. One car, two?
4 A. Two car.
5 Q. And now was it ground level, or was
6 it --
7 A. Ground level.
8 Q. Ground level.
9 How deep was the water in the carport,
10 the same as in the house or more?
11 A. I would say more.
12 Q. More?
13 A. Because it would be ground level.
14 Q. Okay. And you said that -- was
15 anything in your house salvageable, or did you have
16 to take everything out of your house?
17 A. During the first flood?
18 Q. Uh-huh.
19 A. We grabbed as much stuff as we could --
20 Q. Okay.
21 A. -- in a short amount of time, of
22 course. We did salvage some books and toys. We
23 salvaged our computer, some clothes. But all of --
24 and the TVs, of course, because they was up high.
25 Q. Uh-huh.

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1 A. But lots of toys. I had stuff that was
2 in the barn. I know you asked about the house, but
3 I had several power tools.
4 Q. Okay. So your barn was flooded too?
5 A. Yes, sir.
6 Q. How much water was in the barn?
7 A. Around eight foot.
8 Q. Eight feet?
9 A. Yes, sir.
10 Q. And you had what in there?
11 A. Four wheeler, lawn mower. I had a TV
12 out there, a garden tiller, a gun safe, lots of
13 ammunition, weed eaters, chain saw. Power tools I
14 think I've already mentioned before.
15 Q. Uh-huh.
16 Was all of that ruined, or was any of
17 it salvageable?
18 A. The only thing that was salvageable, I
19 was able to get the lawn mower to run, but --
20 Q. Everything else no?
21 A. No, sir.
22 Q. Okay. Now, did some concern by any
23 chance come in and estimate the damages or the loss
24 of damages that you sustained like an insurance
25 adjustor or an insurance company or anybody?

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1 A. FEMA. I mean, they came just for the 2 house. They don't care about -- 3 Q. Okay. 4 A. -- your shop or anything like that. 5 They're just worried about the house. 6 Q. All right. Let's talk about the shop a 7 minute. Can you give me an estimate as to the 8 amount that you lost in regards to the stuff in 9 your shop? 10 A. Not right off the top of my head. I'd 11 have to look at my spreadsheet. 12 Q. I'll ask you about that in a minute. 13 A. Okay. 14 Q. You don't know off the top of your 15 head? 16 A. No, sir. 17 Q. What about like FEMA would have done 18 what in the house? Did they estimate the damages 19 to your house? 20 A. Not necessarily damages to the house, 21 no. No, sir. 22 Q. Did they estimate anything? 23 A. Yes, sir. 24 Q. What did they estimate? 25 A. They basically come through and look at	1 Q. Okay. And who prepared that 2 spreadsheet? 3 A. My wife and I. 4 Q. Okay. And does it include all of the 5 items you lost both in the house and in the shop? 6 A. Yes, sir. 7 Q. Does it have a total? 8 A. Yes, sir. 9 Q. What is the total? 10 A. I'm looking at -- I'm seeing several 11 numbers. 12 Q. Well, tell me what those several 13 numbers are. 14 A. 37,000 -- well, on the end page. 15 Q. On the end page? 16 A. Of 37,749. 17 Q. All right. And is that from the first 18 flood or both floods? 19 A. That was from the first flood. 20 Q. Okay. Let me see it a minute. Thank 21 you. 22 MR. McCUTCHEON: Let's mark that as 23 Defense DOT No. 1. 24 (DFT. DOT EXH. 1, Loss Spreadsheet, 25 Bates Labeled PLAINTIFF_00296-00300, was marked for
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1 the amount of water you have in your house, and 2 basically I guess they have this form they go off 3 of of how many square feet your house is and what's 4 been damaged. 5 Q. Okay. 6 A. Their words, not mine, they're not here 7 to rebuild our house, they're just here for a 8 helping hand. 9 Q. All right. And did they estimate a 10 certain amount of money that you were entitled to 11 from FEMA? 12 A. Yes, sir. 13 Q. And what was that amount? 14 A. I can't remember that number right off 15 the top of my head -- 16 Q. Do you have the -- 17 A. -- but I -- 18 Q. Go ahead. 19 A. I did take out a loan from the SBA, and 20 that was a \$25,000 loan. 21 Q. Let me hand you this document. You 22 referred to a spreadsheet. 23 A. Yes, sir. 24 Q. Is that what you're talking about? 25 A. Yes, sir.	1 identification.) 2 BY MR. McCUTCHEON: 3 Q. And you told me the total, \$37,749.65; 4 is that right? 5 A. Yes, sir. 6 Q. Okay. And that was your loss from the 7 first flood? 8 A. Yes, sir. 9 Q. All right. What about the second 10 flood? Do you have a spreadsheet on the second? I 11 haven't see one. 12 A. We didn't lose as much the second one 13 because I wasn't able to replace most of the stuff 14 that was lost during the first flood. But we did, 15 of course, lose a lot of stuff as far as what we've 16 done in the house. 17 Q. Okay. Did FEMA assist in both or just 18 one? 19 A. Both. 20 Q. Both? 21 A. Yes, sir. 22 Q. And you received monies from FEMA? 23 A. Yes. 24 Q. Do you know how much money you got 25 total from FEMA?

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1 A. Both times or -- 2 Q. Well, let's take the first time first. 3 A. I can't remember those numbers right 4 off the top of my head. 5 Q. Do you have them somewhere? 6 A. Yes, sir. 7 Q. And did you receive assistance during 8 the second one? 9 A. No, sir. Well -- 10 Q. From FEMA? 11 A. -- from FEMA? Yes, sir. 12 Q. That's what I'm talking about. 13 A. Yes, sir. 14 Q. So you got FEMA assistance from both -- 15 A. Yes, sir. 16 Q. -- floods. 17 This spreadsheet is only for the 18 first -- 19 A. Yes, sir. 20 Q. -- or is it both? 21 A. I would say from the first. 22 Q. First. 23 Do you have a spreadsheet for the 24 second? 25 A. I don't know if my wife made one or	1 that we got from your attorney. And can you tell 2 me what those are? They appear to be bank 3 statements. 4 A. Yes, sir. They appear to be bank 5 statements. 6 Q. And let me go over them, please, sir. 7 MR. McCUTCHEON: Let's mark that as 8 Defense DOT No. 2. 9 (DFT. DOT EXH. 2, Wells Fargo Bank 10 Statements for July 1, 2015, through October 31, 11 2016, was marked for identification.) 12 MR. GARRAUX: Jack, what's the Bates 13 label on that? Is it a series? 14 MR. McCUTCHEON: It appears to start 15 PLAINTIFF_00355 and runs through -- well, some of 16 them are out of order. 17 MR. GARRAUX: Okay. No problem. 18 MR. McCUTCHEON: The last number I see 19 is 00371. 20 MR. GARRAUX: Okay. 21 BY MR. McCUTCHEON: 22 Q. Now, Mr. Marlowe, these all appear to 23 be as a result of the first flood -- is that your 24 understanding? -- because they run through October 25 the 1st of 2016. Does it encompass both? The
Page 51	Page 53
1 not. Maybe so. A lot going on. 2 Q. Okay. So you can't tell me -- what 3 you're telling me is this is from the first? 4 A. I'm thinking so, yes, sir. 5 Q. And it doesn't encompass the second. 6 That's Defendant's Exhibit No. 1. 7 A. Yes, sir. 8 Q. Is that your testimony? 9 A. Yes, sir. 10 Q. Okay. But you got assistance from FEMA 11 the second time too, correct? 12 A. Yes, sir. 13 Q. All right. You also indicated to me 14 that you took out a \$25,000 loan? 15 A. Yes, sir. 16 Q. Was that in regards to the first -- 17 A. Yes. 18 Q. -- both, or what? 19 A. The first. 20 Q. The first? 21 A. Yes. 22 Q. And that loan was with who? 23 A. The SBA, Small Business Association. 24 Q. Okay. I want to hand you, sir, this 25 stack of papers that were included in the responses	1 second flood was October 8th of 2016, and the last 2 one in here covers the month October 1, 2016, 3 through October 31, 2016. Does it include both or 4 one, or do I need to ask your wife that question? 5 A. Yes, sir. I can assure you she would 6 give you a better answer than I can on that. 7 Q. All right. And I'm not going to go -- 8 I'm not going to go -- the only question -- and 9 I'll ask her this too, but I'll ask you if you 10 know. Why does the account say Kayla A. Poston 11 Minor, Lori S. Marlowe Custodian? Do you know? If 12 not, I'll ask her. 13 A. Yes, sir. 14 Q. Okay. And I'll just mention that I'm 15 not going to go through each one of them, but on 16 some of them it states that there's a mobile 17 deposit made into the account. Some of them say 18 that they came from FEMA like one on 10-21, of 19 2015, a check for \$19,827.09 from FEMA GoFundMe. 20 And I'm not going to attempt to go through every 21 one of these because that's not necessary. 22 Have you undertaken to replace from the 23 second flood? 24 A. Replace, no, sir. 25 Q. Okay. Have you determined --

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1 A. Are you referring to the house itself?
2 Q. Yes.
3 A. No, sir.
4 Q. All right. Are you going to?
5 A. No intentions as of right now.
6 Q. Unless you get a bunch of money from a
7 the DOT?
8 A. That's not exactly what it's about.
9 Q. Okay. I understand, sir.
10 Have you told me about all the
11 conversations that you've had with any of the folks
12 from DOT or the other defendants?
13 A. As far as I'm aware, yes, sir.
14 Q. Did anyone ever tell you that the
15 flooding would not happen again?
16 A. That was spoken by Mr. Jamie Poston.
17 Q. Jamie Poston?
18 A. Yes, sir.
19 Q. Okay. Where are you living now, sir?
20 A. 760 Tyler Road.
21 Q. Okay. Where is that?
22 A. Scranton, South Carolina.
23 Q. Are you renting, or do you own that
24 house?
25 A. Yes. Renting.

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1 Q. And what is the amount of rental?
2 A. \$400.
3 Q. The house that was damaged in the
4 flood, did you own that?
5 A. Yes, sir.
6 Q. Was it mortgaged?
7 A. Yes, sir.
8 Q. Who was it mortgaged to, Wells Fargo?
9 A. No, sir. It was -- I'm sorry, I'm
10 drawing blanks. I'm drawing blanks.
11 Q. That's okay. But it was mortgaged?
12 A. Yes, sir.
13 Q. Do you remember by chance roughly what
14 your mortgage payments were?
15 A. My mortgage payments?
16 Q. Yes.
17 A. 530 is what I'm making a month.
18 Q. 530?
19 A. Yes, sir.
20 Q. Are you still paying it?
21 A. Yes, sir.
22 Q. Okay. What is the term of the
23 mortgage? Do you remember?
24 A. 30 year.
25 Q. 30 years?

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1 A. Yes, sir.
2 Q. How many more years have you got?
3 A. Around 15. Feels like 100.
4 Q. Got you.
5 Bear with me just one minute.
6 What effect, sir, has this had on your
7 children?
8 A. Every time it rains, my son Brandon
9 asks did the house flood? We have chickens, and he
10 asks if the chickens are okay. He asks if the barn
11 is flooded again.
12 It put us in a situation that we had to
13 drive a long way to school. My daughter, Hailey
14 Marlowe, she had to start seeing a counselor at
15 school because we noticed her grades were dropping
16 off, and she was having a lot of stomach issues and
17 things of that nature.
18 And Kayla, she's -- she's the strongest
19 one that we've got. She wasn't there for the flood
20 the first time, but she was there for the clean up,
21 of course.
22 So it's basically they're scared to
23 live there, with the exception of Kayla. She's
24 scared to live there, but she wants to move back,
25 but she knows in the back of her mind that it all

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1 could happen again, and we could lose everything
2 again.
3 Q. Now, Kayla is the youngest daughter?
4 A. Oldest daughter.
5 Q. The good looking one sitting back
6 there, the one that looks like her mother?
7 A. Yes, sir. Yes, sir.
8 Q. I'm going to take a few minutes to look
9 over my notes.
10 I'm going to hand off the baton to
11 these gentlemen, if they have some questions, and
12 then I may have some on the rebound. But I think
13 I'm about finished.
14 MR. WILLIAMS: Would you like to take a
15 break?
16 THE WITNESS: Yes, sir.
17 MR. WILLIAMS: Let's take a break.
18 (A recess transpired.)
19 EXAMINATION
20 BY MR. WILLIAMS:
21 Q. Mr. Marlowe, my name is James Williams,
22 and I represent United Infrastructure Group. I
23 just have a few questions for you today. Jack
24 pretty well covered everything.
25 First I want to talk about Kevin Piner.

Page 58 1 Just give me a brief -- how did you meet Kevin, and 2 how long have you known him? 3 A. I've known Kevin roughly 20 years. His 4 brother is a taxidermist in Marion County, Buddy 5 Piner. And I met him through him. And we've gone 6 on several duck hunting trips together, dove 7 hunting, things of that nature. 8 Q. Okay. How often did you see Mr. Piner 9 while the roadwork was going on before the first 10 flood? Did you see him in the area? 11 A. I would see him in the area. He was a 12 crane operator. I mean, I would drive by and see 13 him. Of course, I wouldn't stop and speak with him 14 because he was working. 15 Q. Okay. 16 A. But as far as speaking, not too 17 terribly much. 18 Q. Okay. Do you remember where his crane 19 was? 20 A. At the bridge. 21 Q. At the bridge? 22 A. Yes, sir. 23 Q. Okay. Was he ever at the culverts? 24 A. Not that I remember. 25 Q. And I think you talked about	Page 60 1 Q. That's fine. 2 A. It had actually came up beside my barn. 3 And I used the card that Jamie had given me, and I 4 called him and said, hey, what can you do? We just 5 got a little bit of rain, and the water is up to my 6 shed again. And then -- and I don't remember how 7 many -- the timeframe, but several days later -- I 8 remember it was a weekend because we were coming 9 back from visiting my mom and dad in Marion County, 10 and I remember seeing the excavators on the other 11 side of the highway, the new highway, and they were 12 digging out. I just remember that. 13 Q. Okay. And did Jamie or anybody else 14 tell you that that work was related to your call to 15 him about the water coming up to the barn? 16 A. No, sir. I didn't speak to him again 17 about that. 18 Q. Okay. 19 A. I just assumed. 20 Q. Okay. And I know you said you didn't 21 remember which day, but do you remember roughly how 22 much time had passed after the initial flood and 23 that time you're talking about when you called 24 Jaime about the water coming back up to the barn? 25 A. Not right off. Within a month or so.
Page 59 1 conversations with him earlier where he said the 2 DOT engineers wronged you or something to that 3 effect; is that correct? 4 A. Yes. 5 Q. And I think you said that was 6 information that his boss had given him or 7 something like that; is that right? 8 A. Just talking amongst his bosses and 9 things of that nature. 10 Q. Okay. So I guess my question is was he 11 relaying something that his boss had said to him, 12 or was he giving his own opinion? 13 A. As far as I know, something his boss 14 had told him. 15 Q. Okay. You talked about an event where 16 you came back to your house after the first flood, 17 and then there was excavators moving some mud and 18 stuff around, and the water built back up near your 19 barn; is that right? 20 A. No, sir, not at my -- after the first 21 flood -- 22 Q. Yes. 23 A. -- I don't remember what day it was, 24 but we had a good amount of rain, and the water was 25 up touching my barn again. It actually -- sorry.	Page 61 1 Q. Okay. 2 A. Maybe. 3 Q. Okay. 4 A. I can't right off remember. 5 Q. Probably in the same calendar year 6 though? 7 A. Yes, sir. 8 Q. Okay. 9 A. Yes, sir. 10 Q. Okay. I think some of your earlier 11 testimony about something Mr. Poston said to you 12 when he said that they're waiting on the bridge 13 crew to put in a new larger culvert. When you use 14 the term bridge crew, is that what he said to you, 15 or are you just kind of using that term 16 generically? 17 A. No. I'm pretty certain that's exactly 18 what he told me, bridge crew. 19 Q. Okay. And he was talking about the 20 culverts? 21 A. Yes, sir. 22 Q. Okay. Do you have any knowledge about 23 which, if any, of the defendants you sued did the 24 culvert work or did the bridgework? 25 A. From my understanding, United

James David Marlowe
James And Lori Marlowe Vs. SCDOT, Et Al.

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Page 62 1 Infrastructure was the bridgework, and Southern 2 Asphalt was the culvert work. I know there was a 3 lot of -- of course, the DOT plans and then they 4 subcontracted out to United Infrastructure or 5 Palmetto -- not Palmetto, Southern Asphalt and 6 United Infrastructure. 7 Q. Okay. Kent (sic) Carraway, do you know 8 whether he's ever worked as an engineer? 9 A. From our little bit of talkings, he is 10 an engineer with regards -- I know he owns Superior 11 Machine, and he has an engineering degree from 12 Clemson University. 13 Q. Okay. What does Superior Machines do? 14 A. They fabricate from -- from what I 15 know, they fabricate metal, make metal objects for 16 people. 17 Q. Okay. And you said your house got 18 18 inches of water, and the barn got eight feet of 19 water; is that correct? 20 A. Yes, sir. 21 Q. So is the barn like right on the river? 22 A. The land slopes towards the swamp, 23 towards the creek. 24 Q. Okay. The SBA loan, have you been 25 making payments on that yet?	Page 64 1 Q. Let me ask you like this. Did you hire 2 any professionals to do any work to the home? 3 A. We did hire one person to do some 4 sheetrock work. 5 Q. Okay. 6 A. And we did hire someone to replace the 7 ductwork under the house and work on our air 8 conditioning unit. 9 Q. Okay. Who were those companies or 10 people? 11 A. The air condition people were -- it was 12 called Mudd Incorporated. The owner is Jason 13 Huggins. 14 Q. Huggins? 15 A. Huggins. 16 Q. And do you know what town or city 17 they're out of? 18 A. I don't know what the -- I know where 19 he lives, but I don't know what that's considered. 20 I know that's off the Friendfield Road towards the 21 jail in Effingham, but I don't know if that's 22 considered Effingham or if that would still be 23 considered Pamplico. 24 Q. Got you. 25 And how about the sheetrock guy?
Page 63 1 A. Yes, sir. 2 Q. Okay. Do you know how much of that is 3 paid off? 4 A. No, sir. 5 Q. Okay. Is there any mechanism in that 6 loan that it would be forgiven before your payments 7 are made? Do you know? 8 A. What are you referring to? 9 Q. Some types of loans -- and I don't know 10 if it's a loan when they're helping people out -- 11 they'll forgive them after so many years of 12 payments. 13 A. Not that I'm aware of. I was just told 14 this is how much they're taking out, this is how 15 much you're going to pay back is pretty much the 16 same amount. They haven't told me anything of that 17 nature that I'm aware of. Well, I know they hadn't 18 told me about that. 19 Q. Okay. And my understanding is that you 20 and your family did all the repair work within your 21 home after the first flood; is that right? 22 A. Yes, sir. 23 Q. Okay. 24 A. As far as the floor and things of that 25 nature, yes, sir.	Page 65 1 A. His last name is Jeffords, and he is 2 from the Pamplico area. 3 Q. Is he just an individual person? 4 A. Yes, sir. 5 Q. Okay. Is this something he kind of did 6 on the side or -- 7 A. Yes, sir. 8 Q. Okay. Does he work for another company 9 doing sheetrock? 10 A. No, sir. 11 Q. Okay. Do you know how much you paid 12 him? 13 A. Not right off without going back and 14 looking. 15 Q. Okay. How about the HVAC folks? 16 A. I did have an itemized receipt from 17 them of what they done, what they replaced, fixed. 18 I would have to go over the paperwork again with 19 them as well to see all that. I can't remember the 20 number. 21 Q. Okay. What happened to all the 22 contents of the barn and the house that were, I 23 guess we talked about earlier, not salvageable? 24 Are they still at the house, or have they been 25 disposed of?

17 (Pages 62 - 65)

Page 66 1 A. Some of it is still at the house. Most 2 of it has been thrown away, done away with. 3 Q. Okay. 4 A. I mean, my safe is still down in the 5 barn, several boxes of ammunition still in the 6 barn, things of that nature. Lots of tools, 7 toolbox, things of that nature are still in the 8 barn. 9 Q. Okay. 10 A. And I do know that a lot of the stuff 11 we took out of the house we were able to salvage 12 from the first flood we took to the barn, and we 13 lost some stuff with that as well. 14 Q. You might have said this earlier. How 15 much water got in the house the second time? 16 A. I don't remember saying that earlier, 17 but it was 15 inches the second time. 18 Q. Okay. 19 A. 18 inches the first time, 15 inches the 20 second time. 21 Q. And how about the barn? 22 A. Roughly the same amount. 23 Q. Okay. 24 A. Maybe -- probably a little less, but 25 not as much.	Page 68 1 the first culvert like visually looking at it -- 2 A. Yes, sir. 3 Q. -- or are they -- okay. All right. I 4 think that's all the questions I have. Thank you. 5 A. Thank you. 6 EXAMINATION 7 BY MR. GARRAUX: 8 Q. Ready to continue? 9 A. Yes, sir. 10 Q. All right. Mr. Marlowe, my name is 11 Jared Garraux. I represent Southern Asphalt in 12 this lawsuit. I have just a few brief questions 13 for you. I'm just going to go back to the 14 beginning because that's how I track my notes, and 15 I just have questions about some of your prior 16 testimony. 17 The house that you're currently 18 renting, who owns that house? 19 A. Brandon Poston. 20 Q. And who is Mr. Poston? 21 A. In reference? 22 Q. Who is he? Is he a friend? Is he a 23 family member? 24 A. He's a preacher from the area. I would 25 consider him a friend.
Page 67 1 Q. And is your barn a one story? Does it 2 have a loft? 3 A. One story. 4 Q. Okay. And how tall is it? 5 A. Guesstimate 10 foot. 6 Q. Okay. The FEMA money that y'all 7 received, do you have to pay any of that back? 8 A. No, sir. 9 Q. Okay. I think you said the new -- 10 maybe I heard this wrong -- the new culvert that's 11 there, is there one culvert or two culverts? 12 A. There's only one culvert now. 13 Q. Okay. And before that culvert was 14 installed, how many were there? 15 A. There was one more, the previous 16 culvert. So that would make one and a piece of the 17 new culvert. What was there now wasn't all the way 18 there. 19 Q. Okay. But originally there was one 20 culvert? 21 A. Yes, sir. 22 Q. And now that road is completely gone, 23 and now there's one culvert too, correct? 24 A. Yes, sir. 25 Q. Okay. Is the new culvert larger than	Page 69 1 Q. Do you have a lease agreement with that 2 house, are you just renting month to month? 3 A. Just month to month. 4 Q. Now, I wanted to get a little more 5 information on your background. Do you have a 6 college degree? 7 A. Some college. 8 Q. Okay. 9 A. But not a degree, no, sir. 10 Q. Okay. What was your course study work? 11 Your course study work? 12 A. I go to Central Carolina, and I have a 13 waste water degree, a D license in biological waste 14 waters. 15 Q. Are you currently doing that, or is it 16 something you did previously? 17 A. I'm still currently. You have to go 18 every so many years to get CEUs to keep your 19 license. 20 Q. Do you use that license for any of your 21 work? 22 A. Yes, sir. 23 Q. Okay. How do you use it? 24 A. At Nanya Plastics, you have to be 25 licensed to work with the waste water department.

Page 70 1 Q. Okay. All right. You're not an 2 engineer, correct? 3 A. No, sir. 4 Q. You're not a hydrologist, correct? 5 A. No, sir. 6 Q. You're not a climatologist, correct? 7 A. No, sir. 8 Q. You don't have any formal training in 9 engineering, hydrology, or drainage systems, 10 correct? 11 A. No, sir, but I was considered an 12 engineer in the military. I was with the boilers, 13 things of that nature. In the Navy, I was 14 considered an engineer. As far as a degree in 15 engineering, no, sir. 16 Q. You don't have any formal training in 17 civil engineering, correct? 18 A. No, sir. 19 Q. Earlier you discussed -- was it Ken 20 Carraway or Kent Carraway? 21 A. I've always called him Ken. 22 Q. Ken? Okay. 23 A. Yes, sir. 24 Q. Earlier you discussed a conversation 25 you had with him where he had an opinion about the	Page 72 1 know how much is currently owed on that? 2 A. No, sir. 3 Q. What was the money used for? 4 A. The money? 5 Q. Yeah, from that loan. 6 A. We used some money, or did we? There 7 was so much money being moved around. I think we 8 just have that in savings for right now until we 9 know what happens next. 10 Q. Do you have an accounting that shows 11 how much of that loan you've used for anything? 12 A. You would have to speak with my wife 13 Lori Marlowe about that one. 14 Q. Okay. 15 A. She handles the money, so to speak. 16 Q. And similar with respect to the FEMA 17 money that you received, do you have an accounting 18 as to how that money was used? 19 A. Yes, sir. 20 Q. Okay. And where is that? Is that in 21 the spreadsheet that you provided? 22 A. Again, you would have -- 23 Q. Ask Lori? 24 A. Ask my wife Lori that. I stated before 25 she handled a lot of that while I worked in the
Page 71 1 design. He said it didn't look right. Do you 2 recall that testimony? 3 A. Yes, sir. 4 Q. Okay. Do you have an understanding as 5 to the nature or extent of his evaluation of the 6 design to reach that conclusion? 7 A. Yes. What he and I were discussing was 8 the old culvert in reference to where the new piece 9 of culvert was, how they were not aligned and how 10 they -- the water flow from the old culvert would 11 just hit the side of the new road and have to take 12 a 90 degree left turn to get to the new culvert. 13 Q. Okay. So it sounds to me like his 14 opinion was drawn from a visual observation of the 15 existing conditions or the new conditions after 16 construction; is that correct? 17 A. Yes. 18 Q. Do you have any knowledge that he 19 reviewed any design documents or engineering 20 documents to reach that conclusion? 21 A. No, sir. 22 Q. Did he perform any survey of the area 23 to draw that conclusion? 24 A. Not that I'm aware of, no, sir. 25 Q. The SBA loan that you took out, do you	Page 73 1 house and worked. 2 Q. All right. I'll reserve those 3 questions for her then. 4 Did you have homeowners insurance at 5 the house? 6 A. Yes. 7 Q. Did you file a claim or attempt to file 8 a claim? 9 A. Attempted. 10 Q. Was it denied? 11 A. Yes. 12 Q. Did you have flood insurance? 13 A. No, sir. 14 Q. Okay. You're no longer residing at the 15 subject property, correct? 16 A. No, sir. 17 Q. Okay. How often do you go by there? 18 A. Depends on my work schedule, rotating 19 shift work. But I go there -- every morning I drop 20 the kids off from school, I go by just to check on 21 things, check on our chickens, our pets, just to 22 make sure nobody wanted anything around there more 23 than we did, you know... 24 MR. McCUTCHEON: People after the five 25 finger discount.

Page 74 1 THE WITNESS: Yes, sir. Yes, sir. 2 You know, you still have to check on 3 that stuff, so... 4 BY MR. GARRAUX: 5 Q. Do you have anyone living around there 6 that you kind of rely on to keep an eye out for the 7 property? 8 A. Yes, sir. 9 Q. Who is that? 10 A. That would be Mr. Richard Carraway. He 11 keeps an eye out on the property very well for us. 12 Q. The most recent storm that came through 13 was Hurricane Florence. 14 A. Uh-huh. 15 Q. Did that cause any flooding at the 16 residence? 17 A. No, sir. The water did -- when we were 18 getting sections of rain, my father-in-law were 19 moving a few things out of the house. We have 20 totes and things that we keep in the house, and we 21 didn't know if it was going to flood or not, so we 22 moved a lot of stuff to the rental house. But 23 about midday on one of those days after the 24 hurricane, the water had came up to the barn, 25 touched the barn, and just went right back away.	Page 75 1 So no flooding in the barn at all, just a little 2 out of the banks but no harm. 3 Q. Do you know how much rain that area got 4 during Hurricane Florence? 5 A. Just by hearing people talking about 6 range gauges, around four or five inches. 7 Q. With respect to the 2015 flood and then 8 the 2016 flood, did you guys have friends or family 9 in and around the area that's homes also flooded? 10 A. No, sir. 11 Q. You're not aware of any of your friends 12 or family whose houses flooded during either one of 13 those rain events; is that correct? 14 A. No, sir. 15 Q. That's not correct, or that is correct? 16 A. I'm not aware of anyone's house who 17 flooded. 18 Q. During the 2015 or 2016 flood, in that 19 area? 20 A. Yes, sir. 21 Q. Are you familiar with Southern Asphalt 22 outside of this? 23 A. No, sir, just seeing them around the 24 house. 25 Q. And to the best of your recollection,	Page 76 1 did you ever speak to any representative of 2 Southern Asphalt after the first flood event or 3 after the second flood event or any time during the 4 project? 5 A. Not that I recollect. 6 Q. Do you know what their scope of work 7 was on the project? 8 A. No, sir. Scope of work meaning? 9 Q. What portion of the project were they 10 responsible for? Do you know? 11 A. No, sir. As previously stated, I just 12 know that it was a DOT project and was subbed out 13 to Southern Asphalt and United Infrastructure. 14 Q. Okay. 15 A. I didn't know -- I knew United 16 Infrastructure was known for bridgework, but I 17 didn't know who was doing what other than that. 18 Q. Okay. Have you reviewed your Complaint 19 or Amended Complaint in this lawsuit? 20 A. Yes. 21 Q. All right. One of your allegations is 22 that it states: Paragraph 11, unbeknownst to 23 plaintiffs, the design created or selected by 24 defendants did not include sufficient directive or 25 details to allow for the installation and	Page 77 1 construction of a roadway that would exist and be 2 operated without flooding plaintiffs' property. 3 Now, within that allegation you state 4 that the design was created or selected by the 5 defendants plural. What I want to know is do you 6 have any evidence that Southern Asphalt was 7 responsible for any portion of the design or 8 engineering for this project? 9 A. Not that I'm aware of you are 10 completely responsible for the design. 11 Q. Let me ask you again. To your 12 knowledge, was Southern Asphalt responsible for any 13 portion of the design or engineering for this 14 project? 15 A. I would assume that -- well, I know 16 that if DOT subs a job out, that everyone involved 17 is now responsible, the way I feel. 18 Q. Okay. What is that based on? 19 A. Based on just you would think people 20 would do the right thing. As far as who drew up 21 the engineering diagrams, I'm not -- I don't know 22 who did that. 23 Q. And that's essentially what I'm asking 24 you. You've worked with Nanya Plastics for 25 17 years?

Page 78 1 A. 19. 2 Q. 19 years. And you were in the military 3 so you're familiar with construction engineering, 4 correct? 5 A. Yes. 6 Q. And you can appreciate the difference 7 between designing and engineering and actual 8 construction, correct? 9 A. Yes. 10 Q. Design and engineering is typically 11 done by engineers or architects, correct? 12 A. Yes. 13 Q. And construction is typically done by a 14 general contractor, correct? 15 A. Yes. 16 Q. Okay. So it's a really simple 17 question. What I'm trying to find out is do you 18 have any evidence that Southern Asphalt was 19 responsible for any design or engineering for this 20 project, yes or no? 21 A. No evidence. 22 Q. In paragraph 13 of your Amended 23 Complaint, you state: Plaintiffs notified 24 defendants of the issues regarding the design and 25 construction of the roadway, bridge, and culvert	Page 80 1 represented to plaintiffs that the flooding would 2 not happen again as defendants would take steps 3 necessary to ensure that the design and 4 construction of the roadway and culvert system 5 would in the future significantly restrict the 6 water flow that caused the water at the culvert to 7 back up and flood plaintiffs' home. 8 Sitting here today, do you have any 9 evidence that Southern Asphalt or any of their 10 representatives ever represented to you that the 11 flooding would not happen again? 12 A. Not Southern Asphalt. 13 Q. Aside from the house that's the subject 14 of this litigation, do you own any other real 15 property or real estate? 16 A. No, sir. 17 Q. Okay. Do you own any personal property 18 like boats or cars or anything like that? 19 A. Yes, sir. 20 Q. Okay. What do you own? Do you have 21 any boats? 22 A. Yes. 23 Q. Okay. What kind of boat do you have? 24 A. I have a 17-foot Tracker boat. 25 Q. Is that a Bass Tracker boat?
Page 79 1 system and met with defendants on numerous 2 occasions in an effort to remediate the defective 3 design, construction, and installation to avoid any 4 further damage to plaintiffs' property. 5 All right. So taking that in parts, 6 you state plaintiffs notified the defendants of the 7 issues regarding the design and construction. 8 Sitting here today, do you have any evidence that 9 you ever notified Southern Asphalt of any problems 10 with the design or construction of the roadway, 11 bridge, or culvert system? 12 A. Not Southern Asphalt. DOT represented 13 us. 14 Q. Fair enough. 15 You go on to state in paragraph 13 that 16 you met with defendants on numerous occasions. 17 Sitting here today, do you have any 18 evidence that you ever met with any representative 19 of Southern Asphalt to discuss remediation of an 20 alleged defective design, construction, or 21 installation? 22 A. No. There again, I emailed and talked 23 with DOT representatives. 24 Q. Fair enough. 25 Paragraph 16, it states: Defendants	Page 81 1 A. I have a Bass Tracker boat as well, but 2 this was set up for duck hunting. 3 Q. And when did you purchase that boat? 4 A. 2010. 5 Q. Okay. 6 A. Somewhere around 2010. I can't 7 remember exactly. 8 Q. And the other boat, when did you 9 purchase that? 10 A. Early 2000's. 11 Q. Were either one of those damaged during 12 the flood? 13 A. No, sir. They floated -- the ladder 14 floated in the barn. 15 Q. I saw a picture of a boat resting on 16 some debris. 17 A. Yes, sir. That was my duck hunting 18 boat. My Bass Tracker was at my dad's house. I 19 let him use that. 20 Q. Did you replace the four wheeler? 21 A. No. 22 Q. Do you still have it, or did you 23 discard it? 24 A. I still have it, but I... 25 Q. Does the house currently have power

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1 running to it?

2 A. Yes.

3 Q. Okay. So are you paying the power bill

4 on a monthly basis?

5 A. Yes.

6 Q. As far as does it have running water?

7 A. I went there a month ago, and the water

8 was no longer working.

9 Q. Do you have a well?

10 A. Yes, sir. But up until a month ago,

11 yes, we had water as well.

12 Q. Since the second flooding event, have

13 you obtained any estimate from any company that you

14 determined how much it would cost to fix or repair

15 the home?

16 A. Other than FEMA coming in and giving an

17 estimate what it would take, you know, to just get

18 it livable again. But no outside contractors,

19 nothing like that.

20 Q. Do you have an idea in your mind what

21 it would cost to repair it or restore it?

22 A. No, sir. That can only be a blind

23 guess.

24 Q. Do you know whether the home sat in a

25 floodplain or a flood zone at the time of the first

Page 83

1 flood?

2 A. When I first purchased the house, I was

3 talking to my insurance company, who I'm still with

4 now, Nationwide, and asked about flood insurance

5 because I knew that Lynches River was just right

6 down the road, and I knew there was a swamp system

7 behind it. And they told me that I didn't live in

8 a flood zone so I didn't need to take out flood

9 insurance so I didn't.

10 Q. Do you know if the house now currently

11 sits in a floodplain or a flood zone?

12 A. No, sir. I have not looked at --

13 because I know that stuff gets rezoned. I do not

14 know if it's currently in a flood zone or not.

15 Q. And you've not sought to determine that

16 information, correct?

17 A. No.

18 Q. Do you know what's currently owed on

19 your mortgage of that house? Mr. McCutcheon may

20 have asked you that earlier, but I don't remember.

21 A. He may have, but that's something I'd

22 have to -- and that was South Carolina State

23 Housing Authority who I have the mortgage from. I

24 remember you asking me that question.

25 But, no, I would have to call and ask

Page 84

1 them the payoff. That would just be a blind guess,

2 and I wouldn't want to do that without getting some

3 real numbers.

4 Q. Do you still maintain homeowners

5 insurance on the house?

6 A. Yes, sir.

7 Q. Do you know how much that roughly is

8 per month?

9 A. That is paid directly with the --

10 Q. It's escrowed?

11 A. It's escrowed type payment, yes, sir.

12 Q. All right. Mr. Marlowe, just a couple

13 more questions about your background.

14 Where did you attend high school?

15 A. That would be Britton's Neck High

16 School in Marion County.

17 MR. McCUTCHEON: You're kidding.

18 THE WITNESS: No, sir.

19 MR. McCUTCHEON: My wife is from

20 Britton's Neck.

21 THE WITNESS: Really.

22 MR. McCUTCHEON: Yeah. I'll tell you

23 about it in a minute.

24 BY MR. GARRAUX:

25 Q. When did you graduate high school?

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1 MR. McCUTCHEON: Small world.

2 THE WITNESS: Yes, sir.

3 1996.

4 BY MR. GARRAUX:

5 Q. What did you do after you graduated

6 from high school?

7 A. Went into the military. I graduated

8 May, went into the military in August of the same

9 year.

10 Q. What branch of the military?

11 A. Navy.

12 Q. Navy?

13 How long did you spend in the military?

14 A. 1999. I got out in 1999.

15 Q. And what did you do after that?

16 A. Started work at Nanya Plastics.

17 Q. At Nanya Plastics.

18 A. Yes, sir.

19 Q. Okay. I think those are all the

20 questions I have. I really appreciate your time.

21 A. Thank you, sir.

22 MR. McCUTCHEON: I don't have anymore

23 questions.

24 THE WITNESS: Thank you, sir.

25 MR. WILLIAMS: I've got a couple follow

Page 86 1 ups. 2 EXAMINATION 3 BY MR. WILLIAMS: 4 Q. As far as defendants telling you that 5 it wouldn't flood again or they'd fix it, were you 6 notifying the defendants? I think you said you had 7 not notified Southern Asphalt, only DOT. I assume 8 you didn't notify UIG of any of that stuff other 9 than in conversations you had with Kevin Piner; is 10 that correct? 11 A. Other than conversations, the only 12 direct contact I had with anybody from United 13 Infrastructure would have been Kevin Piner. 14 Q. Okay. Have you ever missed a mortgage 15 payment on your house? 16 A. I've been late. 17 Q. Have you ever missed like three in a 18 row? 19 A. No, sir. 20 Q. Okay. You just used the term payoff, 21 and I didn't know whether you had some foreclosure 22 issue? 23 A. No, sir. No, sir. No, sir. No, sir. 24 Q. I believe you said you were in the 25 Navy?	Page 88 1 CERTIFICATE OF REPORTER 2 3 I, Karen M. Ernst, Court Reporter and 4 Notary Public for the State of South Carolina at 5 Large, do hereby certify that the foregoing 6 transcript is a true, accurate, and complete 7 record. 8 I further certify that I am neither 9 related to nor counsel for any party to the cause 10 pending or interested in the events thereof. 11 Witness my hand, I have hereunto 12 affixed my official seal this 19th day of October, 13 2018, at Myrtle Beach, Horry County, 14 South Carolina. 15 16 17 18 19 20 21 22 23 24 25  <i>Karen Ernst</i> Karen M. Ernst Court Reporter My Commission expires September 2, 2025
Page 87 1 A. Yes, sir. 2 Q. When did you join the Navy, and how 3 long were you in the navy? 4 A. I joined in '96 and got out in 1999, 5 1996 to 1999. 6 Q. Okay. And is that all the Armed 7 Forces -- is that the only time you were ever in 8 the Armed Forces? 9 A. Yes. I was in what they considered the 10 inactive reserves until 2007. I didn't have to do 11 any weekend drills or anything like that. I was 12 still -- 13 Q. Okay. 14 A. -- requested to come if they called 15 until 2007. 16 Q. All right. That's all my questions. 17 A. Thank you, sir. 18 EXAMINATION 19 BY MR. McCUTCHEON: 20 Q. Any summer camps during that inactive? 21 A. No, sir. No, sir. Nothing of that, 22 no, sir. 23 Q. That's all I've got. Thank you. 24 MR. HOPKINS: I don't have anything. 25 (Deposition concluded at 11:51 a.m.)	Page 89 1 INDEX 2 3 Page Line 4 5 JAMES DAVID MARLOWE 3 1 6 EXAMINATION 3 3 7 BY MR. McCUTCHEON 8 EXAMINATION 57 19 9 BY MR. WILLIAMS 10 EXAMINATION 68 6 11 BY MR. GARRAUX 12 EXAMINATION 86 2 13 BY MR. WILLIAMS 14 EXAMINATION 87 18 15 BY MR. McCUTCHEON 16 CERTIFICATE OF REPORTER 88 1 17 18 19 REQUESTED INFORMATION INDEX 20 21 Page Line 22 Mr. Bay's last name 21 14 23 24 25

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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign
require rejection of the deposition in whole or in
part.

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In the Matter Of:

James Marlowe & Lori Marlowe, et al. vs
SCDOT, et al.

Brian Dix

June 10, 2019



A. William Roberts, Jr. & Associates

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

JAMES MARLOWE AND LORI MARLOWE, INDIVIDUALLY
AND AS NEXT FRIEND OF K.P., H.M., AND B.M.,
MINORS UNDER THE AGE OF EIGHTEEN (18) YEARS,

Plaintiffs,

vs. CASE NO. 2017-CP-21-01168

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,
SOUTHERN ASPHALT, INC., UNITED INFRASTRUCTURE
GROUP, INC.,

Defendants.

DEPOSITION OF: BRIAN DIX

DATE: June 10, 2019

TIME: 1:16 PM

LOCATION: 955 Park St.
Rm. 115B
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: MARIE MCCOLLUM, Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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RECORD ON APPEAL 306

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(INDEX AT REAR OF TRANSCRIPT)

BRIAN DIX

being first duly sworn, testified as follows:

EXAMINATION

BY MR. HOPKINS:

Q. All right. Mr. Dix, my name is Clay Hopkins. We met a moment ago off the record. I represent the Marlowes in a lawsuit they've brought. You understand you're here today to give a deposition in that case?

A. Yes.

Q. And you watched Mr. Poston, so I won't go over all the rules again. And I'm going to ask you some pretty similar questions to start with.

Can you tell me what your address is, please?

A. 131 Misty Oaks Place, Lexington, South Carolina.

Q. And who lives there with you?

A. My wife and my three kids.

Q. Okay. And what's your wife's name?

A. Misty, M-I-S-T-Y.

Q. And what's Ms. Misty do for a living?

A. She's a physical therapist at University of South Carolina.

Q. Are any of your children over the age

1 of 18?

2 A. They are not.

3 Q. Do you have any family that lives in
4 Florence County?

5 A. I do not.

6 Q. Does Ms. Misty have any family that
7 lives in Florence County?

8 A. She does not.

9 Q. Have y'all ever lived in Florence
10 County?

11 A. We have not.

12 Q. Okay. I want to ask you about your
13 position at DOT and what your duties and
14 responsibilities are, please. Could you tell me
15 that?

16 A. I'm a program manager in the
17 pre-construction division, and I manage projects in
18 the PD area which consists of Marion, Florence,
19 Marlboro, Darlington, Dillon, and Chesterfield.

20 Q. And were you assigned to this project,
21 the 378 widening project in front of the Marlowe's
22 property?

23 A. Yes.

24 Q. And what were your duties and
25 responsibilities as it related to the widening

1 project?

2 A. At the time when I assumed this role,
3 the project was already in construction. So my
4 duties related to this would just be a support role
5 to the construction field, if they had any
6 questions.

7 Q. Did you have any role in the design of
8 the project?

9 A. I did not.

10 Q. Did you have any role in the planning
11 of the project at all?

12 A. I did not.

13 Q. Okay. I want to talk to you first
14 about any conversations that you had with the
15 Marlowes. Can you tell me about any that you had
16 during the time of this project?

17 A. In 2016, Jamie Poston forwarded me a
18 customer service request based on his meeting or
19 conversation with Mr. Marlowe and asked that I
20 explain some of the design elements that were going
21 on with the project.

22 So I met with our design team that was
23 involved with the project and got the details and
24 called Mr. Marlowe back and explained what we were
25 doing with the culvert in that location and the

6

1 hydraulic requirements of the department. And that
2 I also talked with Mr. Poston and got the
3 construction status of the project, where they
4 stood out there while they were building it, and
5 explained to Mr. Marlowe that the culvert was being
6 installed and that we wouldn't be able to fully
7 utilize the new culvert until the bridge over the
8 Lynches River was completed.

9 Q. Okay. And is that related -- what
10 Mr. Poston described, that was an initial customer
11 service, I guess, request that came in from
12 Mr. Marlowe; is that right?

13 A. That's right.

14 Q. And that would have been after the
15 first storm in 2015; is that right?

16 A. My records show that I called him in
17 2016.

18 Q. Okay. So that would have been after
19 that 2015 storm, right?

20 A. Yes.

21 Q. Okay. I guess, what were -- did he
22 have any concerns about the height of the roadway
23 and how it was being built at that time?

24 A. I don't know.

25 Q. Okay. Do you recall talking to him at

1 all about the height of the roadway?

2 A. I do not recall.

3 Q. I just want to know, was the main -- I
4 guess the main subject of your conversation, the
5 culvert and the drainage through the culvert?

6 A. Yes.

7 Q. Okay. Are you aware that Mr. Marlowe
8 described you saying the -- that DOT created a
9 chokepoint on his property?

10 A. I didn't -- I didn't say that.

11 Q. Okay. So you dispute what Mr. Marlowe
12 says, I guess?

13 A. Yes.

14 Q. Do you understand what he may mean by a
15 chokepoint?

16 A. No.

17 Q. Okay. Did you have -- I guess you've
18 told me that you had an e-mail note from 2016. Did
19 you communicate with him primarily over the phone
20 or in e-mail?

21 A. I called -- I called Mr. Marlowe.

22 Q. Do you know how many conversations you
23 had with him?

24 A. Just one.

25 Q. Okay. Did you ever have any sort of

1 follow-up communications with him to update him on
2 the progress of the project?

3 A. I did not.

4 Q. Did you ever speak with him again about
5 any concerns or complaints he had?

6 A. I did not.

7 Q. At the time of the 2015 storm, what was
8 the status of any sheeting on the shoring wall at
9 the project?

10 A. I do not know.

11 Q. Okay. Do you know about the status of
12 any sheeting on the shoring wall after the 2015
13 storm?

14 A. I do not know.

15 Q. Okay. Are you aware of any efforts by
16 DOT to put any sheeting on the shoring wall prior
17 to the 2015 storm?

18 A. I do not know.

19 Q. Okay. When was the larger culvert
20 finally installed?

21 A. I don't have those details.

22 Q. Okay. Was it after the 2016 storm, the
23 second storm?

24 A. I don't know.

25 Q. Okay. You were here for Mr. Poston's

1 deposition --

2 MR. MCCUTCHEON: I will stipulate for
3 the record, it was in January of 2017.

4 BY MR. HOPKINS:

5 Q. Okay. So from the time of the 2015
6 storm until January 2017 when the culvert was
7 finally installed, do you have any knowledge about
8 any efforts taken by DOT to speed up that process
9 at all?

10 A. I do not know.

11 Q. Okay. Was that ever discussed within
12 DOT?

13 A. I didn't have any discussions of that
14 matter.

15 Q. Okay. Did you take any efforts to
16 address the concerns by Mr. Marlowe beyond the
17 conversation that you had with him?

18 A. I explained to him that the culvert
19 that we had put in the plans to install was going
20 to be larger than the existing culvert out there,
21 so it should help the drainage.

22 Q. Okay. Are you aware of any design
23 revisions or edits from the 2015 storm until the
24 culvert was finally installed?

25 A. No.

10

1 Q. Are you aware of any efforts that DOT
2 took to look at the Marlowe property and any
3 surrounding properties and the drainage of -- on
4 those properties prior to this project?

5 A. No.

6 Q. Okay. Have you been to the Marlowe's
7 property since the culvert was installed?

8 A. I have not.

9 Q. Did you ever visit the Marlowe's
10 property while the project was being completed?

11 A. I did not.

12 Q. Have you ever been to their property?

13 A. Just drove by it on 378, that's it,
14 separately.

15 Q. Did you have any communications with
16 any, I guess, inspectors or any contractors at the
17 property during the project's completion?

18 A. I did not.

19 Q. Okay. Have you seen the report
20 prepared by Jason Gregorie in this case?

21 A. I don't know who Jason Gregorie is.

22 Q. I'm just asking if you've seen the
23 report prepared by him.

24 A. I don't know. I don't know if I have
25 or not.

11

1 MR. MCCUTCHEON: I'll stipulate for the
2 record, he ain't got it, because I didn't send it
3 to him.

4 BY MR. HOPKINS:

5 Q. All right. Do you have any opinion on
6 how the project -- the widening project may have
7 affected the Marlowe property?

8 A. I do not.

9 Q. Do you believe there's anything that
10 the DOT could have done to prevent any damage to
11 the Marlowe property?

12 A. I do not.

13 MR. HOPKINS: All right, Mr. Dix. I
14 don't have any more questions for you.

15 MR. MCCUTCHEON: I have none.

16 MR. ROBEY: I don't have any either.

17 COURT REPORTER: Can I get these
18 transcript orders on the record, too?

19 MR. MCCUTCHEON: He doesn't have to
20 read or sign.

21 MR. HOPKINS: Just the electronic one
22 and the original.

23 MR. MCCUTCHEON: And I want the same
24 thing with him.

25 MR. ROBEY: E-tran.

1 (The witness, after having been advised
2 of his right to read and sign this transcript,
3 waives that right.)

4 (This deposition was concluded at 1:26
5 PM.)

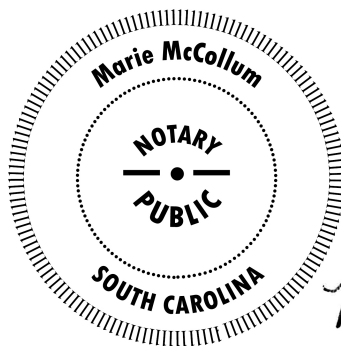
12

CERTIFICATE OF REPORTER

I, Marie McCollum, Court Reporter and
Notary Public for the State of South Carolina at
Large, do hereby certify that the foregoing
transcript is a true, accurate, and complete
record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 26th day of June,
2019 at Charleston County, South Carolina.



Marie McCollum

Marie McCollum,
Court Reporter
My Commission expires
November 8, 2027

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In the Matter Of:

James Marlowe & Lori Marlowe, et al. vs
SCDOT, et al.

Jamie E. Poston

June 10, 2019



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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

JAMES MARLOWE AND LORI MARLOWE, INDIVIDUALLY
AND AS NEXT FRIEND OF K.P., H.M., AND B.M.,
MINORS UNDER THE AGE OF EIGHTEEN (18) YEARS,

Plaintiffs,

vs. CASE NO. 2017-CP-21-01168

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,
SOUTHERN ASPHALT, INC., and UNITED
INFRASTRUCTURE GROUP, INC.,

Defendants.

DEPOSITION OF: JAMIE E. POSTON

DATE: June 10, 2019

TIME: 12:48 PM

LOCATION: 955 Park St.
Rm. 115B
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: MARIE MCCOLLUM, Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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ALSO PRESENT:

Brian Dix

(INDEX AT REAR OF TRANSCRIPT)

JAMIE E. POSTON

being first duly sworn, testified as follows:

EXAMINATION

BY MR. HOPKINS:

Q. Good afternoon, Mr. Poston.

A. Good afternoon.

Q. My name is Clay Hopkins. We met a moment ago off the record. I represent the Marlowe family in a lawsuit they've brought against South Carolina Department of Transportation and Southern Asphalt.

Do you understand you're here today to give a deposition in that matter?

A. I do.

Q. Have you given depositions before?

A. Yes, I have.

Q. I'm sure you're familiar with the rules, so I'll just remind you of the two most important ones: The Court Reporter here, she can't take down two people talking at once. So if you would, would you allow me to try and get my question out, and then I'll try and remember to let you have as much time as you want to answer. Okay?

A. I will.

Q. And also she cannot take down nonverbal

4

1 responses like you nodding your head or shaking
2 your head or anything like that. Okay?

3 A. Yes.

4 Q. So if I ask if that's a yes or a no,
5 I'm not trying to be rude. I'm just trying to make
6 sure I got everything straight for her. Okay?

7 A. Okay.

8 Q. I am usually pretty quick with these,
9 but if you do need to take a break, I know y'all
10 just ate, I just ate, just let me know, and I'll be
11 happy to go off the record for a moment. Okay?

12 A. Yes.

13 Q. Mr. Poston, what's your address?

14 A. 832 Woods Road, Pamplico, South
15 Carolina.

16 Q. And who lives there with you?

17 A. My wife.

18 Q. What's her name?

19 A. And my mother -- Darlene Poston.

20 Q. And your mother's name?

21 A. Happy Poston, Harriet.

22 Q. What does Ms. Darlene do for a living?

23 A. She works with the DOT, and she's in
24 procurement.

25 Q. And does she work in the Columbia

1 office for that position?

2 A. No. She's in the district.

3 Q. Okay. In Florence?

4 A. In Florence.

5 Q. Got it. How long has she been doing
6 that?

7 A. She's been there since January 2005.

8 Q. Okay. And before that, did she work in
9 Florence County?

10 A. She worked at Delta Mills, used to be
11 J.P. Stevens.

12 Q. Yes, sir.

13 A. She worked there for about 28 years,
14 and they closed the plant.

15 Q. Do you and Ms. Darlene have any
16 children over the age of 18?

17 A. Yes.

18 Q. What are their names?

19 A. Jodie Poston and Lindsey Poston.

20 Q. Do Jodie or Lindsey live in Florence
21 County anymore?

22 A. Yes.

23 Q. Where do they live?

24 A. They both live in Pamplico.

25 Q. And what do they do for a living?

6

1 A. My son is with Dominican -- Dominion.
2 Used to be SCE&G. My daughter's with PSA which is
3 a billing -- a doctors billing outfit in Florence.

4 Q. Okay. I understand that you were born
5 and raised in Florence; is that right?

6 A. That's correct.

7 Q. I understand you probably have a good
8 bit of family in the area; is that right?

9 A. Yes.

10 Q. Could you tell me briefly just what the
11 last names of your family members would be in
12 Florence County?

13 A. Postons, Evans, and that's probably --
14 Morris. They're from Lake City, Morris.

15 Q. Okay. I understand. Are you and
16 Ms. Darlene a member of any church in Florence?

17 A. Yes. Bethlehem United Methodist
18 Church.

19 Q. And the same -- are y'all a member of
20 any social organizations in Florence, like -- I
21 guess like a junior league or something like that?

22 A. No.

23 Q. What do you do for DOT, Mr. Poston?

24 A. I'm actually currently right now, I'm
25 the assistant district construction engineer in

1 Florence over the eight counties. At the time of
2 this project, I was actually the RCE.

3 Q. Okay. And what were your duties and
4 responsibilities as the RCE at that time?

5 A. Managed the projects in Florence and
6 Williamsburg County, anything that was assigned to
7 Florence and Williamsburg.

8 Q. Okay. Can you tell me about how you
9 first became involved in this project involving the
10 378 widening project?

11 A. This was, you know, a project that's --
12 a project that was assigned to Florence. And, you
13 know, it was actually given to my job -- my office
14 for -- you know, for management.

15 Q. Okay. And what role did you play in
16 the project?

17 A. It was just to oversee the project,
18 make sure everything was built per plan, make sure
19 all the state specifications were followed and
20 guidelines.

21 Q. Did you have any role in the design or
22 planning of the project?

23 A. No.

24 Q. Who would have been in charge of that?

25 A. That would be here in Columbia.

1 Q. Do you know what individuals that would
2 have been?

3 A. Not everybody. I think Stan Roof was
4 the hydrologic engineer. And at the time, I think
5 Wilson Eligan was actually the road design engineer
6 at the time. He's since retired.

7 Q. Okay. Are you familiar with the
8 Marlowes's property?

9 A. Yes.

10 Q. You live there --

11 A. Yes.

12 Q. -- in that area?

13 What familiarity did you have with the
14 Marlowes prior to the 378 widening project?

15 A. I didn't know him, him or his wife.

16 Q. Okay. Did you have any discussions
17 with the Marlowes before construction started on
18 the project?

19 A. No.

20 Q. Okay. When did your first interaction
21 with the Marlowes occur?

22 A. We had a service directive come in, and
23 that's just a -- when they e-mail here to Columbia
24 a service request, that they -- you know, they
25 wanted to talk with somebody, that was after the

1 first flood.

2 Q. And did they specify what they wanted
3 to talk about?

4 A. They just had some concerns with the
5 drainage in that area and wanted to kind of discuss
6 what -- you know, what we had done or, you know,
7 what we had on site.

8 Q. And did you speak with them?

9 A. Yes.

10 Q. And can you tell me about that
11 conversation, please?

12 A. Well, I mean, we just met, and he kind
13 of gave me his, you know, issues or what -- what
14 kind of issues he had. And I basically told him,
15 you know, what we were doing, the time frames that
16 the work was, you know, going to progress. And he
17 had questions about design, and I told him that I
18 would forward him to somebody that, you know, could
19 speak towards the design because I couldn't.

20 You know, basically what we did was
21 build it. Once it got in -- you know, got in
22 place, we, you know, build it per plan.

23 Q. Okay. And I guess let me parse out
24 some of that. The main concerns he had were with
25 the drainage?

10

1 A. Yeah. Well, he felt like the road
2 being built up caused his problem.

3 Q. Did you have any opinion or any
4 information on that at the time?

5 A. I mean, at the time, all I told him
6 was, you know, we were having -- you know, the
7 culvert size that we had in place, you know, under
8 the old road that we were going to be basically
9 three times as good -- you know, we were -- the new
10 culvert was actually three times bigger than that.
11 So, you know, we -- we -- once that got removed, we
12 shouldn't have any issues, you know -- or I say any
13 issues, that it would -- it would help some of the
14 concerns that he was, you know, discussing.

15 Q. So that was after the first -- the
16 2016 -- 2015 --

17 A. '15.

18 Q. -- flood; is that correct?

19 A. That's correct.

20 Q. And at that time, the new culvert had
21 not been placed in the area of the Marlowes's
22 property, correct?

23 A. Yes. Not in their property, no. We
24 had started the culvert.

25 Q. And at that time, construction on the

11

1 road had begun as well with the building up of the
2 road; is that correct?

3 A. That's correct.

4 Q. Do you know or are you aware of any
5 studies that DOT performed prior to the beginning
6 of that construction on whether or not the building
7 up of the road would exacerbate any flooding or
8 drainage issues on the property?

9 A. That would be handled through the
10 design -- through the design process, which, you
11 know, we don't have any dealings with that. We
12 just, you know, basically take what's per plan and
13 build it per plan.

14 Q. I understand. As we sit here today, do
15 you recall seeing any plans or designs as it
16 related to building up of the road and whether it
17 would have any issues with drainage or flooding?

18 A. No.

19 Q. You said that you directed him to -- or
20 you were going to direct him to somebody at that
21 time within design; is that correct?

22 A. That's correct.

23 Q. Do you know who that would have been or
24 do you know if those conversations took place?

25 A. Well, what -- what I did, when I come

12

1 back, I e-mailed Brian. He was -- you know, he's
2 the project manager.

3 Q. Yes, sir.

4 A. And he forwarded it on to the design
5 crew. And -- and that -- you know, that's the
6 way -- that's what happened.

7 Q. Okay. Did you have any opinion on the
8 state of the Marlowes's property after that 2015
9 flood?

10 A. No, other than, you know, it flooded.

11 Q. Okay.

12 A. I mean...

13 Q. Are you aware or do you know of any
14 studies that the DOT performed on the Marlowe
15 property or any surrounding properties and what the
16 estimated -- any estimated drainage or flooding
17 issues might have been?

18 A. No.

19 Q. Okay. Have you seen any of those
20 studies as we sit here today?

21 A. No.

22 Q. Okay. Is that a DOT standard practice?
23 Do they normally perform any studies on drainage or
24 flooding issues as it relates to properties?

25 A. Yes.

13

1 Q. Okay. But as we sit here today, you
2 don't recall any for the Marlowes's property?

3 A. No. Well, I hadn't seen any. I'm sure
4 there were, but I didn't see any.

5 Q. And specifically -- well, scratch that.
6 Do you recall whether DOT had any
7 discussions with the Marlowes prior to the widening
8 project?

9 A. I would assume that -- you know,
10 right-of-way talk with him, but, you know, we
11 didn't. I mean -- I mean, whatever right-of-way we
12 acquisition, they would have been talked to.

13 Q. Okay. What is the standard procedure
14 for communicating with a home owner prior to a
15 widening project like this?

16 A. I mean, it's handled several different
17 ways. They -- we'll put on a public hearing and
18 let people come and, you know, address issues and
19 all before -- beforehand, before it's let. But,
20 you know, nothing other than that or right-of-way
21 purposes.

22 Q. Is that in a DOT policy or procedure
23 somewhere?

24 A. Not that I'm aware of. I just -- most
25 of the bigger projects, we do that.

14

1 Q. Okay. I know you said you're not in
2 design, and we talked about there may have been a
3 flooding or drainage study performed prior to the
4 project being commenced. Is that based off any
5 sort of publication, manual, or standard that those
6 studies are performed?

7 A. I would think so. I don't know for
8 sure.

9 Q. Okay. Did you have any more
10 discussions with Mr. Marlowe or Ms. Marlowe after
11 that discussion in 2015?

12 A. No.

13 Q. Okay. Do you recall seeing any
14 complaints from the Marlowes after that
15 conversation?

16 A. Actually, I was promoted January of
17 2016, and another guy moved into -- Will Fulton
18 moved into the resident's job on that project. And
19 there was one other time that he sent in our
20 service department -- sent in, you know, saying he
21 had some issues, and it was drive related. It
22 wasn't drainage related.

23 Q. Okay. Do you recall at what point the
24 bigger culvert was placed near the Marlowes's
25 property?

1 A. It was actually placed after a bridge.
2 We had to -- you know, it staged, and we had to get
3 the bridge over Lynches River built first before we
4 could move traffic onto the new location, and it
5 was February 2017 before that happened.

6 Q. Okay. And that would have been after
7 the second flood --

8 A. Second.

9 Q. -- as well, correct?

10 A. That's right.

11 Q. At any point prior to that -- the
12 insertion of that new culvert in 2017, was DOT made
13 aware of any adverse conditions or problems with
14 the Marlowe property as it related to the widening
15 project aside from Mr. Marlowe's complaints?

16 A. That was it.

17 Q. Do you know if DOT ever sent anybody
18 out there besides you to go see what may have been
19 wrong or what Mr. Marlowe believed was wrong?

20 A. Well, what happened was when he -- he
21 gave his concerns to me, we passed it on back to
22 the hydrology, and hydrology went back and
23 revisited everything.

24 Q. Okay. Is there somebody -- and I guess
25 that's kind of what my question is. Is there

1 somebody within DOT who monitors the widening
2 project at all times and addresses concerns from
3 property owners --

4 A. We --

5 Q. -- as they come up?

6 A. Yeah. We have an inspector on site at
7 all times. And, you know, the resident is actually
8 over the job, and the inspectors, you know, feed
9 any kind of information that's needed -- you know,
10 that's his eyes and ears.

11 Q. Do you know who the inspector or
12 inspectors were for this project?

13 A. Yes. It was Robby Foxworth and Chris
14 Smith.

15 Q. Are they in the district office or are
16 they in Columbia?

17 A. No. They're in the Florence office,
18 the Florence construction office. And they were
19 actually road engineers. We had -- we had several
20 others on the bridge. I don't know if you want
21 those.

22 Q. Yeah. Can you just tell me those, if
23 you recall those?

24 A. Travis Springs and Seth...

25 MR. MCCUTCHEON: Seth what?

17

1 THE WITNESS: Seth -- what is his last
2 name? I can't remember his last name. Seth -- I
3 can't remember his last name. He's out of the
4 bridge office.

5 BY MR. HOPKINS:

6 Q. Okay. Seth something.

7 At any point during the widening
8 project as it related to the Marlowes and the area
9 near their property, are you aware of any changes
10 to the design of that area?

11 A. No.

12 Q. Okay. So the design as it was
13 originally intended or originally designed is
14 ultimately what was placed at their property?

15 A. That's correct.

16 Q. So I guess then I can assume that based
17 on their concerns or Mr. Marlowe's concerns that he
18 made to DOT or made to somebody at DOT, there were
19 no changes implemented in the design based on those
20 concerns?

21 A. No. No. Other than lengthening the --
22 you know, we lengthened the shoring wall.

23 Q. Okay. And why did y'all do that?

24 A. We just did that because we needed -- I
25 mean, that was actually what was submitted by the

1 contract.

2 Q. Okay. And that's Southern Asphalt?

3 A. Yeah.

4 Q. Did Southern Asphalt indicate why they
5 needed a longer shoring wall?

6 A. Well, I mean, during -- during the
7 first storm, there was no sheeting in place because
8 we were actually building -- you know, building the
9 section of road. And we kind of used the
10 information from that and set the sheeting up, you
11 know, once it was completed, the culvert -- or to
12 the point we needed to put sheeting.

13 Q. Okay. Is that standard prior to the
14 road being built, no sheeting was put on the
15 shoring wall?

16 A. No -- do what now?

17 Q. Let me parse that out. You said prior
18 to the road being constructed there was -- and this
19 is prior to the first storm, right?

20 A. Right. Yeah.

21 Q. There was no sheeting on the shoring
22 wall at that time, correct?

23 A. That's correct.

24 MR. ROBEY: Objection.

25 BY MR. HOPKINS:

1 Q. And why is that?

2 A. Because we were building the fill, you
3 know, the actual -- the actual shoring wall went in
4 place to hold back the fill when it got to a
5 certain point because we -- we had to extend once
6 we moved traffic to do what we needed to do, to
7 give us the room.

8 Q. Okay. And is that standard to not
9 place any sheeting on the shoring wall at that
10 point?

11 A. Yeah. Well, it's -- it's when you need
12 it, that's when you put it.

13 Q. Okay. Prior to the storm -- the actual
14 storm in 2015, were there any discussions within
15 DOT or between DOT and Southern Asphalt to put any
16 sheeting on the shoring wall?

17 A. It was actually set up in the plans to
18 put it. And, you know, we -- the culvert was
19 placed in June, and -- and from that point on,
20 we -- you know, everything was built to a point,
21 and then whenever it was time to build -- to do the
22 sheeting, we did the sheeting.

23 Q. And what is the purpose of sheeting?

24 A. It's usually used for staged
25 construction where you got different elevations

1 where you don't have, you know, a whole lot of room
2 so you can hold your slopes and all like they need
3 to be.

4 Q. The purpose is to keep higher slope
5 from coming down --

6 A. That's right.

7 Q. -- into a lower slope --

8 A. That's right.

9 Q. -- is that right?

10 A. That is correct.

11 Q. And certainly water or heavy rainfall
12 can exacerbate that problem, couldn't it?

13 MR. MCCUTCHEON: Object to the form.

14 You can answer.

15 THE WITNESS: If you don't --

16 MR. MCCUTCHEON: You can answer. Go
17 ahead.

18 THE WITNESS: If you don't do what's
19 necessary for erosion, yeah.

20 BY MR. HOPKINS:

21 Q. Okay. And so then after the 2015
22 storm, do you know what steps were taken to put
23 sheeting on the shoring wall?

24 MR. MCCUTCHEON: Object to the form of
25 the question.

1 You may answer.

2 THE WITNESS: As we were building the
3 slope, you know, we riprap the bank as we were
4 coming up until we got to a point that, you know,
5 we needed to put the sheeting up.

6 BY MR. HOPKINS:

7 Q. And do you know when that sheeting was
8 placed initially?

9 A. Yes.

10 Q. When was that?

11 A. It was actually -- I had it documented.
12 The sheeting was done -- it was actually put
13 1/30/16.

14 Q. January 30th, 2016.

15 A. January 30th, '16.

16 Q. And that would have been about three
17 months after that 2015 storm, correct?

18 A. That's correct.

19 Q. Okay. Were there any steps taken or
20 any steps considered in that three-month time
21 period to put sheeting on the shoring wall to
22 prevent any --

23 A. Well, I mean, the plan was submitted
24 November -- the 1st of November for the sheeting
25 because it was time to do -- you know, it was time

1 to do it. That was done ahead of time. It was
2 actually then -- then -- it was then before we
3 needed it. I mean, we needed it then when we put
4 it.

5 Q. Okay. I guess my question is was prior
6 to the storm coming in 2015, were there any steps
7 taken by DOT to prevent a flooding event at the
8 Marlowe property?

9 A. I don't -- erosion measures. We take
10 erosion measures. You know, there was stuff put on
11 the slopes to maintain the slopes.

12 Q. Okay. And what sort of stuff would
13 that be?

14 A. Riprap and geotech style that goes on
15 the face of the slopes.

16 Q. Okay. And so then after the storm, the
17 work order is put in to put sheeting on the shoring
18 walls; is that correct?

19 MR. MCCUTCHEON: Object to the form.

20 THE WITNESS: No. I mean, it was in
21 the process. We were in the process of building
22 the slopes when the storm came. I mean, we just --
23 it was just where it hit in the -- in the middle of
24 construction.

25 BY MR. HOPKINS:

1 Q. Okay. I'm not trying --

2 A. Yeah, I know.

3 Q. I'm not trying to trick you. I'm just
4 trying to get a timeline for my understanding. I'm
5 not an expert in this field at all.

6 So then in January the sheeting is
7 finally placed against the shoring wall, correct?

8 A. That's correct.

9 Q. January 30th, 2016?

10 A. (Witness moves head up and down.)

11 Q. Okay. And then from that time, January
12 30th, 2016, until the next rain event in October of
13 2016, were there any changes made to the design or
14 the execution of the widening project?

15 A. No.

16 Q. Okay. Were there any complaints
17 addressed or concerns addressed by the DOT during
18 that time period as well?

19 A. Not that I'm aware of. I mean, the
20 only concerns were that they felt like us building
21 the road up so high caused their problem.

22 Q. Okay.

23 A. That's...

24 Q. And do you have any thoughts on that?

25 A. I mean, that's -- that would be above

1 my -- you know, that would be a design engineer
2 would have to answer that.

3 Q. Okay. And have you seen the pictures
4 of the flooding on the Marlowes's property?

5 A. Yes, yes.

6 Q. Does it appear that the higher
7 elevation prevented water from getting out -- the
8 higher elevation of the road construction prevented
9 water from draining off their property?

10 A. Well, I mean, we had a culvert there to
11 handle the drainage.

12 Q. Okay. Prior to the initial storm in
13 2015, do you know whether DOT did any study on
14 whether the original roadway allowed water to go
15 over it -- to drain over it?

16 A. Not that I'm aware of.

17 Q. Okay. Give me one second, Mr. Poston.
18 I'm just trying to find one thing here.

19 Did you personally have any
20 conversations with any employees of Southern
21 Asphalt during this time about any concerns or
22 complaints regarding the widening project?

23 A. I made them aware that there was, you
24 know, issues that had arose from the flood, which
25 we -- you know, we felt like would come. I mean...

25

1 Q. I guess, what issues were those that
2 you made them aware of?

3 A. That, you know, we had -- we had -- I
4 mean, all our issues were obvious. You know, we
5 had -- we had places that washed out that we had to
6 go back and repair, but, you know -- other than
7 that, other than just regular construction.

8 Q. Okay. Are you aware of any efforts by
9 DOT after the storm in 2015 to install the bigger
10 culvert at an earlier pace than what was previously
11 designed or planned for?

12 A. No. No.

13 Q. Okay.

14 A. You say changed the size?

15 Q. Change the install date.

16 A. Really the install date was going to be
17 dependent on the opening of the bridge. We had to
18 open the bridge before we could lay the rest of the
19 culvert because of the -- you know, because of the
20 room.

21 Q. Okay. I understand. And so we know
22 the bigger culvert was installed in 2017 after the
23 second storm, right?

24 A. Right.

25 Q. And --

1 A. Well, it's half. It's staged. It's
2 staged. We did half of the new culvert, and -- and
3 we put, you know, what fill we needed on that
4 section to do the traffic switch. And then once
5 that traffic switch was done, we're able to come
6 back and add the rest -- you know, the rest of the
7 culvert and tear the old roadbed out.

8 Q. Have you seen a report prepared by
9 Jason Gregorie in this case?

10 A. No, I haven't.

11 Q. Okay. Have we talked about all the
12 interactions that you had with Mr. Marlowe that you
13 recall?

14 A. Have what now? I didn't understand.

15 Q. Have we talked about all the
16 conversations, your interactions --

17 A. Yes.

18 Q. -- that you had with Mr. Marlowe?

19 A. Yes.

20 Q. How was Mr. Marlowe in all the
21 conversations you had with him? Was he pleasant?

22 A. Yeah. Well, he was -- I mean, he was
23 hurt, but, I mean, it was just -- I mean, he wasn't
24 out of the way.

25 Q. Okay. And do you still drive by their

1 property on occasion?

2 A. Yes.

3 Q. What's it look like now?

4 A. Well, I mean, he's -- you know, he had
5 his house fixed back, or to the point that he was
6 fixing to move back in, before the second flood.
7 And I don't know that he's -- what he's done in
8 there now.

9 Q. Okay. Do you have any opinion on any
10 effect this project has had on the Marlowes's
11 property?

12 A. No, I mean, other than, you know, he
13 lost his house. I don't know that the project, you
14 know -- he thinks it did, but, you know, I can't
15 verify whether it did or didn't.

16 Q. Do you think even had the project not
17 been begun, they still would have lost their house?

18 MR. MCCUTCHEON: Object --

19 THE WITNESS: I have no idea.

20 MR. MCCUTCHEON: Object to the form.

21 It calls for pure speculation.

22 BY MR. HOPKINS:

23 Q. Do you believe that the damage to the
24 Marlowes's property both in the 2015 storm and the
25 2016 storm could have been prevented in any way by

1 DOT?

2 A. No.

3 MR. HOPKINS: Okay. Mr. Poston, I told
4 you I'd be quick. I don't think I have any more
5 questions for you.

6 MR. MCCUTCHEON: I have none.

7 MR. ROBEY: None for me.

8 COURT REPORTER: I need to get the
9 transcript orders on the record.

10 MR. HOPKINS: Just an electronic one
11 for me and the original.

12 MR. MCCUTCHEON: We'll waive reading
13 and signing of his deposition.

14 COURT REPORTER: Would you like a copy
15 of the transcript?

16 MR. MCCUTCHEON: Yes. I want the big
17 transcript and an e-tran.

18 MR. ROBEY: E-tran.

19 (The witness, after having been advised
20 of his right to read and sign this transcript,
21 waives that right.)

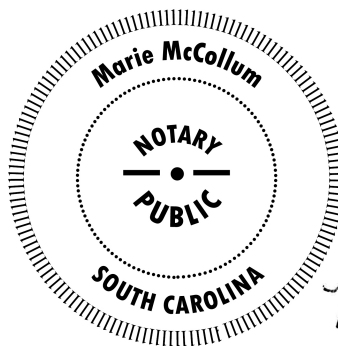
22 (This deposition was concluded at 1:15
23 PM.)

CERTIFICATE OF REPORTER

I, Marie McCollum, Court Reporter and
Notary Public for the State of South Carolina at
Large, do hereby certify that the foregoing
transcript is a true, accurate, and complete
record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 26th day of June,
2019 at Charleston County, South Carolina.



Marie McCollum

Marie McCollum,
Court Reporter
My Commission expires
November 8, 2027

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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James Marlowe and Lori Marlowe,
individually, and as Next Friends of K.P.,
H.M., and B.M., Minors under the age of
Eighteen (18) years,

Plaintiffs,

v.

South Carolina Department of
Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C.A. No. 2017-CP-21-01168

**PLAINTIFFS' MOTION TO
RECONSIDER, ALTER, OR AMEND**

Pursuant to Rule 59(e), SCRCP, Plaintiffs file this motion requesting the Court reconsider, alter, or amend its ruling dated March 25, 2020, granting Defendant South Carolina Department of Transportation's ("SCDOT" or "Defendant") Motion for Summary Judgment. As set out more fully below, reconsideration of that ruling is warranted:

- 1) because the Stormwater Management and Sediment Reduction Act is inapplicable in this case;
- 2) because the Court made improper factual determinations specifically reserved for the jury, including, who or what – and specifically, whether Defendant, its agents, or employees – caused the flooding to Plaintiffs' property;
- 3) because the Court improperly weighed the testimony of Plaintiffs' expert witness;
- 4) because the Court failed to address Plaintiffs' discretionary immunity arguments;
- 5) because the Court granted summary judgment on Plaintiffs' inverse condemnation claim despite Defendant failing to raise the issue in its Notice or Motion for Summary Judgment;
- 6) because the Court improperly made factual determinations reserved for

the jury in determining the facts of this case do not amount to inverse condemnation;

- 7) because the Court relied on an inapplicable test to determine that Plaintiffs' had not sustained an injury necessary to establish inverse condemnation.¹

LEGAL STANDARD

"A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may file such a motion "when [he or she] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780. "A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* (emphasis in original).

ARGUMENT

I. RECONSIDERATION IS WARRANTED BECAUSE THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION ACT IS INAPPLICABLE HERE.

Plaintiffs respectfully argue that both this Court's conclusion and its reliance on Defendant's citation to the Stormwater Management and Sediment Reduction Act ("Stormwater Act")² to support granting summary judgment are erroneous. Plaintiffs did not allege any deficiency in Defendant's application or procurement of a permit under the Stormwater Act.

¹ The facts of this case are fully set out in Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment.

² S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2005).

The Legislature's intent is plainly and unequivocally expressed in the applicable statute. The General Assembly enacted the Stormwater Act to specifically address stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167.

The Stormwater Act requires a person who intends 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, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The stormwater regulations provide that unless exempted, "a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan." S.C. Code Ann. Regs. 72–305(A). In other words, all non-exempt development construction sites must have a permitted plan for handling stormwater, the requirements of which depend on the size and complexity of the project. *See id.* 72–305(B). Further, as the Court's Order notes, the Stormwater Act states that "[n]othing... in this chapter...may be construed: (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity." (See Order dated March 25, 2020, at 3-4 (citing S.C. Code Ann. § 48-14-160(2))).

The Stormwater Act does not apply to the facts of this case. Not only did the Court's Order and Defendant's memorandum, respectively, fail to cite to or rely on any South Carolina appellate case (or federal court analysis) interpreting the Stormwater Act to

relieve a party from similar actions and inactions as the facts alleged here, but, as the Order notes, the Stormwater Act expressly states that it does not relieve Defendant from liability for actions or inactions in the land disturbing activities. (*Id.*).

In fact, there is no South Carolina case or other authority in support of the proposition that this Defendant may make an end run around liability for its actions or inactions by relying on a permitting statute. To the contrary, South Carolina law states that where the language of a statute is plain and express (as it is here), the court has no right to impose another meaning.

Because the General Assembly's intent is plain and explicit, because there is no precedent or authority supporting the Court's conclusion in similar cases, and because proximate causation is a jury question, Plaintiffs respectfully request this Court reconsider, alter or amend its ruling that the Stormwater Act precludes liability for Defendant's actions or inactions here.

II. RECONSIDERATION IS WARRANTED BECAUSE THE COURT MADE FACTUAL DETERMINATIONS WHICH WERE SOLELY FOR THE JURY'S CONSIDERATION.

a. Whether the flooding to Plaintiffs' property was caused by an "act of God" was a question for the jury.

In its Order, the Court found that the flooding to Plaintiffs' residence was caused by "acts of God," not any negligence on the part of the SCDOT.³ Causation, and specifically whether a party's injuries were caused by an "act of God", is a question of fact

³ Specifically, the Court concluded that "[t]he flooding in October 2015 and October 2016 were Acts of God and not caused by the SCDOT. In October 2015, the Grand Strand and Pee Dee suffered from the '1000 Year Flood.' Then in October 2016, Hurricane Matthew struck South Carolina causing massive flooding throughout the Grand Strand and Pee Dee. Many residents suffered flooding in their homes, including many who had never experienced flooding previously." (Order, at 5).

for the jury. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938).⁴

"Ordinarily, proximate cause is a question for the jury[.]" *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 613-14, 579 S.E.2d 136, 145 (Ct. App. 2003) (citations omitted), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

Other jurisdictions have specifically concluded that whether a flooding event constitutes an "Act of God" is a question of fact for the jury to consider. See *Lee v. Mobil Oil Corp.*, 203 Kan. 72, 452 P.2d 857 (Kan. 1969) ("Whether a particular flood is of such extraordinary and unprecedented nature as to constitute an 'act of God' is a question of fact for the jury."); *Maddock v. Andersen*, 2013 ND 80, 830 N.W.2d 627 (N.D. 2013) ("Whether an act-of-God defense has been established is a question of fact."); *Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud*, 532 N.W.2d 192, 209 Mich. App. 452 (Mich. App. 1995) ("An act of God is a valid defense to a trespass claim and presents a question of fact for a factfinder."); *Brown v. Sandals Resorts Intern.*, 284 F.3d 949 (8th Cir. 2002) (citing *Northwestern Bell Telephone Co. v. Henry Carlson Co.*, 83 S.D. 664, 165 N.W.2d 346, 349 (S.D.1969) (holding that whether damage was

⁴ This analysis applies equally to the Court's Stormwater Act determination, *supra*: "whether the violation of a statute is the proximate cause of an injury is ordinarily a jury issue and thus inappropriate for disposition by summary judgment." *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1983).

proximately caused by act of God is question of fact for jury to resolve, and that trial judge erred in taking issue away from jury); *Omega Apparel Inc. v. ABF Freight Sys., Inc.* (M.D. Tenn. 2012) (denying a defendant's motion for summary judgment where the Court stated that even though a jury would be "hard-pressed" to find flooding was not an "act of God," the defendant was not absolved of liability unless it could show that its negligence played no role in the loss.).

In this case, it certainly was a question of fact for the jury to consider whether the flooding to Plaintiffs' property was caused by the Defendant's negligent acts and/or omissions or "acts of God" and, therefore, which was the proximate cause of Plaintiff's injuries. *Montgomery*, 186 S.C. at 167. "[W]hen a defendant pleads the act of God, he must prove that the act of God is the sole proximate cause of the injury, and to do so, such defendant must of necessity prove that he is without negligence which contributed as a proximate cause. In other words, this defense creates a separate issue in which the rule is different, in that a defendant has to prove himself without negligence in order to show that the act of God is the sole proximate cause." *Id.*

The Court erroneously granted Defendant's motion for summary judgment because whether the flooding was a result of "acts of God" was a question of fact which should have been determined at trial by the jury. For that reason, summary judgment was inappropriate and reconsideration of the Court's determination regarding Defendant's "acts of God" defense is warranted. See *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (2014) (rendering summary judgment inappropriate where a question of fact exists); see also *Thomas v. Dootson*, 659 S.E.2d 253, 377 S.C. 293 (Ct. App. 2008) (finding a directed verdict inappropriate where a jury question was presented).

b. Whether the flooding to Plaintiffs' property was caused by a natural condition was a question for the jury.

The Court further concluded that, pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on Plaintiffs' property "as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees." (Order, at 5). As discussed above, the factual determination by the Court as to the proximate cause of Plaintiffs' injuries was inappropriate at the summary judgment stage where there was conflicting evidence concerning causation. Specifically, the question of whether the flooding on Plaintiffs' property was a natural condition or caused by Defendant, its agents, or employees was a factual questions for determination by a jury.

While the two (2) weather events which occurred when Plaintiffs' property flooded were extreme, and even historic, there was evidence in the record, as set forth above, which suggested the condition which caused the flooding of Plaintiffs' property was not just a "natural condition" but rather was, in fact, caused by the negligence of a government employee or employees. Taking the evidence in the light most favorable to Plaintiffs, as the Court was required to do, there was evidence that Defendant knew, or should have known, that Plaintiffs' home would likely be affected by a 10-year rain event due to the existing box culvert, and Defendant took no steps, or even considered taking any steps, to remove that culvert or install a new one until 2017, well after the two rain events. The evidence also showed that were those events isolated to only one-day events, the rainfall would have exceeded those permitted levels, which were below Defendant's self-created standard of 100-year rain events. For these reasons, reconsideration of the Court's determination is warranted in light of the conflicting evidence in this case which presented a factual dispute for jury determination.

c. Whether the flooding to Plaintiffs' property was caused by Defendant, its agents, or employees was a question for the jury.

Similarly, the Court's ruling that "[p]ursuant to the Tort Claims Act, [Defendant] is not liable for the flooding on [Plaintiffs'] property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees" was a factual determination reserved for the jury. Evidence was submitted that suggested Defendant had knowledge of a defect or hazard in the culvert adjacent to Plaintiffs' property, failed on multiple occasions to remedy that defect or hazard, and that the inadequate culvert was the cause of the flooding on Plaintiffs' property. Thus, summary judgment was inappropriate, and the Court's determination that these conditions were natural was a factual determination reserved for the jury in light of the conflicting evidence submitted.

First, Defendant is liable to Plaintiffs because it knew or should have known in 2013 during its design of the Project, again in 2015 when it began construction on the Project, after the 2015 rain event, and after the 2016 rain event, that the existing box culvert adjacent to Plaintiffs' property was substandard under its own design requirements, and made no efforts to correct or replace the culvert. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008)

In *Giannini*, the plaintiffs claimed that DOT failed to take proper measures after notice of an existing hazard. 664 S.E.2d at 453. In that case, the portion of the roadway where the plaintiff's car accident occurred had experienced several crossover accidents within two miles of their accident in which two people had been killed, and the accidents had been publicized by local media. *Id.* The Supreme Court of South Carolina determined that the plaintiff's claim was not a claim of defective construction but, rather, one of failure to take corrective action after notice of a defect. *Id.*

The *Giannini* Court determined that the case was analogous to *Wooten v. SCDOT*, 333 S.C. 464, 511 S.E.2d 355 (1999). *Id.* In *Wooten*, the Supreme Court affirmed the Court of Appeals' ruling that although SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition. 333 S.C. at 467-468, 511 S.E.2d at 357. In *Wooten*, the plaintiffs claimed SCDOT was negligent in failing to provide traffic lights at an intersection which would allow a pedestrian ample time to cross the street. *Id.* The Court of Appeals held that although DOT initially had design immunity, such immunity was not "perpetual." *Id.* The Court of Appeals held that once DOT had notice the intersection was hazardous, it was no longer immune from liability. 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997). On appeal, the Supreme Court affirmed as modified, adopting the trial court's ruling that the immunity provision regarding signs and signals was the more specific one applicable to the case, such that a jury issue was presented as to whether SCDOT was liable. 333 S.C. at 468-469, 511 S.E.2d at 357-358 (1999). Accordingly, the *Giannini* Court found that the trial court properly denied SCDOT's motions for directed verdict and JNOV on the issue of whether it breached a duty to the plaintiffs in failing to install median barriers after notice of cross over accidents along that stretch of roadway. 664 S.E.2d at 454.

Here Defendant was unable to testify when the Project's new culvert was finally installed, but the record establishes it was not fully installed by at least 2017. (DOT Dep. p. 37, ¶¶6-13; p. 50, ¶¶9-15). However, in 2017, Defendant admitted it had the information necessary in 2013 to determine (in accordance with its Addendum) that the existing culvert prior to the initiation of the Project could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on Plaintiff's property. (*Id.* p. 36, ¶¶1-

5). Defendant admitted the existing culvert was undersized according to its own standard. (*Id.* p. 11, ¶¶17-20) (“The existing culvert was undersized.”) Despite this knowledge, Defendant admitted there was never any consideration given to install a new culvert, much less the one that was supposed to be installed during Stage I of the Project. (*Id.* p. 41, ¶24 – 42, ¶5; p. 12, ¶¶6-21).

Furthermore, not only was Defendant aware that the existing culvert was undersized when it began designing and construction on the Project, Defendant knew or should have known that the existing roadway served as an outlet for water, even at 25-year rainfall levels. (*Id.* p. 27, ¶¶15-19). Defendant knew this was unsafe. (*Id.* p. 28, ¶¶4-6) (“Q: And the standard should be a hundred-year rain event; is that correct? A: Right.”). Despite its own models indicating overflow, Defendant admits it took no steps to speak to Plaintiffs or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (*Id.* p. 35, ¶¶1-4; p. 53, ¶¶2-11). Defendant admits it did not even consider contacting them. (*Id.*, p. 53, ¶¶17-19).

As Jason Gregorie’s report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to Plaintiffs’ property both showed rainfall events greater than 10-year but less than 25-years. (See Ex. 2 to Plaintiffs’ Mem. Opp. S.J., 20).⁵ Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, Defendant knew the existing culvert adjacent to Plaintiffs’ property would likely affect their home. For that reason, by Defendant’s own admission, it had information in 2013 and prior to the construction of the Project that the existing culvert was a hazard, which no

⁵ Defendant produced no contradicting evidence, from expert testimony or otherwise, concerning these rainfall figures. For that reason alone, summary judgment was inappropriate on this issue.

longer provided it immunity, and Plaintiffs' claim for negligence in this aspect should be submitted to a jury. *Wooten*, 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997).

III. RECONSIDERATION IS WARRANTED BECAUSE THE COURT IMPROPERLY WEIGHED THE TESTIMONY OF PLAINTIFFS' EXPERT WITNESS.

The Court concluded that Jason Gregorie, Plaintiff's expert, testified there was no defect in the design or construction of the project, and that if there is no defect in the construction or design, then there is no basis for liability on the part of SCDOT. (See Order dated March 25, 2020, at 5). The Court further noted that "Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project, the Marlowe's residence *may* have still flooded." (*Id.*) (emphasis added). Specifically, the Court stated:

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

(*Id.*). As previously discussed in Plaintiffs' memorandum in opposition to Defendants' Motion for Summary Judgment, Defendant's argument, and the Court's ruling, disregards the South Carolina Supreme Court's decision in *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008). In fact, the *Giannini* Court's decision establishes that the Court's findings regarding Jason Gregorie are misplaced. 664 S.E.2d at 454.

In *Giannini*, the plaintiffs presented the deposition testimony of a highway transportation engineer. *Id.* The plaintiffs' expert testified that it was feasible to install three-cable median barriers prior to the car accident, and that such a barrier would have

entrapped or redirected the tires of a car hitting it. *Id.* When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified,

"I think it is highly likely that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And although there may have been some subsequent crash, it would not have been the crash that occurred. The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

The *Giannini* Court found that this evidence was sufficient to submit the issue to the jury, and any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury. *Id.* at 454-55 (citing *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility)).

In fact, the South Carolina Supreme Court has specifically addressed the Court's ruling concerning Gregorie's testimony that the property may have flooded absent Defendant's actions or inactions. *King v. North River Ins. Co.*, 278 S.C. 411, 297 S.E.2d 637 (S.C. 1982). In *King*, a case involving the collapse of the roof of a warehouse following a heavy rainstorm, the Supreme Court stated that "it is generally sufficient to prove the event insured against was the efficient cause of the loss, even though not the sole cause." *Id.* at 414. The *King* Court found that "[w]here an expert has testified that the accumulated water on the roof would not by itself have caused the roof to collapse, a reasonable jury could find that the clogging of the downspouts was the efficient and proximate cause." *Id.*

Nevertheless, Plaintiffs again emphasize, as they did in their memorandum and at the hearing on the motion for summary judgment, Defendant can use cross-examination to question Gregorie's conclusions and identify any potential flaws in his causation argument for the jury. The dispute in facts between Gregorie and Defendant, however, is quintessentially a fact-finding issue reserved for adjudication by a jury. For this reason, any perceived defects in Gregorie's testimony do not warrant summary judgment, and the Court's factual determination and conclusions warrant reconsideration.

IV. RECONSIDERATION IS WARRANTED BECAUSE THE COURT FAILED TO CONSIDER PLAINTIFFS' DISCRETIONARY IMMUNITY ARGUMENT.

Respectfully, the Court's Order fails to consider or address the South Carolina Supreme Court's decisions finding liability against the DOT under Plaintiffs' "discretionary immunity" arguments. The Court's ruling that "[i]f there is no defect in the construction or design [of the Project], then there is no basis for liability on the part of [Defendant]." (Order, at 5). This holding misapplies South Carolina precedent regarding the Tort Claims Act and discretionary immunity, which the Court failed to consider or address in its Order.

The Court found that the Tort Claims Act, and specifically, S.C. Code § 15-78-60(15), completely shields Defendant from liability in this case, which is, respectfully, in contravention of South Carolina jurisprudence on the subject. Section 15-78-60(15) sets forth exceptions to the state's waiver of sovereign immunity, stating, in pertinent part, that a governmental entity is not liable for loss resulting from:

(15) absence, condition or malfunction ... of any ... median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.... Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the

governmental entity.... Governmental entities are not liable for the design of highways and other public ways....

The Tort Claims Act, Section 15–78–60(5), also provides that a “governmental entity is not liable for a loss resulting from: (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.” S.C. Code Ann. § 15–78–60(5) (2005). The South Carolina Supreme Court has repeatedly explained that “the burden of establishing a limitation on liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.” *Pike v. S.C. Dep’t of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

“To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice.” *Id.* “Furthermore, ‘the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.’” *Id.* at 230, 540 S.E.2d at 90–91 (quoting *Foster v. S.C. Dep’t of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

Plaintiffs presented substantial evidence, including expert witness testimony and Defendant’s 30(b)(6) testimony, that Defendant failed to weigh any competing considerations or alternatives with regard to, *inter alia*, its decision to delay installation of the new culvert either before or after the 2015 rain event, its decision that traffic should not be rerouted to install the culvert sooner, to consider the simultaneous existence of the

existing Highway 378 roadway, with its existing culvert having very limited flow capacity, adjacent to the new elevated Highway 378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction. The Court's failure to consider this theory of liability, and Defendant's failure to present evidence establishing it was entitled to the defense of discretionary immunity, warrants reconsideration.

Here, like the case of *Summer v. Carpenter*, Plaintiffs presented evidence that Defendant failed to consider critical stages of construction for the Project, and, ultimately, failed to consider anything, much less competing considerations or alternatives. 328 S.C. 36, 492 S.E.2d 55 (1997). In *Summer*, the Supreme Court determined (in a legal malpractice action concerning an attorney's failure to sue the DOT before the statute of limitations ran) that the defendant presented evidence which indicated (1) the design used for the intersection was common and (2) while respondent's expert would have selected another design, the chosen design was not wrong. 328 S.C. 46.

The Supreme Court determined this evidence did not establish that defendant considered various design options for the intersection and then selected the chosen design plan after carefully weighing competing considerations. *Id.* Accordingly, the Supreme Court held that the trial judge erred in concluding the Highway Department would have been immune from liability under the discretionary exception to the Act as a matter of law. *Id.* For these reasons, Defendant did not meet its burden that it was entitled to discretionary immunity, and because the Court failed to address or determine whether Defendant could be liable to Plaintiffs for these failures, the Court's Order warrants reconsideration.

V. RECONSIDERATION IS WARRANTED BECAUSE THE COURT FAILED TO ADDRESS THE ARGUMENT THAT DEFENDANT DID NOT RAISE PLAINTIFFS' INVERSE CONDEMNATION CLAIM IN ITS MOTION FOR SUMMARY JUDGMENT.

At oral argument on its motion for summary judgment, Defendant argued, for the first time, the Court should grant summary judgment in its favor on Plaintiffs' inverse condemnation claim. Plaintiff objected on the ground this relief was not stated or sought in Defendant's motion. The Court ruled Defendant was entitled to summary judgment on Plaintiffs' inverse condemnation claim. Because Defendant failed to move for summary judgment on Plaintiffs' inverse condemnation claim in its Notice and Motion for Summary Judgment, the Court's Order warrants reconsideration.

In its Notice and Motion for Summary Judgment, Defendant stated, "This motion is based upon the fact that [Defendant] is not liable to the Plaintiff[s] as a matter of law pursuant to 15-78-10 et seq.". In its memorandum in support of the motion, Defendant restated this position and went on to argue, "there is no evidence that the SCDOT breached any alleged duty to the Plaintiffs." Neither Defendant's motion nor its memorandum referred to or even mentioned Plaintiffs' inverse condemnation claim but only discussed the negligence claims. Defendant raised, for the first time, a new argument at the hearing on its motion that Plaintiffs could not establish inverse condemnation. Plaintiffs' counsel objected to this new argument being heard for the first time since it was not raised in either Defendant's Notice of its Motion, or its memorandum in support of its Motion.

"One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "Ordinarily, a court may not grant relief beyond the limits or scope

of such notice." *Id.*; see also, *Turbeville v. Floyd*, 341 S.E.2d 651, 288 S.C. 171 (Ct. App. 1986). However, our Supreme Court has indicated in dicta that the Circuit Court may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection. See *Salvo v. Hewitt, Coleman & Associates*, 274 S.C. 34, 260 S.E.2d 708 (1979). At oral argument, Plaintiffs' counsel objected to Defendant's argument regarding Plaintiffs' inverse condemnation claim. Because Plaintiffs' counsel objected, and Defendant did not raise the issue in its Notice or Motion for Summary Judgment, the Court's decision warrants reconsideration.

VI. RECONSIDERATION IS WARRANTED BECAUSE THE COURT IMPROPERLY MADE FACTUAL DETERMINATIONS RESERVED FOR THE JURY IN DETERMINING DEFENDANT'S ACTIONS COULD NOT CONSTITUTE INVERSE CONDEMNATION.

- a. **South Carolina appellate courts have consistently held that the acts taken by Defendant in this case amount to an affirmative, positive, and aggressive act.**

The Court also found the facts of this case do not amount to a taking because Plaintiffs have failed to show that SCDOT and its employees had any affirmative, positive, and aggressive acts that cause the Plaintiffs' alleged harm." (Order, at 7). The Court's decision cited to *Kiriakides v. Sch. Dist. of Greenville*, and stated, "[i]n installing culverts and construction to public roadways is a 'legitimate government action' on behalf of the SCDOT as discussed in the *Kiriakides* case[.]" (*Id.*) (citing 675 S.E.2d 439, 382 S.C. 8 (2009)).

This conclusion is unusual, as the *Kiriakides* case never mentions culverts, and involved a situation where a school district attempted to take property by eminent domain after sale negotiations fell through. 675 S.E.2d at 441. In fact, *Kiriakides* held that the institution of condemnation proceedings does not constitute a taking, even where the

condemning authority abandons the action nine months later. *Id.* at 443. There was no construction, no installation of culverts, and no designs of any kind at issue in *Kiriakides*. The case is not on point, not similar, and not relevant either factually or legally. The case only involved the potential institution of condemnation proceedings. For those reasons alone, the Court's reliance on *Kiriakides* was misplaced and warrants reconsideration.

South Carolina Courts have consistently acknowledged, though, the well-established principle that government-induced flooding may, in some circumstances, constitute a taking that would justify compensation under the Takings Clause. *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 776 S.E.2d 900 (2015) (citing *Arkansas Game & Fish Comm'n v. United States*, — U.S. —, 133 S. Ct. 511, 518, 184 L.Ed.2d 417 (2012) (“[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181, 13 Wall. 166, 20 L. Ed. 557 (1871)). For flooding to amount to a taking, there must be a causal connection between the challenged government act and the increased flooding — a question of fact for the jury given Gregorie's opinions regarding the increased severity and levels of flooding. *Id.*, at 443 (“In addition to the requirement of a causal connection, a compensable taking occurs only where a claimant shows an actual increase in the frequency or severity of flooding.”).

At oral argument, Plaintiffs' counsel pointed the Court's attention to *Tipperary Sales v. S.C. Dep't of Transp.*, 2016-UP-351 (Ct. App. filed June 30, 2016), which is more analogous to the facts herein, and is in line with South Carolina precedent without piecemeal citations of relevant quotes to support one party's desired conclusion. Although

an unpublished opinion, the Court of Appeals' decision in *Tipperary* involved similar facts as the instant case and relied on well-settled South Carolina law in determining the DOT's actions could constitute inverse condemnation.

In *Tipperary*, the Court of Appeals held the circuit court erred in dismissing the plaintiff's inverse condemnation claim against the DOT. In concluding the plaintiff's allegations against the DOT amounted to only a mere failure to act, the Court of Appeals found that the circuit court referenced the plaintiff's allegations about DOT's construction and installation of developments upstream from the plaintiff's store as well as DOT's alleged failure to remedy drainage defects caused by the flooding on the plaintiff's store premises.

Citing *Hawkins v. City of Greenville*, on which the Court relied in its decision that Defendant's conduct does not constitute a taking, the trial court held that DOT's purported failure to act or to remedy the drainage defects did not constitute the type of affirmative, positive, aggressive acts by a governmental agency that would result in liability for inverse condemnation. 358 S.C. 280, 291, 594 S.E.2d 557, 562 (Ct. App. 2004) (recognizing "an affirmative, positive, aggressive act on the part of the governmental agency" is an element of an inverse condemnation claim). The Court of Appeals held, however, that the trial court appeared to ignore the plaintiff's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding the plaintiff's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that the DOT had installed; (3) in September 2002, the DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by the DOT's resident engineers indicated the project would add 13.7 acres of

impermeable surface adjacent to the choke point in the DOT's right-of-way, which in turn could result in flooding which would exceed the capacity the existing drainage system could handle.

The facts in *Tipperary* are nearly identical facts in this case, and, thus, it is clear that Defendant's conduct could constitute an affirmative, positive, and aggressive act that would support Plaintiffs' inverse condemnation claim. *Tipperary* at 6; see also *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, was "an affirmative, aggressive, positive act"), *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); *Kline v. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597, 599-600 (1967) (finding that improving and widening a public street is an affirmative, aggressive, and positive act).

Furthermore, the Court's reliance on *Hawkins* is misplaced because the *Hawkins* court determined that the record contained no evidence the acts alleged caused the flooding of the plaintiff's property. 358 S.C. at 291. In fact, the plaintiffs' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. *Id.* Furthermore, both experts for plaintiffs and defendants testified it was impossible to determine whether installation of a riprap negatively or positively affected drainage on plaintiffs' property. *Id.*

Here, though, there was evidence presented (uncontradicted by Defendant) that Defendant's actions increased the flood level on Plaintiffs' property. Although Gregorie testified that Plaintiffs' property may have flooded regardless of Defendant's actions, he also testified that the Project likely exacerbated flooding. For those reasons, this case is distinguishable from *Hawkins* and is more analogous to *Tipperary*.

In sum, because Defendant's actions increased the flood hazard to which Plaintiffs' property has historically been exposed – according to both Plaintiffs' and Gregorie's uncontradicted testimony, respectively – a taking occurred. See *Columbia Venture*, 413 S.C. at 445 (citing *Jacobs v. United States*, 290 U.S. 13, 16, 54 S. Ct. 26, 78 L. Ed. 142 (1933) (finding a compensable flowage easement was created by reason of the government's construction of a dam along a tributary of the Tennessee River, which caused an increase in the frequency of intermittent overflows upon claimant's farmland, destroyed claimant's crops, and impaired his use of the land for agricultural purposes); *Cotton Land Co. v. United States*, 75 F .Supp. 232, 233–35 (Ct. Cl. 1948) (finding compensable taking occurred where the construction of a dam and the impounding of water in its reservoir caused over 7,000 acres of claimant's land to be flooded); *Barnes v. United States*, 538 F.2d 865, 870–73 (Ct.Cl.1976) (finding claimant had shown a government taking of a flowage easement by demonstrating significant damages resulting from frequent and inevitably recurring flooding which was the natural consequence of the government's control of the flow of a river through a nearby dam)).

Thus, the Court's decision that Defendant's conduct failed to reach the level of an affirmative, positive, and aggressive act warrants reconsideration.

b. The Court's Order warrants reconsideration based on *Cutchin v. S.C. Department of Highways and Public Transportation* – a nearly identical culvert installation case.

The Court's Order warrants reconsideration based on the Supreme Court's holding in a nearly identical factual scenario in *Cutchin v. S.C. Dep't of Highways and Public Transp.* 301 S.C. 35, 389 S.E.2d 646 (19891). In 1954 or 1955, the defendant in *Cutchin* constructed a cement culvert under U.S. Highway 123 By-Pass in Easley. *Id.* at 36. The culvert was approximately 40 yards from the Cutchins' home. *Id.*

During the 1970's, the Cutchins' yard was flooded by rainwater on several occasions. *Id.* In August 1984, during a rainstorm, flood waters rose above the window sills of their home, causing severe damage. *Id.* A second, similar flood occurred in August 1985. *Id.*

The Cutchins instituted an inverse condemnation against the State defendant, alleging that the cement culvert was improperly constructed, causing damage to their home from the flood waters. *Id.* at 37. The Cutchins received a jury award of \$70,000. *Id.*

On appeal, the State defendant claimed it was entitled to directed verdict, in that (1) no evidence was presented that the culvert, as initially installed, was improperly constructed, or (2) that in no event did it proximately cause the damages. *Id.* at 38. The Supreme Court disagreed. *Id.*

In reaching its decision, the Supreme Court noted that the Cutchins' expert testified that the culvert was inadequate when built and inadequate at the time of its decision. *Id.* Additionally, the Court noted, there was uncontradicted evidence in the record that the State defendant's own maintenance engineer made the statement that the pipe in the culvert was too small – like Defendant here in its testimony and documents. *Id.* Viewing

this evidence in the light most favorable to the Cutchins, the Court held that the trial court correctly submitted the case to the jury. *Id.* Based on the Supreme Court's holding in *Cutchin*, the Court's Order warrants reconsideration.

c. The "Special Injury" Test in Hardin only applies to non-abutting property owners where there has been no taking; which specifically does not apply to Plaintiffs.

Next, the Court ruled that Plaintiffs could not establish a claim for inverse condemnation because they "failed to show that they suffered special damages, different in kind from that suffered from the public at large as required in *Hardin*." (Order, at 7). Again, the Court's application of *Hardin* warrants reconsideration because that case, and the "special injury" test, only applies to situations where non-abutting property owners allege governmental taking:

The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is **whether one whose property does not abut immediately on the part of the street** vacated — the part vacated being in the same block between his property and the next connecting cross street— **is so specially injured** as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Hardin v. South Carolina Dept. of Transp., 641 S.E.2d 437, 371 S.C. 598 (2007).

In *Hardin*, the plaintiffs filed an inverse condemnation action against SCDOT alleging the closure of a break in the median of an abutting highway deprived the traffic leaving their properties of the ability to cross the highway and constituted a taking. 371 S.C. at 603, 641 S.E.2d at 440. The trial court ruled the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *Id.* at 603, 641 S.E.2d at 440. The supreme court reversed the court of appeals and found there was no taking. *Id.* at 610, 641 S.E.2d at 444.

In *Hardin*, the Court actually abandoned the “special injury” analysis which previously existed in this state's jurisprudence and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements. *Id.* at 609, 641 S.E.2d at 443. The *Carolina Chloride* Court specifically found that *Hardin* created no new right or cause of action, but, rather, restated the focus in determining whether a **road re-configuration** amounts to a taking. 706 S.E.2d at 504 (emphasis added).

In fact, our Courts have previously addressed the specific situations considered by the *Hardin* Court's analysis:

There is a distinction, however, to be noted between the assessment of compensation in the case of a taking and in the case of damage **when no land is taken**.

In the former case, the mere fact that there has been a taking entitles the owner to recover for all damages to his remaining land (whether special or shared by the general public), provided they flow from the taking, since he is constitutionally entitled to be made whole for all injuries resulting from the taking of his land.

But when there is **no taking**, he is entitled only to such damages * * * which are special and peculiar.

Gray v. South Carolina Dept. of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992) (emphasis added).

Thus, the Court incorrectly analyzed Plaintiffs' damages under the wrong standard, and because Defendant's conduct was a taking of Plaintiffs' property, including their land and home, they are entitled to all injuries resulting from that taking, and were not required to establish special and peculiar damages as outlined by *Hardin*, on which the Court relied in granting Defendant's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court reconsider, alter, and amend its Order dated March 25, 2020 and issue an Order denying Defendant's Motion for Summary Judgment.

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April 3, 2020

Pawleys Island, South Carolina

State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2017-CP-21-01168
	)	
	)	
James Marlowe and Lori	)	
Marlowe, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Transcript of Record
	)	
	)	
South Carolina Department of	)	
Transportation, et. al.,	)	
	)	
Defendants.	)	
	)	

February 10, 2020
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

A P P E A R A N C E S:

J. Clay Hopkins, Esquire
Attorney for the Plaintiff

John B. McCutcheon, Jr., Esquire
Attorney for the Defendant

Krystal J. Smith
Circuit Court Reporter

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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
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1 FEBRUARY 10, 2020

2 (WHEREUPON, the proceedings began at 9:33 a.m.)

3 THE COURT: Number two is James Marlowe versus

4 Department of Transportation and others.

5 MR. MCCUTCHEON: Good morning, sir.

6 THE COURT: Good morning. How are you doing? Good.

7 All right. When y'all get settled, I'll be glad to hear
8 from the moving party.

9 MR. MCCUTCHEON: Thank you. I'm Jack McCutcheon from
10 Conway. I represent the South Carolina Department of
11 Transportation.

12 It is my motion for summary judgment in this particular
13 case and my motion is based, Your Honor, on several grounds
14 and several theories, keeping in mind that I am aware of the
15 fact that if there's any issue of fact that needs to be
16 determined by the jury, then obviously that would defeat any
17 claim for a motion for summary judgment.

18 However, in this particular case, Your Honor, this case
19 is a case against the South Carolina Department of
20 Transportation, an arm of the State. It is -- obviously, the
21 State of South Carolina and the Department of Transportation
22 are subject to the Tort Claims Act.

23 Just briefly, Your Honor, this case arises out of an
24 incident or two incidents that occurred on Highway 378 when
25 they were widening 378 from two lanes to four lanes. The

1 complaint in this case is brought against the DOT, not only
2 for negligence, but allegedly all -- it's always brought for
3 inverse condemnation. I'll address the inverse condemnation
4 in a minute because I don't think that this is an inverse
5 condemnation case.

6 But as -- but as far as the negligent aspect of this
7 case is concerned, Your Honor, the State of South Carolina
8 and the South Carolina Department of Transportation are
9 subject to the Tort Claims Act, Section 15-78-10 and all of
10 the subsequent sections. It exempts the SCDOT from liability
11 from that for conditions on a public highway, roadway or a
12 nuisance.

13 What happened in this case, Your Honor, was two
14 occasions Mr. Marlowe's property flooded. Those two
15 occasions were -- number one was the 1000-year flood that we
16 experienced in South Carolina.

17 THE COURT: And the other one was the hurricane.

18 MR. MCCUTCHEON: The second one was a hurricane, which
19 was Hurricane Matthew, which occurred one year later.

20 So the DOT -- it further exempts the SCDOT from
21 liability for design of highways and any defect or conditions
22 on the highways unless the condition is not corrected within
23 a reasonable time after actual or constructive notice.

24 In this particular case, the landowner has retained the
25 services of an expert witness, an engineer who will testify

1 in this particular case, but he has testified unequivocally
2 in his deposition that he has no problem with the design of
3 the highway. And I think that in my memo, which I assume
4 that Your Honor has, it refers to certain places where he
5 testifies that there is no design problem in this particular
6 case.

7 It also said -- the DOT is also, if Your Honor please,
8 not -- not resulting from discretion or judgment by the
9 governmental entity or employee, a failure to perform any act
10 or service which is in the discretion of the judgment is not
11 responsible for a nuisance. It's not responsible for snow or
12 ice conditions or temporary or natural conditions on any
13 public highway. And then it deals -- also deals with
14 signage, but signage doesn't have anything to do with this
15 particular case.

16 As I said, governmental entities are not liable for the
17 design of highways or other public ways. They are
18 responsible for maintaining highways, roads, streets, and
19 bridges on public ways. They are not liable for loss arising
20 out of defect or condition in or otherwise overhanging
21 highways, roads, and streets. Those are just several of
22 them, Your Honor.

23 As I pointed out, in the deposition of Jason Gregorie,
24 the professional engineer, he testifies:

25 I can say -- I do say to a reasonable degree of

1 engineering certainty that the flood depth would have been
2 less on the Marlowe property and I believe the impact on the
3 Marlowe property would have been less.

4 He goes on then to say:

5 I say that it's possible that it would have been
6 prevented.

7 And of course, we know, Your Honor, that with any
8 expert, possibility don't cut it. That doesn't get it. It's
9 got to be to a reasonable degree of engineering certainty.

10 He goes on to say on page 29:

11 To a reasonable degree of certainty, I say that it has
12 affected the depth, the flood depth of the property. I think
13 I say that it may -- may have or there was a possibility that
14 it would have prevented the flooding inside the structure
15 altogether.

16 Question: May have?

17 Answer: Yes, that's correct.

18 So it's still -- you agree that even with the old US 378
19 and these two rain events, the Marlowe property still could
20 have flooded?

21 It's possible, yes.

22 In addition to that, Your Honor, both of these events we
23 think fit into the category and under the purview of matters
24 that are called Acts of God, thus preventing recovery. The
25 flooding of plaintiffs' property and residence was caused by

1 Act of God, not any negligence on part of -- on behalf of the
2 SCDOT. Pursuant to the Tort Claims Act, it's not liable for
3 the flooding on the Marlowe as to the rain event and
4 hurricane were natural conditions, not caused by SCDOT or its
5 agents or employees.

6 Furthermore, I'll point out again that the plaintiffs'
7 expert testified there is no defect in the construction or
8 design. Then there -- then there is no liability on the part
9 of the SCDOT. For those reasons, Your Honor, we think we are
10 entitled for summary judgment.

11 The one issue though that the plaintiff has raised in
12 this case is that he says that it amounts to an inverse
13 condemnation case, which, as Your Honor is aware of, is the
14 taking of someone's property not in a regular condemnation
15 case that leads to certain damages and so forth to that
16 particular property.

17 It's our considered opinion, Your Honor, that this is
18 not an inverse condemnation case. The courts have addressed
19 these issues in several cases, Your Honor. I'll hand them up
20 to Your Honor. May I approach?

21 THE COURT: Yes, sir.

22 MR. MCCUTCHEON: I'll hand them up.

23 THE COURT: Thank you, sir.

24 MR. MCCUTCHEON: And although most of them being, Your
25 Honor --

1 THE COURT: You had mentioned that you had -- you had
2 mentioned that you had a memo. I don't believe -- do we --
3 we've got it? Very good. Thank you. Go ahead.

4 MR. MCCUTCHEON: Huh?

5 THE COURT: I was checking on the memo. I didn't think
6 -- I had not seen the memo, but my law clerk indicates that
7 we have.

8 MR. MCCUTCHEON: Oh, okay.

9 THE COURT: Go ahead.

10 MR. MCCUTCHEON: Although most of these cases, Your
11 Honor, deal with -- and you may -- you may be familiar with
12 some of them, one of -- one of the big ones being the case of
13 *Harden v. the South Carolina Department of Transportation*
14 that has gleaned a bunch of law in this particular case.

15 But in those inverse cases, Your Honor, they refer to
16 the fact that in order for it to be an inverse case, it has
17 to amount to, quote, special damages to a single individual,
18 something that is not throughout the entire project. Now,
19 granted, this gentleman's house flooded on this particular
20 date. There was another individual right down the road whose
21 business flooded because of this extensive amount of rain.

22 And we don't think in this case that this is an inverse
23 case, although obviously, the gentleman did experience
24 damages to his house, his house flooded, the place down the
25 road flooded, but we don't think -- we think, Your Honor,

1 that this is a negligence case. Now, I'm not a -- I'm not a
2 -- Your Honor, a pure negligence case that doesn't have
3 anything to do with inverse condemnation. The -- the case
4 law seems to indicate, Your Honor, that.

5 And then in the plaintiffs' memo, which I'm sure the
6 Court has, he refers -- he refers to the fact because
7 plaintiffs' claims were inverse condemnation and
8 constitutional violations are not immune from liability. It
9 is our considered opinion, Your Honor, that when you read
10 through his brief, he refers to some things that happened
11 after the fact. For example, the DOT went back in and did a
12 new assessment. They did a new assessment to make sure that
13 they hadn't screwed something up the first time and they
14 found that they did not.

15 But in his -- in his brief, Your Honor, he argues
16 despite this important step in this design evaluation, the
17 defendant did not speak with the plaintiffs. In other words,
18 we didn't talk to the plaintiff before we went forward with
19 this project.

20 After complaints primarily from plaintiffs regarding
21 flooding on their property, defendant performed an
22 investigation and completed an addendum to its original
23 design. And this is what he is referring to when he says
24 there's some things in the -- this latter part that should
25 have been known or should have been done to begin with.

1 And when you read through there, Your Honor, all of
2 these things center around problems with design, and his
3 expert witness had all of this information when he arrived at
4 his opinions in this case and he testified in several
5 different places I see no problem with the design of this
6 particular roadway, but yet now he says that's the basis for
7 my claim for inverse condemnation because you went back after
8 the fact and you did some things that maybe you should've
9 done to begin with.

10 But he's got to have expert testimony, Your Honor. This
11 is not a case of general knowledge by individuals who can
12 determine it. This is one -- he says the defendant's
13 standard for culverts is withstanding a 1000-year rain event.

14 What the DOT does, Your Honor, the regulations say --
15 the federal regulations, the ones that bind the South
16 Carolina Department of Transportation when it engages in a
17 road construction, is it has to be -- it has to be designed
18 to a 50-year flood event.

19 However, the DOT takes it one step further and always
20 checks the property for a 100-year rain event. And in this
21 particular case, it was checked for a 100-year rain event. I
22 point out to His Honor that it ain't designed for a 1000-year
23 flood event.

24 THE COURT: And were both of those events 1000-year
25 events?

1 MR. MCCUTCHEON: No, sir, only the first one. The first
2 one was -- the first one was a 1000-year flood event. The
3 second one was Hurricane Matthew, who dumped -- and I think
4 some of the -- the closest rain point in this particular case
5 was one, like, 16 or 17 miles away, but even over there over
6 a 2- to 3-year period, some of those showed over eight inches
7 of rain in a short period of time.

8 (Coughs.) Excuse me, Your Honor.

9 In its addendum, it included -- they use this as part of
10 their argument. It could be impacted by a flood associated
11 with a 20-year return interval. Well, nobody disputes that,
12 Your Honor.

13 And assuming that the highway hadn't been there, I don't
14 -- you know, the culvert that they had there was a 25-year
15 culvert and I can't see how anybody could imagine and would
16 say that had it not been there, the house wouldn't have
17 flooded. Nobody can say that, Your Honor.

18 Now, they also claim, Your Honor, that we built this
19 highway higher, and one of the issues in this case, Your
20 Honor, is the fact that we designed -- we designed the thing.
21 We go down and then we -- we turn it over to a contractor and
22 that contractor goes in and that -- that contract has to be
23 approved, and they were in the process of going -- going
24 forward with that contract when these rain events took place.

25 They -- they -- they state in their brief, Your Honor --

1 once again, it says -- he refers to our memo. It says that
2 there is no defect on the -- in the construction or design,
3 then there's no basis for liability on the part of the
4 defendant. I agree with that.

5 The TCA, I assume that's there. The Tort Claims Act
6 does not apply to plaintiffs' claims for inverse condemnation
7 and constitutional violations because these claims do not
8 land in tort.

9 It is our position, Your Honor, that this is not an
10 inverse condemnation case because if you read the *Talent* [ph]
11 and *Harden* case or the *Harden v. SCDOT*, it refers to the fact
12 that it is not inverse condemnation. Of course, now those,
13 Your Honor, deal with roadways. *Harden* deals with the fact
14 that they were closing an intersection and this one
15 individual was claiming, well, I'm -- I'm entitled to inverse
16 condemnation because I can't get to my property.

17 That -- and that case is important because it holds to
18 the proposition that if it is something that results in a
19 special damage only to one person, then maybe it is inverse,
20 but if it affects others, then it's not. As I stated, there
21 was a place right down the road that got -- that claims it
22 flooded because of this.

23 They say at issue here is not a tort committed by the
24 government against an individual, but the taking of property
25 for public use without the payment of just compensation,

1 although they claim that we did this and we did that, in
2 addition to the fact that we didn't design it right. The
3 Tort Claims Act -- well, I've already mentioned those.

4 And in this particular case, Your Honor, you know, we
5 don't think it's an inverse case. We think that we're
6 entitled to summary judgment in this case because even their
7 own expert testifies that there was -- there was no design
8 problems.

9 And this whole case, Your Honor, when you read through
10 his memo, everything in there refers to the things that he
11 says in the addendum would relate to design and yet his
12 expert had the benefit of all of that when he opined in this
13 case that there was no problem with the defect. So,
14 therefore, Your Honor, on behalf of the DOT --

15 THE COURT: No problem with the design you mean?

16 MR. MCCUTCHEON: Huh?

17 THE COURT: No problem with the design?

18 MR. MCCUTCHEON: Design, yes. Thank you, Your Honor.

19 THE COURT: Very good. Thank you, Mr. McCutcheon.

20 Yes, sir?

21 MR. HOPKINS: Good morning, Judge. Clay Hopkins for the
22 Marlowes.

23 THE COURT: How are you doing, Mr. Hopkins?

24 MR. HOPKINS: I'm doing well. How are you, Judge?

25 THE COURT: Good.

1 MR. HOPKINS: Additionally, we point out, Judge, that
2 the inverse condemnation argument was not even brought up in
3 their memo or their motion, but they brought it and they've
4 moved solely on the TCA grounds; so I don't really think that
5 issue is ripe before the Court, but I'm prepared to argue it,
6 Judge.

7 In fact, just two years ago there was a case exactly on
8 point in Charleston at a La-Z-Boy furniture store. There was
9 some road construction out in front of the store. DOT was
10 doing some things to widen I-26 out in the area. Heavy rain
11 resulted in flooding to the store.

12 The tenant sued the DOT, sued DHEC. Judge Dennis
13 granted judgment on the pleadings to the DOT on inverse
14 condemnation. The Court of Appeals overturned it and said,
15 no, that's an affirmative act. It's a question for the jury
16 on the main issues.

17 The special damages that Mr. McCutcheon is talking about
18 is the value of the property, not necessarily the degree of
19 flooding or the level of damages within the house.

20 THE COURT: Or the number of plaintiffs?

21 MR. HOPKINS: Inverse condemnation is solely the
22 landowner and the value of the land that I have lost. So
23 that's the special damages which are isolated to just that
24 specific claim and that plaintiff, Judge.

25 So certainly, one, the TCA doesn't even apply to inverse

1 condemnation, a due process violation, but they affirmed that
2 actions taken by the DOT supporting a finding for inverse
3 condemnation, the Court of Appeals said just that.

4 As it relates to the negligence causes of action, Judge
5 -- well, in addition, Judge, you know, we can plead in the
6 alternative. So we can claim inverse condemnation on one
7 side, on one hand, and then also argue to the jury, hey, a
8 tort has been committed.

9 In terms of the negligence, I don't think what Mr.
10 McCutcheon is saying is exactly accurate about what we're
11 claiming. Here, Judge, we've got this addendum that was
12 provided to the DOT's file in 2017 after my clients
13 complained about flooding.

14 So what this engineer went back and did, he said he went
15 -- he went out and he updated basically his report, but
16 again, he didn't talk to my clients, he didn't speak to any
17 of the surrounding landowners, and what they claimed in their
18 additional design report in 2013 is, hey, we've never seen
19 any overtopping of the existing roadway in terms of
20 floodwaters.

21 And they say, well -- I said, well, why did you include
22 that in there? Is that an important aspect, you know, of how
23 you design and why you design something?

24 Yeah, absolutely. We want to know whether, you know,
25 the road is overtopping and to what degree it is, and so they

1 said, well, we didn't talk to anybody, we didn't consider
2 anything to come to that conclusion, which we think was in
3 error.

4 But then in 2017, they go back and he does a little --
5 he adds a little bit more pizzazz to his report. He says,
6 well, first of all, the culvert that was there in 2013, which
7 was there even at the time the addendum was written, would
8 only withstand a 25-year rain event. For the structure of
9 the property, that is my client's home, would be affected by
10 a 10-year storm.

11 So I said, well -- this was a 30(b)(6) of the DOT. I
12 said, well, sir, did you have that information in 2013?
13 Would you have come to the same conclusion?

14 Oh, yeah, absolutely. You know, we knew this culvert
15 was undersized.

16 As Mr. McCutcheon says, their standard at the DOT is a
17 100-year rain event. So they knew in 2013 or at least had
18 the information to know this culvert was undersized and would
19 potentially affect my client's home if there was a flood or
20 rain event.

21 But they knew it in 2015 when they started construction
22 on the project after the, quote/unquote, 1000-year storm.
23 They knew it and didn't take any efforts to get the new
24 culvert installed any quicker.

25 But the issue we have with it, Judge, is Mr. McCutcheon

1 and the DOT I'm sure would love for you to look at these
2 events over the four-day or five-day periods, but if you go
3 just the first day of the, quote/unquote, 1000-year flood or
4 even Hurricane Matthew, the nearest rainfall data that was
5 within 10 or 12 miles of plaintiffs' property showed that
6 there was already a 25-year rainfall that day.

7 So the DOT knew in 2013 and 2015 prior to these storms
8 that the culvert could not withstand that type of rain. So
9 then, yes, of course, Judge, we have four days of it, but the
10 DOT knew that was a defect, knew it was a hazard.

11 And we've quoted a case in our brief, the *Wooten v. DOT*
12 case, in which the Supreme Court said, yeah, you know, that's
13 not a design issue. What they're claiming is that the DOT
14 had knowledge or knew about a defect in the property. They
15 told me that at the 30(b)(6). He said, yeah, we had this
16 information available to us in 2013, not in 2017.

17 They never took any steps to get that culvert out to
18 protect our clients' property even after 2015. Let's say
19 I'll just give them a pass on that 1000-year flood, Judge.
20 They knew that property couldn't withstand that type of rain
21 event. They took no efforts to get that culvert out, get a
22 new culvert in. We think that's a major, major issue with
23 our negligence case.

24 And first, so then in terms of Jason Gregorie, what he
25 was saying, Judge, in the deposition was, well, I think

1 that's a critical piece and knowing whether the road had
2 previously overtopped was critical because, as you may be
3 aware, Judge, if you were driving that way when they were
4 doing construction, the new road is about 3 to 4 feet higher
5 than what the existing road was.

6 And so they were building it simultaneously and they
7 never, based on their report from 2013, ever considered
8 whether that overtopping would now hit this new roadway,
9 stop, and back up under my clients' property, which is
10 exactly what happened. They've done videos. They took
11 pictures. That's what happened, Judge, and that's why Jason
12 said, well, this was a critical piece of the design process.
13 They should have considered it.

14 At the 30(b)(6), I asked them. I said did you ever
15 consider whether the overtopping could cause water to come
16 back on the plaintiffs' property. No, we never considered
17 it, never even looked at it.

18 So we think that's, you know, another issue, Judge, that
19 Jason -- what Jason is saying, he's not -- again, he's not
20 saying there's a design flaw. He's saying, no, these are
21 critical pieces in what you were doing to design the roadway.
22 You should have considered these things. You should've
23 looked at them because, if you did, the design may be == may
24 be different or you may have taken steps to ensure that old
25 culvert was out so you had the larger culvert in there to

1 withstand that rainfall to keep it from backing up, if that
2 makes sense, Judge.

3 So in terms of the negligence, Judge, again, we're not
4 claiming any design flaw in the design of the roadway or the
5 culvert. What we're saying is, one, the existing culvert was
6 a hazard. It didn't come out until after these two
7 rainstorms, even though they knew both rainstorms was
8 insufficient to withstand the type of water coming to the
9 plaintiffs' property.

10 Two, they failed to consider whether this new higher
11 roadway would basically serve as an outlet for the undersized
12 culvert. They knew this culvert was undersized. So this
13 outlet now is basically helping out that undersized culvert,
14 but now what they did was they built a roadway up and stopped
15 that outlet. Everything is coming back onto the plaintiffs'
16 property, having to go through the undersized culvert, which
17 we know is too small, and that's how they got the water
18 backed up into their house.

19 And what Mr. Gregorie said is, yeah, I'm not saying that
20 the entire property wouldn't have flooded, I'm saying the
21 degree of flooding, the level of flooding, is what was
22 affected by these decisions.

23 So we also cite the case in our brief, Judge, from
24 *Giannini v. DOT* case. The Supreme Court said, listen, that's
25 a question for the jury and it related the expert saying he's

1 not saying -- as long as he says I think that this
2 proximately caused the plaintiffs' injuries or some of their
3 injuries, that's sufficient.

4 So that's the last point in our brief, Judge, and I'm
5 happy to answer any questions you have for me.

6 THE COURT: Mr. McCutcheon, would you like to say
7 anything right now?

8 MR. MCCUTCHEON: Yes, sir. Just briefly, Your Honor.

9 Everything that Mr. Hopkins just referred to refers to
10 negligence in this particular case in as it reflects the
11 design of the particular property in question. He says we
12 knew that the existing culvert was undersized. We're not
13 dealing with a roadway as with a culvert that size, Your
14 Honor. We're dealing with a roadway for a much bigger
15 culvert in this particular case.

16 Sure, my people knew that the one that was there was a
17 25-year flood event. That's why they were -- that's why they
18 were doing these things. And when they went in and did the
19 addendum, it didn't show anything other than what they
20 already knew or would have known about the culvert that was
21 already there.

22 In this particular case, Your Honor, there's -- I guess
23 they say that because we didn't know that the road was going
24 to overtop. Well, I'm not sure that's sufficient, Your
25 Honor, but I go back to what I said earlier.

1 Mr. Gregorie didn't say anything in his testimony about
2 the fact that had they gone and done this, had they gone and
3 done that, it might've made a difference. He simply
4 testified in his deposition unequivocally that there was no
5 problem with the design of the culvert in this case, period.

6 Thank you, Your Honor.

7 THE COURT: All right. I would like an opportunity to
8 review these memorandums. I have not seen the memorandums
9 yet. Y'all have presented it very, very thoroughly, but I
10 want to read those and I also want to read the full
11 deposition of the expert. Do we have that?

12 MR. HOPKINS: Yes, sir. We filed it with our
13 memorandum.

14 THE COURT: Okay. So the entire --

15 MR. HOPKINS: Yes, sir.

16 THE COURT: -- the entire --

17 MR. MCCUTCHEON: Yes, sir.

18 THE COURT: -- deposition. All right.

19 MR. HOPKINS: In addition, I'd say, Judge, we also filed
20 a supplemental brief because his deposition was taken before
21 that 30(b)(6) of the DOT. So he's provided at least some
22 supplemental testimony that says, listen, their failure to
23 consider this roadway difference was a critical aspect of the
24 construction design.

25 And we think that, you know, goes just kind of further

1 into what -- what Mr. McCutcheon is talking about. He's
2 saying it's a design issue.

3 That's not what we're saying. We're saying, listen,
4 these are steps in the construction, these are steps that
5 they should have considered throughout the construction that
6 were going along with the knowledge that this culvert is
7 undersized, and I think that's what Mr. Gregorie is saying,
8 and I think Mr. McCutcheon is trying to say, well, no, he's
9 saying it would have never even flooded. That's not what he
10 said, but we did file the addendum.

11 THE COURT: All right.

12 MR. MCCUTCHEON: Your Honor, I'm confused about one
13 thing. He filed a supplemental brief?

14 MR. HOPKINS: There's a --

15 MR. MCCUTCHEON: I saw only one.

16 MR. HOPKINS: A supplemental affidavit of the expert,
17 not a brief, Judge.

18 THE COURT: All right. Do you have a copy of the
19 supplemental affidavit?

20 UNIDENTIFIED FEMALE: Yes, we do. It was filed too.

21 MR. MCCUTCHEON: It was filed too, Your Honor.

22 THE COURT: Okay. Good. All right. While I'm reading
23 these memos and the deposition, would y'all be kind enough to
24 send proposed orders?

25 MR. MCCUTCHEON: Yes, sir.

1 THE COURT: And if we could do that, I'll --

2 MR. MCCUTCHEON: Yeah. I had -- I had my legal -- also,

3 I had my legal -- paralegal with me, Judge. She's the brief

4 writer.

5 THE COURT: She's the one doing all the work.

6 MR. MCCUTCHEON: That's exactly right --

7 THE COURT: Very good.

8 MR. MCCUTCHEON: -- Your Honor.

9 THE COURT: All right. Good. Thank y'all.

10 MR. MCCUTCHEON: Thank you, Judge.

11 THE COURT: And I'll take a look at that and if y'all

12 could send those proposed orders, I'd appreciate it. Thank

13 y'all.

14 (WHEREUPON, the proceedings ended at 10:04 a.m.)

15

16 --- END REQUESTED TRANSCRIPT ---

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State of South Carolina	)	
	)	Certificate
County of Florence	)	

I, the undersigned, Krystal J. Smith, Notary Public and Official Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing pages, numbered 1 through 24, constitute a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of Common Pleas for Florence County, South Carolina, on the 10th day of February, 2020.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

Kristal J. Smith

Court Reporter

Florence, South Carolina

June 2, 2020

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Sep 10 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-000614

James Marlowe and Lori Marlowe, individually, and as Next Friends of K.P., H.M., and B.M., Minors under the age of Eighteen (18) years,

Appellants,

v.

South Carolina Department of Transportation,

Respondent.

**CERTIFICATION OF COUNSEL REGARDING
RECORD ON APPEAL**

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Sep 29 2020

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in determining the Stormwater Management and Sediment Reduction Act applies to this case and supports granting summary judgment?
- II. Did the trial court err in making factual determinations regarding the cause of the flooding on Appellants' property and Appellants' injuries?
- III. Did the trial court err in placing itself in the role of the jury by improperly weighing Appellants' expert witness's testimony?
- IV. Did the trial court err in failing to consider, or rule upon, Appellants' discretionary immunity arguments in opposition to Respondent's motion for summary judgment and Appellants' Rule 59(e) motion for reconsideration?
- V. Did the trial court err in granting summary judgment on Appellants' inverse condemnation claim when Respondent failed to raise that issue in its motion for summary judgment?
- VI. Did the trial court err in improperly making factual determinations reserved for the jury in granting summary judgment on Appellants' inverse condemnation claim?

STATEMENT OF THE CASE

On May 3, 2017, Appellants Lori Marlowe and Jamie Marlowe ("Marlowes") brought this action against Respondent South Carolina Department of Transportation ("SCDOT"), Southern Asphalt, Inc. and United Infrastructure Group, Inc. asserting claims for inverse condemnation, conversion, due process violations, and negligence. (R. pp. 13-24). On August 22, 2018, Appellants filed an Amended Complaint against the same parties, adding their minor children as named plaintiffs in the action, asserting the same claims. (R. pp. 35-43).

On March 26, 2019, a consent order was entered dismissing all claims against United Infrastructure Group, Inc.

On November 7, 2019, SCDOT filed its motion for summary judgment solely on the basis that it was immune from liability on all of Appellants' claims pursuant to the

South Carolina Tort Claims Act (“TCA”), S.C. Code Ann. §15-78-10, *et seq*, and that there was no evidence it breached any duty to the Marlowes. (R. pp. 54-55).

A hearing was held on February 10, 2020. (R. p. 383). On February 27, 2020, a consent order was entered dismissing all claims against Southern Asphalt, Inc. On March 25, 2020, the trial court issued an Order granting summary judgment in favor of SCDOT. (R. pp. 1-9). Thereafter, on April 3, 2020, the Marlowes filed a Rule 59(e), SCRCP, motion to alter or amend – commonly referred to as a motion for reconsideration. (R. pp. 358-382). Specifically, the Marlowes argued that reconsideration of that ruling was warranted:

- 1) because the Stormwater Management and Sediment Reduction Act is inapplicable in this case;
- 2) because the Court made improper factual determinations specifically reserved for the jury, including, who or what – and specifically, whether Respondent, its agents, or employees – caused the flooding to Appellants’ property;
- 3) because the Court improperly weighed the testimony of the Marlowes’ expert witness;
- 4) because the Court failed to address the Marlowes’ discretionary immunity arguments;
- 5) because the Court granted summary judgment on the Marlowes’ inverse condemnation claim despite SCDOT failing to even raise the issue in its Notice or Motion for Summary Judgment;
- 6) because the Court improperly made factual determinations reserved for the jury in determining the facts of this case do not amount to inverse condemnation;
- 7) because the Court relied on an inapplicable test to determine that the Marlowes’ had not sustained an injury necessary to establish inverse condemnation.

Three (3) days later, on April 6, 2020, the trial court denied the Marlowes’ motion

for reconsideration in a two sentence Form 4 Order. (R. pp. 10-12). The next day, April 7, 2020, the Marlowes timely filed their Notice of Appeal.

FACTS

The Marlowe family formerly lived in a single-family home located at 2479 W. Highway 378, Pamplico, South Carolina, in Florence County, which Jamie Marlowe purchased in 2003. (R. p. 267, ¶¶6-19). In late 2013, SCDOT began designing and seeking bids for the 378 Widening Project (the “Project”), which would affect the roadway immediately in front of the Marlowes’ property. Construction began in early 2015. (See R. p. 37).

The Project included installing a new bridge box culvert adjacent to the Marlowes’ property, which would be installed under the new and existing 378 roadway. Before construction began, SCDOT engaged in an extensive design phase.

Stanley Roof, an engineer with SCDOT (and one (1) of its 30(b)(6) witnesses), performed an initial study concerning the existing box culvert adjacent to the Marlowes’ property in August of 2013. (R. pp. 135-36). In its initial investigation, SCDOT determined that the existing culvert could not be extended and would need to be replaced. (*Id.* p. 136, ¶¶5-9). SCDOT never considered placing the Project’s new culvert in any other location than the one ultimately selected. (*Id.*, ¶¶17-20).

During this process, SCDOT determined that “[t]he resident construction engineer for Florence County indicated that he had never seen the roadway overtopped at this location.” (*Id.* p. 137, ¶¶17-23). This was an important consideration for SCDOT because it “usually look[s] at past floods for a site and tr[ies] to get as much as information as [it] can for it.” (*Id.* p. 138, ¶¶19-23). Despite this important step in its design and evaluation,

SCDOT did not speak with the Marlowes, or any other adjacent property owners, to ascertain whether the roadway in front of their property ever overtopped. (*Id.*, p. 140, ¶¶20-24).

In June of 2017, after complaints primarily from the Marlowes regarding flooding on their property, SCDOT performed an investigation and completed an addendum to its original design. (*Id.* pp. 142-43). At that point, the new culvert had not been completely installed. (*Id.*, p. 143, ¶¶8-18).

However, this time, SCDOT determined that for a 25-year rain event, the existing roadway in front of the Marlowes' property would experience overtopping (*Id.* p. 144, ¶20 – p. 145, ¶8), – that is, where flood waters from adjacent property flows over the top of the roadway to an outlet, which is usually a stream, river, pond, or lake. SCDOT's standard for culverts is withstanding a 100-year rain event. (*Id.* p. 140, ¶¶4-8). Incredibly, SCDOT claimed this new information was discovered because it “didn't have that information at the time” – in 2013. (*Id.* p. 145, ¶¶9-13). The only reason this information was unavailable to SCDOT was because of its failure perform any analysis on the subject.

Again, SCDOT did not speak with the Marlowes during its investigation, or any adjacent property owners. (*Id.* p. 147, ¶¶1-4; p. 148, ¶¶2-19). During the investigation, though, SCDOT's analysis determined that the existing culvert (present prior to the Project's construction) “would overtop for discharges associated with the 25-year return interval and greater.” (See R. p. 79). In its addendum, SCDOT included its determination that the Marlowes' “structure” – or house – “could be impacted by a flood associated with the 25-year return interval, and potentially the 10-year interval.” (*Id.*) (R. p. 148, ¶¶1-5). The most disturbing aspect of this information's inclusion in the addendum is the

information was readily available to SCDOT in 2013. (R. p. 171, ¶¶21-23) (“Q: And, so, you had the same information in 2013, correct? A: Correct.”). At this point, though, the new culvert was still not completely installed. (R. p. 149, ¶¶6-13).

A critical piece of SCDOT’s new addendum was missing: any consideration of the higher elevation of the Project’s new roadway being built simultaneously next to the existing roadway. (R. p. 151, ¶¶14-18). Therefore, the 2017 addendum, which included an analysis of the existing roadway’s height compared to the height of the Marlowes’ house, did not even include an accurate figure for the height of the roadway in relation to the Marlowes’ home. (R. p. 152, ¶¶5-8). In 2017, as it concerned the roadway’s overtopping, SCDOT again failed to consider whether the new roadway could potentially block the existing roadway’s overtopping. (R. p. 153, ¶¶2-5). More importantly, though, SCDOT never considered this possibility or performed any analysis in 2013 when it drafted its initial design report. (R. p. 153, ¶¶8-11).¹

In October of 2015, South Carolina experienced historic rainfall levels, with one-day rainfall levels at the two (2) closest NOAA weather stations to the Marlowes’ property experiencing greater than 10-year but less than 25-year rainfall levels. (R. p. 99). Those stations experienced 4-day rainfall levels between 200-500 years. (R. p. 99). This event, in conjunction with SCDOT’s construction of the Project, caused catastrophic flooding to the Marlowes’ home, with approximately 18 inches of water in their house. (R. p. 220, ¶¶12-19). After that, the Marlowes essentially reconstructed their home with the

¹ SCDOT also testified that it never performed (prior to construction beginning, in 2015, or in 2016) any analysis concerning whether the new roadway’s construction next to the existing roadway could create a “choke point.” (R. p. 161, ¶¶17-21; p. 161, ¶22 – p. 162, ¶5).

assistance of FEMA and taking out personal loans. (R. p. 219-20). Then, in 2016, Hurricane Matthew passed through the region, again bringing historic levels of rainfall to the Marlowes' property, with 1-day rainfall levels corresponding to greater than 10-year but less than 25-year levels. (R. p. 99). Those stations experienced 4-day rainfall levels greater than 100-years but less than 200-years. (R. p. 99). The Marlowes' home was again destroyed, with water levels between 15 and 16 inches, and since then, the Marlowes have been unable to live at their home. (R. p. 220, ¶¶16-25).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial [392 S.C. 122] court pursuant to Rule 56(c), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; accord *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); see also *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101,

410 S.E.2d 537 (1991); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)); accord *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Hall v. Fedor*, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing *Young v. South Carolina Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (1999)).

ARGUMENT**I. THE TRIAL COURT ERRED IN DETERMINING THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION ACT APPLIES TO THIS CASE AND SUPPORTS GRANTING SUMMARY JUDGMENT**

The trial court's reliance on SCDOT's citation to the Stormwater Management and Sediment Reduction Act ("Stormwater Act")² in support of the ruling granting summary judgment was a clear error of law and amounted to an erroneous abuse of discretion. The Marlowes did not allege any deficiency in regard to SCDOT's application or procurement of a permit under the Stormwater Act. The Stormwater Act is inapplicable to the facts and issues in this case, and the trial court's reliance on it in granting SCDOT's motion for summary judgment was a clear error of law that amounted to an abuse of discretion.

The Legislature's intent is plainly and unequivocally expressed in the applicable statute. The General Assembly enacted the Stormwater Act to specifically address stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167.

In fact, the Supreme Court has previously stated that the "legislature enacted the Stormwater Act to specifically deal with stormwater management and sediment reduction." *Responsible Economic Development v. SC DHEC*, 641 S.E.2d 425, 371 S.C. 547 (2007). The *Responsible Economic Development* Court wrote that the purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the

2 S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2005).

existing stormwater management and sediment control program." *Id.* (citing Act No. 51, 1991 Acts 167).

The Stormwater Act requires a person who intends 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, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The stormwater regulations provide that unless exempted, "a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan." S.C. Code Ann. Regs. 72–305(A). In other words, all non-exempt development construction sites must have a permitted plan for handling stormwater, the requirements of which depend on the size and complexity of the project. *See id.* 72–305(B). Further, as the Court's Order notes, the Stormwater Act states that "[n]othing... in this chapter...may be construed: (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity." (See Order dated March 25, 2020, at 3-4 (citing S.C. Code Ann. § 48-14-160(2))).

Put simply, the Stormwater Act does not in any way even remotely apply to the facts of this case, and there is no South Carolina authority determining a party was not liable to another for creating or worsening property flooding because of reliance on the Stormwater Act. In fact, there is no South Carolina case or other authority in support of the proposition that the SCDOT may make an end run around liability for its actions or inactions by relying on a permitting statute. To the contrary, South Carolina law states that where the language of a statute is plain and express (as it is here), the court has no

right to impose another meaning. The trial court's order, like SCDOT's memorandum in support of its motion for summary judgment, glaringly fails to cite to or rely on any South Carolina appellate case (or federal court analysis) interpreting the Stormwater Act to relieve a party from similar actions and inactions as the facts alleged here. However, as the Order – and statute – notes, the Stormwater Act expressly states that it does not relieve SCDOT from liability for actions or inactions in the land disturbing activities. (R. p. 4).

Because the General Assembly's intent is plain and explicit, because there is no precedent or authority supporting the trial court's conclusion in similar cases, and because proximate causation is a jury question, the trial court's reliance on the Stormwater Act was not a valid basis for granting summary judgment in SCDOT's favor. For that reason, the trial court's determination was controlled by an error of law and constituted an abuse of discretion. *Parker v. Williams & Madjanik, Inc.*, 239 S.E.2d 487, 269 S.C. 662 (1977); *see also McClurg v. Deaton*, 380 S.C. 563, 570, 671 S.E.2d 87, 91 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support."). Thus, the trial court's Order should be reversed.

II. THE TRIAL COURT ERRED IN MAKING FACTUAL DETERMINATIONS REGARDING THE CAUSE OF THE FLOODING OF THE MARLOWES' PROPERTY AND THE MARLOWES' INJURIES.

A. Whether the flooding to the Marlowes' property was caused by an "act of God" was a question for the jury.

In its order, the trial court found that the flooding to the Marlowes' residence was caused by "acts of God," not any negligence on the part of SCDOT.³ Causation, and specifically whether a party's injuries were caused by an "act of God", is a question of fact for the jury. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938).⁴

"Ordinarily, proximate cause is a question for the jury[.]" *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 613-14, 579 S.E.2d 136, 145 (Ct. App. 2003) (citations omitted), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

South Carolina law imposes no liability for injuries or damages sustained as the result of an act of God. Nor is one liable for damages caused by the act of God, if such act be the direct or proximate cause of the injury. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938). However, "act of God" is a valid defense only when it is the sole cause of the injury. *Id.* (emphasis added).

³ Specifically, the Court concluded that "[t]he flooding in October 2015 and October 2016 were Acts of God and not caused by the SCDOT. In October 2015, the Grand Strand and Pee Dee suffered from the '1000 Year Flood.' Then in October 2016, Hurricane Matthew struck South Carolina causing massive flooding throughout the Grand Strand and Pee Dee. Many residents suffered flooding in their homes, including many who had never experienced flooding previously." (R. p. 5).

⁴ This analysis applies equally to the Court's Stormwater Act determination, *supra*: "whether the violation of a statute is the proximate cause of an injury is ordinarily a jury issue and thus inappropriate for disposition by summary judgment." *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1983).

In *Montgomery*, the Supreme Court held that it was a question of fact for the jury to determine if the “act of God” was the proximate cause of respondent's injury, or if respondent had shown by the preponderance of the evidence that the act of omission on the part of appellants in failing to warn her of the blocked condition of the highway in time to prevent the injury, combining and concurring with the act of God, was the proximate cause of the injuries suffered by respondent. *Id.* Leaving out the question of contributory negligence on the part of a plaintiff, when a defendant pleads the act of God, he must prove that the act of God is the sole proximate cause of the injury, and to do so, such defendant must of necessity prove that he is without negligence which contributed as a proximate cause. *Id.* In other words, this defense creates a separate issue in which the rule is different, in that a defendant has to prove himself without negligence in order to show that the act of God is the sole proximate cause. *Id.*

Other jurisdictions have similarly concluded that whether a flooding event constitutes an “Act of God” is a question of fact for the jury to consider. See *Lee v. Mobil Oil Corp.*, 203 Kan. 72, 452 P.2d 857 (Kan. 1969) (“Whether a particular flood is of such extraordinary and unprecedented nature as to constitute an 'act of God' is a question of fact for the jury.”); *Maddock v. Andersen*, 2013 ND 80, 830 N.W.2d 627 (N.D. 2013) (“Whether an act-of-God defense has been established is a question of fact.”); *Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud*, 532 N.W.2d 192, 209 Mich. App. 452 (Mich. App. 1995) (“An act of God is a valid defense to a trespass claim and presents a question of fact for a factfinder.”); *Brown v. Sandals Resorts Intern.*, 284 F.3d 949 (8th Cir. 2002) (citing *Northwestern Bell Telephone Co. v. Henry Carlson Co.*, 83 S.D. 664, 165 N.W.2d 346, 349 (S.D.1969) (holding that whether damage was

proximately caused by act of God is question of fact for jury to resolve, and that trial judge erred in taking issue away from jury); *Omega Apparel Inc. v. ABF Freight Sys., Inc.* (M.D. Tenn. 2012) (denying a defendant’s motion for summary judgment where the Court stated that even though a jury would be “hard-pressed” to find flooding was not an “act of God,” the defendant was not absolved of liability unless it could show that its negligence played no role in the loss.).

In this case, there was testimony – both by SCDOT, its witnesses, and the Marlowes’ expert witness – that SCDOT’s actions and/or inactions contributed to the flooding on the Marlowes’ property. Thus, whether the flooding was caused by an “act of God,” and whether the “act of God” was the sole cause of the Marlowes’ injuries was a question of fact for the jury to determine. *Montgomery*, 186 S.C. at 167. At the very least, the issue is in dispute “so as to make a genuine question for determination by the trier of the facts.” *Lunsford v. McDaniel*, 272 S.C. 525, 252 S.E.2d 917 (1979). Therefore, summary judgment was inappropriate, and the trial court’s order should be reversed, and the case remanded for a trial on the merits. See *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (2014) (rendering summary judgment inappropriate where a question of fact exists); see also *Thomas v. Dootson*, 659 S.E.2d 253, 377 S.C. 293 (Ct. App. 2008) (finding a directed verdict inappropriate where a jury question was presented).

B. Whether the flooding to the Marlowes’ property was caused by a natural condition was a question for the jury.

In its order granting summary judgment, the trial court further concluded that, pursuant to the Tort Claims Act, SCDOT was not liable for the flooding on the Marlowes’ property “as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees.” (R. p. 5). As discussed above, the factual determination by

the trial court as to the proximate cause of the Marlowes' injuries was inappropriate at the summary judgment stage where there was conflicting evidence concerning causation. Specifically, the question of whether the flooding on the Marlowes' property was caused by a natural condition or, rather, caused by SCDOT, its agents, or employees, was a factual question for the jury's determination.

While the two (2) weather events which occurred when the Marlowes' property flooded were extreme, and even historic, there was evidence in the record that suggested – and created a genuine issue of material fact –the flooding of the property was not just a “natural condition” but was, in fact, caused by the negligence of a government employee or employees. Taking the evidence in the light most favorable to the Marlowes, as the trial court was required to do, there was evidence that SCDOT knew, or should have known, (1) that the Marlowes' home would likely be affected by a 10-year rain event due to the existing box culvert; and (2) SCDOT took no steps, or even considered taking any steps, to remove that culvert or install a new one until 2017, well after the two (2) rain events. The evidence also showed that were those events isolated to only one-day events, the rainfall would have exceeded permitted levels, which were below SCDOT's self-created standard of 100-year rain events. For these reasons, reversal of the trial court's order is warranted, and the issues should be submitted to a jury in light of the conflicting evidence in this case which presented a factual dispute. See *Springob*, 407 S.C. 490; *Thomas*, 377 S.C. 293.

C. Whether the flooding to the Marlowes' property was caused by SCDOT, its agents, or employees was a question for the jury.

Similarly, the trial court's ruling that “[p]ursuant to the Tort Claims Act, [Respondent] is not liable for the flooding on [Marlowes'] property as the rain event and

Hurricane were natural conditions, not caused by [SCDOT] or its agents or employees” was a factual determination reserved for the jury in light of the conflicting evidence presented, which created a genuine issue of material fact. Evidence was submitted that suggested (1) SCDOT had knowledge of a defect or hazard in the culvert adjacent to the Marlowes’ property; (2) SCDOT failed on multiple occasions to remedy that defect or hazard, and (3) that the inadequate culvert was the cause of the flooding on the Marlowes’ property. Thus, summary judgment was inappropriate, and the trial court’s conclusion that these conditions were natural was a factual determination reserved for the jury considering the conflicting evidence submitted.

First, SCDOT knew or should have known in 2013 during its design of the Project, again in 2015 when it began construction on the Project, after the 2015 rain event, and after the 2016 rain event, that the existing box culvert adjacent to the Marlowes’ property was substandard under its own design requirements, and made no efforts to correct or replace the culvert. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008).

In *Giannini*, the plaintiffs claimed that DOT failed to take proper measures after notice of an existing hazard. 664 S.E.2d at 453. In that case, the portion of the roadway where the plaintiff’s car accident occurred had experienced several crossover accidents within two miles of their accident in which two people had been killed, and the accidents had been publicized by local media. *Id.* The Supreme Court of South Carolina determined that the plaintiff’s claim was not a claim of defective construction but, rather, one of failure to take corrective action after notice of a defect. *Id.*

The *Giannini* Court determined that the case was analogous to *Wooten v. SCDOT*, 333 S.C. 464, 511 S.E.2d 355 (1999). *Id.* In *Wooten*, the Supreme Court affirmed the

Court of Appeals' ruling that although SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition. 333 S.C. at 467-468, 511 S.E.2d at 357. In *Wooten*, the plaintiffs claimed SCDOT was negligent in failing to provide traffic lights at an intersection which would allow a pedestrian ample time to cross the street. *Id.* The Court of Appeals held that although DOT initially had design immunity, such immunity was not "perpetual." *Id.* The Court of Appeals held that once DOT had notice the intersection was hazardous, it was no longer immune from liability. 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997). On appeal, the Supreme Court affirmed as modified, adopting the trial court's ruling that the immunity provision regarding signs and signals was the more specific one applicable to the case, such that a jury issue was presented as to whether SCDOT was liable. 333 S.C. at 468-469, 511 S.E.2d at 357-358 (1999). Accordingly, the *Giannini* Court found that the trial court properly denied SCDOT's motions for directed verdict and JNOV on the issue of whether it breached a duty to the plaintiffs in failing to install median barriers after notice of cross over accidents along that stretch of roadway. 664 S.E.2d at 454.

Here, SCDOT provided no evidence – through documentation or testimony – establishing when the Project's new culvert was finally installed, but the record establishes it was not fully installed by at least 2017. (R. p. 149, ¶¶6-13; p. 150, ¶¶9-15). However, SCDOT testified, that in 2017, it had information necessary in 2013 to determine that the existing culvert prior to the initiation of the Project could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on the Marlowes' property. (R. p. 148, ¶¶1-5). SCDOT admitted the existing culvert was undersized according to its own standard. (R. p. 123, ¶¶17-20) ("The existing culvert was

undersized.”) Despite this knowledge, SCDOT admitted there was never any consideration given to install a new culvert, much less the one that was supposed to be installed during Stage I of the Project. (R. p. 153, ¶¶24 – 42, ¶¶5; p. 124, ¶¶6-21).

Furthermore, not only was SCDOT aware that the existing culvert was undersized when it began designing and construction on the Project, it knew or should have known that the existing roadway served as an outlet for water, even at 25-year rainfall levels. (R. p. 139, ¶¶15-19). SCDOT knew this was unsafe. (R. p. 140, ¶¶4-6) (“Q: And the standard should be a hundred-year rain event; is that correct? A: Right.”). Despite its own models indicating overflow, SCDOT admitted that it took no steps to speak to the Marlowes or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (R. p. 147, ¶¶1-4; p. 165, ¶¶2-11). SCDOT admitted it did not even consider contacting the Marlowes or adjacent property owners. (R. p. 165, ¶¶17-19).

As the Marlowes’ expert witness’s report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to the Marlowes’ property both showed rainfall events greater than 10-year but less than 25-years. (See R. p. 99).⁵ Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, the evidenced established that SCDOT knew the existing culvert adjacent to the Marlowes’ property would likely affect their home.

Taking this evidence in the light most favorable to the Marlowes, by SCDOT’s own admission, it had information in 2013 and prior to the construction of the Project that the existing culvert was a hazard. According to *Giannini*, that knowledge and notice no longer

⁵ SCDOT produced no contradicting evidence, from expert testimony or otherwise, concerning these rainfall figures. For that reason alone, summary judgment was inappropriate on this issue.

provided SCDOT immunity, and the trial court's determination amounted to a determination of fact in light of a genuine issue of material fact. For this reason, the trial court's order should be reversed and the Marlowes' claim for negligence should be submitted to a jury. *Wooten*, 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997).

III. THE TRIAL COURT ERRED IN PLACING ITSELF IN THE ROLE OF THE JURY BY IMPROPERLY WEIGHING THE TESTIMONY OF THE MARLOWES' EXPERT WITNESS.

The trial court concluded that the Marlowes' expert witness, Jason Gregorie, testified there was no defect in the design or construction of the project, and that if there was no defect in the construction or design, then there was no basis for liability on the part of SCDOT. (See R. p. 5). The trial court further noted that "Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project, [the Marlowes'] residence *may* have still flooded." (R. p. 5) (emphasis added). Specifically, the trial court stated:

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

(R. p. 5). As discussed above, the trial court's ruling, disregards the *Giannini* Court's decision. In fact, the *Giannini* Court's decision establishes that the trial court's factual determinations regarding Jason Gregorie were misplaced. 664 S.E.2d at 454.

In *Giannini*, the plaintiffs presented the deposition testimony of a highway transportation engineer. *Id.* The plaintiffs' expert testified that it was feasible to install three-cable median barriers prior to the car accident, and that such a barrier would have

entrapped or redirected the tires of a car hitting it. *Id.* When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified,

"I think it is highly likely that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And although there may have been some subsequent crash, it would not have been the crash that occurred. The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

The *Giannini* Court found that this evidence was sufficient to submit the issue to the jury, and any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury. *Id.* at 454-55 (citing *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility)).

In fact, the South Carolina Supreme Court has specifically addressed the trial court's ruling concerning Gregorie's testimony that Appellants' property may have flooded absent SCDOT's actions or inactions. *King v. North River Ins. Co.*, 278 S.C. 411, 297 S.E.2d 637 (1982). In *King*, a case involving the collapse of the roof of a warehouse following a heavy rainstorm, the Supreme Court stated that "it is generally sufficient to prove the event insured against was the efficient cause of the loss, even though not the sole cause." *Id.* at 414. The *King* Court found that "[w]here an expert has testified that the accumulated water on the roof would not by itself have caused the roof to collapse, a

reasonable jury could find that the clogging of the downspouts was the efficient and proximate cause.” *Id.*

Nevertheless, the Marlowes again emphasize, as they did in its briefing to the trial court, SCDOT could have used cross-examination to question Gregorie’s conclusions and identify any potential flaws in his causation argument for the jury. The dispute in facts between Gregorie and SCDOT, however, is quintessentially a fact-finding issue that created a genuine issue of material fact. Thus, the Marlowes’ expert witness’s opinions – and any defects in those opinions – were reserved for adjudication by a jury. For this reason, taking the evidence presented by the expert witness in the light most favorable to the Marlowes, a genuine issue of material fact existed, rendering the trial court’s granting of summary judgment erroneous. Thus, reversal of the trial court’s order is warranted, and these issues should be submitted to a jury for consideration.

IV. THE TRIAL COURT FAILED TO CONSIDER, OR RULE UPON, THE MARLOWES’ DISCRETIONARY IMMUNITY ARGUMENT.

In its order granting SCDOT’s motion for summary judgment, the trial court failed to consider or address the South Carolina Supreme Court’s decisions finding liability against SCDOT under the Marlowes’ “discretionary immunity” arguments. For that reason, the Marlowes addressed this deficiency in their Rule 59(e) motion for reconsideration. (R. p. 370). “A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule.” *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may file such a motion “when [he or she] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24, 602 S.E.2d at 780. “A party *must* file such a motion

when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Id.* (emphasis in original).

The trial court determined that “[i]f there is no defect in the construction or design [of the Project], then there is no basis for liability on the part of [SCDOT].” (R. p. 5). This holding misapplied South Carolina precedent regarding the Tort Claims Act and discretionary immunity, which the Court failed to consider or address in its order.

In its order, the trial court found that the Tort Claims Act, and specifically, S.C. Code § 15-78-60(15), completely shielded SCDOT from liability in this case, which is in contravention of South Carolina jurisprudence on the subject. § 15-78-60(15) sets forth exceptions to the state's waiver of sovereign immunity, stating, in pertinent part, that a governmental entity is not liable for loss resulting from:

(15) absence, condition or malfunction ... of any ... median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.... Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity.... Governmental entities are not liable for the design of highways and other public ways . . .

The Tort Claims Act, § 15–78–60(5), also provides that a “governmental entity is not liable for a loss resulting from: (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.” S.C. Code Ann. § 15–78–60(5) (2005). The South Carolina Supreme Court has repeatedly explained that “the burden of establishing a limitation on liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an

affirmative defense.” *Pike v. S.C. Dep’t of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

“To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice.” *Id.* “Furthermore, ‘the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.’” *Id.* at 230, 540 S.E.2d at 90–91 (quoting *Foster v. S.C. Dep’t of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

The Marlowes presented substantial evidence, including expert witness testimony and SCDOT’s 30(b)(6) testimony, that SCDOT failed to weigh any competing considerations or alternatives with regard to, *inter alia*, (1) its decision to delay installation of the new culvert either before or after the 2015 rain event, (2) its decision that traffic should not be rerouted to install the culvert sooner, and (3) its failure to consider the simultaneous existence of the existing Highway 378 roadway, with its existing culvert having very limited flow capacity, adjacent to the new elevated Highway 378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction. The trial court’s failure to consider this theory of liability, the Marlowes’ presentation of evidence establishing SCDOT’s liability under these theories, and SCDOT’s failure to present evidence establishing it was entitled to the defense of discretionary immunity created a genuine issue of material fact, which not only warranted reconsideration of this issue by the trial court, but barred summary judgment on this issue.

Here, like the case of *Summer v. Carpenter*, the Marlowes presented evidence that SCDOT failed to consider critical stages of construction for the Project, and, ultimately, failed to consider anything, much less competing considerations or alternatives. 328 S.C. 36, 492 S.E.2d 55 (1997). In *Summer*, the Supreme Court determined (in a legal malpractice action concerning an attorney's failure to sue the DOT before the statute of limitations ran) that the defendant presented evidence which indicated (1) the design used for the intersection was common and (2) while respondent's expert would have selected another design, the chosen design was not wrong. 328 S.C. 46.

The Supreme Court determined this evidence did not establish that defendant considered various design options for the intersection and then selected the chosen design plan after carefully weighing competing considerations. *Id.* Accordingly, the Supreme Court held that the trial judge erred in concluding the Highway Department would have been immune from liability under the discretionary exception to the Act as a matter of law. *Id.*

Likewise, for these reasons, SCDOT failed to meet its burden that it was entitled to discretionary immunity, and because the trial court failed to address or determine whether it could be liable to the Marlowes for these failures, the trial court's order warranted reconsideration. However, because SCDOT failed to present any arguments or evidence establishing that it was entitled to a discretionary immunity defense, the Marlowes created a genuine issue of material fact which precluded the trial court's granting of summary judgment, and the trial court's order should be reversed, and this issue presented to a jury for trial on the merits.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE MARLOWES' INVERSE CONDEMNATION CLAIM WHEN SCDOT FAILED TO EVEN RAISE THAT ISSUE IN ITS MOTION FOR SUMMARY JUDGMENT.

At oral argument on its motion for summary judgment, SCDOT argued, for the first time, the trial court should grant summary judgment in its favor on the Marlowes' inverse condemnation claim. Undersigned counsel for the Marlowes objected on the ground this relief was not stated or sought in SCDOT's motion. Despite these glaring deficiencies, and the Marlowes' objection, the trial court ruled SCDOT was entitled to summary judgment on the inverse condemnation claim. Because SCDOT failed to move for summary judgment on the Marlowes' inverse condemnation claim in its Notice and Motion for Summary Judgment, the trial court's granting of summary judgment should be reversed and remanded for trial.

In its Notice and Motion for Summary Judgment, SCDOT stated, "This motion is based upon the fact that [SCDOT] is not liable to [the Marlowes] as a matter of law pursuant to 15-78-10 et seq." (R. p. 54). In its memorandum in support of the motion, SCDOT restated this position and went on to argue, "there is no evidence that [SCDOT] breached any alleged duty to [the Marlowes]." (R. p. 56). Neither SCDOT's motion nor its memorandum referred to or even mentioned the Marlowes' inverse condemnation claim but only discussed the negligence claims. SCDOT raised, for the first time, a new argument at the hearing on its motion that the Marlowes could not establish inverse condemnation. Undersigned counsel objected to this new argument being heard for the first time since it was not raised in either SCDOT's Notice of its Motion, or its memorandum in support of its Motion. (R. p. 397).

"One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "Ordinarily, a court may not grant relief beyond the limits or scope of such notice." *Id.*; see also, *Turbeville v. Floyd*, 341 S.E.2d 651, 288 S.C. 171 (Ct. App. 1986). However, our Supreme Court has indicated in dicta that the Circuit Court may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection. See *Salvo v. Hewitt, Coleman & Associates*, 274 S.C. 34, 260 S.E.2d 708 (1979). At oral argument, undersigned counsel objected to SCDOT's argument regarding the inverse condemnation claim. Because undersigned counsel objected (R. p. 397), and SCDOT did not raise the issue in its Notice or Motion for Summary Judgment, the trial court's granting summary judgment on the inverse condemnation claim should be reversed.

VI. THE TRIAL COURT ERRED IN MAKING FACTUAL DETERMINATIONS RESERVED FOR THE JURY IN GRANTING SUMMARY JUDGMENT ON THE MARLOWES' INVERSE CONDEMNATION CLAIM.

A. South Carolina appellate courts have consistently held that the acts taken by SCDOT in this case amount to an affirmative, positive, and aggressive act.

In granting summary judgment on the Marlowes' inverse condemnation claim, the trial court found the facts of this case did not amount to a taking because "[the Marlowes] failed to show that [SCDOT] and its employees had any affirmative, positive, and aggressive acts that cause the [Marlowes'] alleged harm." (R. p. 7). The trial court's decision cited to *Kiriakides v. Sch. Dist. of Greenville*, and stated, "[i]n installing culverts and construction to public roadways is a 'legitimate government action' on behalf of the

SCDOT as discussed in the *Kiriakides* case[.]” (*Id.*) (citing 382 S.C. 8, 675 S.E.2d 439 (2009)).

This conclusion was somewhat baffling and unusual to say the least, as the *Kiriakides* case never mentions culverts, and involved a situation where a school district attempted to take property by eminent domain after sale negotiations fell through. 675 S.E.2d at 441. In fact, *Kiriakides* held that the institution of condemnation proceedings does not constitute a taking, even where the condemning authority abandons the action nine months later. *Id.* at 443. There was no construction, no installation of culverts, and no designs of any kind at issue in *Kiriakides*. The case is not on point, not similar, and not relevant either factually or legally. The case only involved the potential institution of condemnation proceedings. For those reasons alone, the trial court’s reliance on *Kiriakides* supporting its granting of summary judgment on the Marlowes’ inverse condemnation claim was misplaced, erroneous and warrants reversal.

However, South Carolina Courts have consistently acknowledged the well-established principle that government-induced flooding may, in some circumstances, constitute a taking that would justify compensation under the Takings Clause. *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 776 S.E.2d 900 (2015) (citing *Arkansas Game & Fish Comm’n v. United States*, ____ U.S. ____, 133 S. Ct. 511, 518, 184 L.Ed.2d 417 (2012) (“[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.’ ”) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181, 13 Wall. 166, 20 L. Ed. 557 (1871)). For flooding to amount to a taking, there must be a causal connection between the challenged government act and the

increased flooding — a question of fact for the jury given Gregorie's opinions regarding the increased severity and levels of flooding. *Id.*, at 443 ("In addition to the requirement of a causal connection, a compensable taking occurs only where a claimant shows an actual increase in the frequency or severity of flooding.").

At oral argument, undersigned counsel pointed the trial court's attention to *Tipperary Sales v. S.C. Dep't of Transp.*, 2016-UP-351 (Ct. App. filed June 30, 2016), which is more analogous to the facts herein, and is in line with South Carolina precedent without piecemeal citations of relevant quotes to support one party's desired conclusion. Although an unpublished opinion, the Court of Appeals' decision in *Tipperary* involved similar facts as the instant case and relied on well-settled South Carolina law in determining the DOT's actions could constitute inverse condemnation.

In *Tipperary*, the Court of Appeals held the circuit court erred in dismissing the plaintiff's inverse condemnation claim against the DOT. In concluding the plaintiff's allegations against the DOT amounted to only a mere failure to act, the Court of Appeals found that the circuit court referenced the plaintiff's allegations about DOT's construction and installation of developments upstream from the plaintiff's store as well as DOT's alleged failure to remedy drainage defects caused by the flooding on the plaintiff's store premises.

Citing *Hawkins v. City of Greenville* (on which the trial court relied in its decision that SCDOT conduct did not constitute a taking), the trial court held that DOT's purported failure to act or to remedy the drainage defects did not constitute the type of affirmative, positive, aggressive acts by a governmental agency that would result in liability for inverse condemnation. 358 S.C. 280, 291, 594 S.E.2d 557, 562 (Ct. App. 2004) (recognizing "an

affirmative, positive, aggressive act on the part of the governmental agency" is an element of an inverse condemnation claim). The Court of Appeals held, however, that the trial court appeared to ignore the plaintiff's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding the plaintiff's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that the DOT had installed; (3) in September 2002, the DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by the DOT's resident engineers indicated the project would add 13.7 acres of impermeable surface adjacent to the choke point in the DOT's right-of-way, which in turn could result in flooding which would exceed the capacity the existing drainage system could handle.

The facts in *Tipperary* are nearly identical to the facts in this case, and, thus, SCDOT's conduct could constitute an affirmative, positive, and aggressive act that would support the Marlowes' inverse condemnation claim. *Tipperary* at 6; see also *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, was "an affirmative, aggressive, positive act"), *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); *Kline v. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597, 599-600 (1967) (finding that improving and widening a public street is an affirmative, aggressive, and positive act).

Furthermore, the trial court's reliance on *Hawkins* was misplaced because the *Hawkins* Court determined that the record contained no evidence the acts alleged caused the flooding of the plaintiff's property. 358 S.C. at 291. In fact, the plaintiffs' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. *Id.* Furthermore, both experts for plaintiffs and defendants testified it was impossible to determine whether installation of a riprap negatively or positively affected drainage on plaintiffs' property. *Id.*

Here, though, there was evidence presented (uncontradicted by SCDOT) that its actions increased the flood level on the Marlowes' property. Although Gregorie testified that the Marlowes' property may have flooded regardless of SCDOT's actions, he also testified that the Project likely exacerbated flooding on the property. For those reasons, this case is distinguishable from *Hawkins* and is more analogous to *Tipperary*.

In sum, because SCDOT's actions increased the flood hazard to which the Marlowes' property has historically been exposed – according to both SCDOT's own testimony and Gregorie's uncontradicted testimony, respectively – a taking occurred. See *Columbia Venture*, 413 S.C. at 445 (citing *Jacobs v. United States*, 290 U.S. 13, 16, 54 S. Ct. 26, 78 L. Ed. 142 (1933) (finding a compensable flowage easement was created by reason of the government's construction of a dam along a tributary of the Tennessee River, which caused an increase in the frequency of intermittent overflows upon claimant's farmland, destroyed claimant's crops, and impaired his use of the land for agricultural purposes); *Cotton Land Co. v. United States*, 75 F. Supp. 232, 233–35 (Ct. Cl. 1948) (finding compensable taking occurred where the construction of a dam and the impounding of water in its reservoir caused over 7,000 acres of claimant's land to be

flooded); *Barnes v. United States*, 538 F.2d 865, 870–73 (Ct.Cl.1976) (finding claimant had shown a government taking of a flowage easement by demonstrating significant damages resulting from frequent and inevitably recurring flooding which was the natural consequence of the government's control of the flow of a river through a nearby dam)). Thus, taking the evidence in the light most favorable to the Marlowes, whether SCDOT's conduct reached the level of an affirmative, positive, and aggressive act is a genuine issue of material fact, and the trial court's ruling should be reversed and remanded for trial.

B. The trial court erred in failing to follow the Supreme Court's holding in *Cutchin v. S.C. Department of Highways and Public Transportation* – a nearly identical culvert installation case.

The trial court's order granting summary judgment warrants reversal based on the Supreme Court's holding in a nearly identical factual scenario in *Cutchin v. S.C. Dep't of Highways and Public Transp.* 301 S.C. 35, 389 S.E.2d 646 (1990). In 1954 or 1955, the defendant in *Cutchin* constructed a cement culvert under U.S. Highway 123 By-Pass in Easley. *Id.* at 36. The culvert was approximately 40 yards from the Cutchins' home. *Id.*

During the 1970's, the Cutchins' yard was flooded by rainwater on several occasions. *Id.* In August 1984, during a rainstorm, flood waters rose above the window sills of their home, causing severe damage. *Id.* A second, similar flood occurred in August 1985. *Id.*

The Cutchins instituted an inverse condemnation against the State defendant, alleging that the cement culvert was improperly constructed, causing damage to their home from the flood waters. *Id.* at 37. The Cutchins received a jury award of \$70,000. *Id.*

On appeal, the State defendant claimed it was entitled to directed verdict, in that (1) no evidence was presented that the culvert, as initially installed, was improperly constructed, or (2) that in no event did it proximately cause the damages. *Id.* at 38. The Supreme Court disagreed. *Id.*

In reaching its decision, the Supreme Court noted that the Cutchins' expert testified that the culvert was inadequate when built and inadequate at the time of its decision. *Id.* Additionally, the Court noted, there was uncontradicted evidence in the record that the State defendant's own maintenance engineer made the statement that the pipe in the culvert was too small – like SCDOT here in its testimony and documents. *Id.* Viewing this evidence in the light most favorable to the Cutchins, the Court held that the trial court correctly submitted the case to the jury. *Id.*

Because the facts of this case are nearly identical to those presented in *Cutchin*, and because they directly contradict the trial court's misplaced reliance on *Kiriakides*, the trial court's order warrants reversal and the Marlowes' inverse condemnation claim should be submitted to the jury.

C. The “Special Injury” test set out in *Hardin* only applies to non-abutting property owners where there has been no taking; which specifically does not apply to the Marlowes.

The trial court held that the Marlowes could not establish a claim for inverse condemnation because they “failed to show that they suffered special damages, different in kind from that suffered from the public at large as required in *Hardin*.” (R. p. 7). Again, the trial court's application of *Hardin* warrants reversal because that case, and the “special injury” test, only applies to situations where non-abutting property owners allege governmental taking:

The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is **whether one whose property does not abut immediately on the part of the street vacated** — the part vacated being in the same block between his property and the next connecting cross street— **is so specially injured** as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007).

In *Hardin*, the plaintiffs filed an inverse condemnation action against SCDOT alleging the closure of a break in the median of an abutting highway deprived the traffic leaving their properties of the ability to cross the highway and constituted a taking. 371 S.C. at 603, 641 S.E.2d at 440. The trial court ruled the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *Id.* at 603, 641 S.E.2d at 440. The Supreme Court reversed the Court of Appeals and found there was no taking. *Id.* at 610, 641 S.E.2d at 444.

In *Hardin*, the Supreme Court actually abandoned the “special injury” analysis which previously existed in this state's jurisprudence and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements. *Id.* at 609, 641 S.E.2d at 443. The *Carolina Chloride* Court specifically found that *Hardin* created no new right or cause of action, but, rather, restated the focus in determining whether a **road re-configuration** amounts to a taking. *Carolina Chloride v. S.C. Dep't. of Transp.*, 391 S.C. 429, 706 S.E.2d 501, 504 (2011) (emphasis added).

In fact, our Courts have previously addressed the specific situations considered by the *Hardin* Court's analysis:

There is a distinction, however, to be noted between the assessment of compensation in the case of a taking and in the case of damage **when no land is taken**.

In the former case, the mere fact that there has been a taking entitles the owner to recover for all damages to his remaining land (whether special or shared by the general public), provided they flow from the taking, since he is constitutionally entitled to be made whole for all injuries resulting from the taking of his land.

But when there is **no taking**, he is entitled only to such damages * * * which are special and peculiar.

Gray v. South Carolina Dept. of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992) (emphasis added).

Thus, the trial court incorrectly analyzed the Marlowes' damages under the wrong standard, which alone warrants reversal. However, because the cases cited above establish that SCDOT's conduct was a taking of the Marlowes' property, including their land and home, they are entitled to all injuries resulting from that taking, and were not required to establish special and peculiar damages as outlined by *Hardin*, on which the trial court relied in granting summary judgment. For those reasons, the trial court's order warrants reversal and the inverse condemnation claim should be submitted to the jury.

CONCLUSION

Based upon the foregoing, Appellants respectfully request the trial court's order granting summary judgment be reversed and remanded for trial on the merits for all of Appellants' claims. Additionally, Appellants would ask that the judgment be reversed for any other reason appearing in the record of the case.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-000614

James Marlowe and Lori Marlowe, individually, and as Next Friends of K.P., H.M., and B.M., Minors under the age of Eighteen (18) years,

Appellants,

v.

South Carolina Department of Transportation,

Respondent.

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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South Carolina Department of Transportation,

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in determining the Stormwater Management and Sediment Reduction Act applies to this case and supports granting summary judgment?
- II. Did the trial court err in making factual determinations regarding the cause of the flooding on Appellants' property and Appellants' injuries?
- III. Did the trial court err in placing itself in the role of the jury by improperly weighing Appellants' expert witness' testimony?
- IV. Did the trial court err in failing to consider, or rule upon, Appellants' discretionary immunity arguments in opposition to Respondent's motion for summary judgment and Appellants' Rule 59(e) motion for reconsideration?
- V. Did the trial court err in granting summary judgment on Appellants' inverse condemnation claim when Respondent failed to raise that issue in its motion for summary judgment?
- VI. Did the trial court err in improperly making factual determinations reserved for the jury in granting summary judgment on Appellants' inverse condemnation claim?

STATEMENT OF CASE

The Appellants own property located at 2479 W Highway 378, Pamplico, South Carolina. In March 2015, the SCDOT began construction on widening Highway 378 in the area near the Appellants' residence. The Appellants allege that on October 4, 2015 and October 5, 2016 their home flooded, and the Appellants further allege that the construction to Highway 378 caused the flooding at Appellants' residence. (R. p. 18-23). However, in the same timeframe of October 2015

and October 2016, the Pee Dee experienced the 1000 Year Flood and Hurricane Matthew. Both storms caused extensive flooding throughout the Pee Dee and Grand Strand.

On May 3, 2017, Appellants Lori Marlowe and Jamie Marlowe brought this action against Respondent South Carolina Department of Transportation as well as Defendants Southern Asphalt, Inc. and United Infrastructure Group, Inc. alleging causes of action for inverse condemnation, conversion, due process violations, and negligence. (R. p. 21-23). On August 22, 2018, Appellants added their minor children as Appellants against the same Defendants with the same causes of action. (R. p. 35).

On November 7, 2019, Respondent filed the Motion for Summary Judgment, and a hearing was held on February 10, 2020. (R. p. 54, 383, 386). On March 25, 2020, the trial court issued the Order Granting Defendant SCDOT's Motion for Summary Judgment. (R. p. 001-009).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC; Knight v. Austin, 396 S.C. 518, 521-522, 722 S.E.2d 802 (2012). Furthermore, the “evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Id. (citing Fleming v. Rose, 350 S.C. 488, 493-94, 657 S.E.2d 857, 860 (2002)). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” McNair v Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct.App. 1998).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION IS NOT LIABLE TO THE APPELLANTS PURSUANT TO THE TORT CLAIMS ACT

The flooding in October 2015 and October 2016 were Acts of God and not caused by the SCDOT. In October 2015, the Grand Strand and Pee Dee suffered from the “1000 Year Flood.” Then in October 2016, Hurricane Matthew struck South Carolina causing massive flooding throughout the Grand Strand and Pee Dee. Many residents suffered flooding on their property and in their homes, including many who had never experienced flooding previously. The flooding to Appellants’ residence was caused by Acts of God, not any negligence on the part of the SCDOT.

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

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

The governmental entity is not liable for a loss resulting from:

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(7) a nuisance;

(8) snow or ice conditions or **temporary or natural conditions on any public way or other public place due to weather conditions** unless the snow or ice thereon is affirmatively caused by a negligent act of the employee;

(15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. **Governmental entities are not liable for the design of highways and other public ways.** Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. **Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice;**

SC Code Ann 15-78-60
[emphasis added]

Pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on the Appellants' property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees. The Tort Claims Act relieves SCDOT from liability for the design of highways, which is exactly what the Appellants have alleged in their Complaint. The Tort Claims Act further relieves SCDOT from liability for natural conditions occurring on public roadways. The rain event and hurricane were natural conditions, and as such, SCDOT had no

control over those natural conditions or their impact on Appellants' property. While the statute specifically mentions snow or ice, it also refers to "temporary or natural conditions" which would include stormwater. The stormwater and flooding surrounding the Appellants' residence were temporary natural conditions due to weather. Therefore, SCDOT is immune from liability under the Tort Claims Act for the flooding damage to Appellants' property.

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

The Appellants have alleged that rainwater during the 1000-year flood and Hurricane Matthew caused flooding to their property. (R. p. 19-20). Rainwater is a natural and temporary condition on a roadway that would cause the Tort Claims Act to apply to this case.

Pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on the Appellants' property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees. The Tort Claims Act relieves SCDOT from liability for the design of highways, which is exactly what the Appellants have alleged in their Complaint. The Tort Claims Act further relieves SCDOT from liability for natural conditions occurring on public roadways. The rain event and hurricane were natural conditions, and as such, SCDOT had no control over those natural conditions or their impact on Appellants' property.

II. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS' EXPERT FAILED TO OPINE AS TO THE ALLEGED DEFECT AND CAUSATION

In addition, the trial court correctly found that Appellants' expert failed to opine as to any alleged defect and causation between the alleged defect and the flooding. (R. p. 004-005). The

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

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

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

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

A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.

Q: May have?

A: That's correct.

Q: So it still—you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?

A: It's possible, yes.

(Gregorie depo, page 84)

Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project and road construction, the Marlowe's residence may have still flooded. Mr. Gregorie could not testify to a reasonable degree of engineering certainty that absent the road construction, the flooding would have been prevented. Stated differently, Mr. Gregorie testified that the Appellants' property still could have flooded even without the road construction.

The Appellants' expert does not find any defect in the construction of Highway 378 near the Appellants' property. Furthermore, the Appellants' expert failed to opine that the actions (or inactions) of SCDOT caused flooding to the Appellants' residence to a reasonable degree of engineering certainty. Therefore, the trial court correctly determined that there was no evidence of breach of any duty the SCDOT owed, and furthermore, that any alleged breach caused damage to Appellants' property.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE INVERSE CONDEMNATION CLAIM

The trial court correctly determined that summary judgment was proper on the Appellants' claim for inverse condemnation. (R. p. 006-007). The Appellants argue in their brief that SCDOT failed to move for summary judgment on the inverse condemnation claim. However, the issue was fully argued during the Motion for Summary Judgment hearing, and further alleged in Appellants' Complaint. (R. p. 21, 390-402).

"To establish an inverse condemnation, a Appellant must show: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Hawkins v. City of Greenville, 358 SC

280, (Ct.App.2004) 290 (the Court later determined that the permanence factor was no longer required).

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

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

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

In this case, the Appellants failed to show that SCDOT and its employees had any affirmative, positive, and aggressive acts that caused the Appellants’ alleged harm. As noted by the Hawkins court, a mere failure to act is insufficient. There has been no affirmative conduct on

the part of the SCDOT restricting the Appellants' land. Installing culverts and construction to public roadways is a "legitimate government action" on behalf of the SCDOT as discussed in the Kiriakides case above. Therefore, the Appellants' inverse condemnation allegations fail to meet the standard of an affirmative, positive, and aggressive act by the SCDOT.

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

The Appellants failed to show that they suffered special damages, "different in kind" from that suffered from the public at large as required in Hardin. In fact, the Appellants allege quite the opposite, indicating that several other homeowners near their property also flooded. Furthermore, it is common knowledge that many homes in the Pee Dee flooded during the 1000-year flood and Hurricane Matthew. Because the Appellants have not suffered a special damage, different in kind from the public at large, then they do not have a claim for inverse condemnation. Therefore, the trial court correctly granted summary judgment on the Appellants' inverse condemnation claim.

IV. THE TRIAL COURT CORRECTLY RELIED ON THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION ACT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The Stormwater Management and Sediment Reduction Act states:

- (A) Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed.
- (B) Each person responsible for the land disturbing activity shall certify, on the stormwater management and sediment control plan submitted, that all land disturbing activities will be done according to the approved plan.

(C) All approved land disturbing activities must have associated therein at least one individual who functions as responsible personnel. (SC Code Ann. 48-14-30)

Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

(1) to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees thereof for the recovery of damages caused by such action or failure to act; or

(2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity. (SC Code Ann. 48-14-160)

Pursuant to SC Code Section 48-14-160, the Stormwater Management and Sediment Reduction Act does not impose any liability on SCDOT and their agents or employees for the road construction near the Appellants' residence.

CONCLUSION

For the above stated reasons, the Court of Appeals should affirm the trial court's granting of summary judgment in favor of the South Carolina Department of Transportation.

Signature page to follow

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ARGUMENT IN REPLY**I. THE TORT CLAIMS ACT DOES NOT PROVIDE IMMUNITY TO RESPONDENT UNDER THE FACTS OF THIS CASE.**

Respondent argues that the trial court properly determined that it is not liable to Appellants pursuant to South Carolina's Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (hereinafter the "TCA") for three (3) reasons: (1) that "[t]he flooding to Appellants' residence was caused by Acts of God, not any negligence on the part of [Respondent]"; (2) that "the trial court correctly found that [the TCA] exempts [Respondent] from liability for natural conditions on a public roadway, or nuisance[]"; and, in a new argument raised for the first time on appeal (3) that "[the TCA] further exempts [Respondent] from liability for design of highways and any defect or condition on a highway 'unless the defect or condition is not corrected within a reasonable time after actual or constructive notice.' S.C. Code Ann 15-78-60(15)." (Resp't Br. 4-5).

A. Respondent did not meet its burden in proving that any "acts of God" were the sole causes of Appellants' injuries and damages.

In its brief, Respondent again claims the flooding to Appellants' property was caused by "Acts of God, not any negligence on [its] part" without citing to any South Carolina precedent (or any precedent for that matter) or any matter in the Record. In fact, Respondent cited to absolutely no authority for the proposition that flooding caused by actions taken during and arising out of construction of a public roadway amount to an Act of God. Respondent attempts to have this Court (as it did with the trial court) make this factual determination by peppering its brief with bald statements that the flooding of Appellants' property was only due to the "1000 Year Flood" and Hurricane Matthew – and not because of any actions or inactions on its part. That determination is precisely the

genuine issue of material fact reserved for the jury's consideration that Appellants argued at the trial court and in their Initial Brief.

Respondent's Answer in this case asserted that Appellants' injuries and damages were caused by "acts of God." As such, this constituted an affirmative defense. *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938). The burden of proof is upon the party who by the pleadings has the affirmative on the issue. *Baker v. Mutual Loan & Inv. Co.*, 218 S.C. 47, 61 S.E.2d 387 (1950); *Ford v. Atlantic Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143 (1932), and *Simonds v. Simonds*, 232 S.C. 185, 101 S.E.2d 494 (1957). One who pleads an affirmative defense has the burden of proving it. *McCabe v. Sloan*, 184 S.C. 158, 191 S.E. 905 (1937).

For the trial court to grant summary judgment on Respondent's "acts of God" defense, the burden of proof was upon Respondent, and the trial court needed to make a two-part determination: (1) that Respondent produced evidence that the sole source of any and all flooding during the statutory period complained of by Appellants were either the "1000 Year Flood" and Hurricane Matthew, respectively; and (2) that Respondent produced evidence that the flooding from those two (2) events (if they were indeed Acts of God) were the **sole** causes of Appellants' injuries or damages.

However, Appellants produced testimony – both by Respondent, its witnesses, and Appellants' expert witness – that Respondent's actions and/or inactions included poor maintenance issues that Respondent had actual or constructive notice prior to beginning construction near Appellants' property; that Respondent's actions and/or inactions contributed to the flooding on Appellants' property, and, furthermore, that there was flooding which was non-contemporaneous with the "1000 Year Flood" and Hurricane

Matthew. As Appellant James Marlowe stated in his deposition, there was additional flooding on Appellants' property that occurred between these two (2) events, as well. (R. p. 271, ¶21 – p. 272, ¶13).

Thus, Respondent did not meet its burden in establishing that “acts of God” were the **sole** cause of any injuries or damages sustained by Appellants. Whether the flooding was caused by “acts of God,” and whether the “acts of God” were the sole cause(s) of Appellants' injuries and damages were questions of fact for the jury to determine. *Montgomery*, 186 S.C. at 167. At the very least, the issue is in dispute “so as to make a genuine question for determination by the trier of the facts.” *Lunsford v. McDaniel*, 272 S.C. 525, 252 S.E.2d 917 (1979). Therefore, summary judgment was inappropriate, and the trial court's order should be reversed, and the case remanded for a trial on the merits.

B. Respondent did not meet its burden in establishing Appellants' injuries and damages were solely caused by natural conditions not affirmatively caused by a negligent act.

Next, Respondent baldly asserts that “[t]he rain event and hurricane were natural conditions, and as such, [Respondent] had no control over those natural conditions or their impact on Appellants' property. While the statute specifically mentions snow or ice, it also refers to ‘temporary or natural conditions’ which would include stormwater.” (Resp't Br. 4-5). Respondent again cites to no authority to support its contention that stormwater is recognized as a temporary or natural condition for purposes of immunity under the TCA. However, the failure to cite to any comparable or controlling authority is not nearly as egregious as Respondent's failure to acknowledge that the TCA's “temporary or natural conditions” provision more fully states:

The governmental entity is not liable 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). Again, Respondent has attempted to piecemeal favorable quotes from governmental immunity statutes in order to falsely portray that it is entitled to absolute immunity for **any** temporary or natural condition.

As discussed above, the factual determination by the trial court as to the proximate cause of Appellants' injuries and damages was inappropriate at the summary judgment stage where there was conflicting evidence concerning causation. Specifically, the question of whether Appellants' injuries and damages were caused by a temporary or natural condition (and, now, for the first time on appeal, whether stormwater is a temporary or natural condition) or, rather, "affirmatively caused by a negligent act of" Respondent, its agents, or employees, was a factual question for the jury's determination.

C. Respondent utterly failed to address Appellants' argument that a defect or condition existed which was not corrected within a reasonable time after actual or constructive notice.

Additionally, Respondent relies on another liability exception of the TCA, which states, among other things,

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

S.C. Code Ann. §15-78-60(15) (emphasis added). Again, Respondent fails to cite to any evidence in the Record that it was entitled to summary judgment based on this liability exception under the TCA, and, in fact, Appellants produced uncontradicted evidence that

a defect or condition existed (the box culvert adjacent to Appellants' property), that Respondent had actual or constructive notice of the defect or condition (Respondent's 30(b)(6) testimony paired with its Project plans and addendums), and that this defect or condition caused Appellants' injuries and damages. While Respondent's Brief cites the applicable language from the TCA, there is virtually no discussion, case citation or reference to the record in support of the defense, just a conclusory statement that the defense applies.

In fact, though, Appellants produced uncontradicted evidence that showed: (1) Respondent had knowledge of a defect or hazard in the culvert adjacent to Appellants' property; (2) Respondent failed on multiple occasions to remedy that defect or hazard, and (3) that the inadequate culvert was the cause of the flooding on Appellants' property. Thus, summary judgment was inappropriate because Respondent did not carry its burden in establishing that these conditions were natural or temporary, or that they were the sole causes of Appellants' injuries and damages. Thus, these issues were genuine issues of material fact reserved for the jury considering the conflicting evidence submitted. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008).

D. Respondent failed to even discuss or refute Appellants' discretionary immunity argument or the trial court's failure to address it.

As Appellants argued in their Initial Brief, and as Respondent failed to address in its brief¹, the trial court failed to consider or address the Supreme Court's decisions finding liability against Respondent under Appellants' "discretionary immunity" arguments. The failure to argue an exception in a brief ordinarily amounts to an abandonment of it. *Howell*

¹ Respondent did include this issue in its "Statement of Issues on Appeal."

v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987); *see also Mixson v. Westinghouse Elec. Corp.*, 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 1991). For those reasons, and the reasons previously stated in Appellants' Initial Brief, the trial court's order granting summary judgment should be reversed so that Appellants may have a trial on the merits to determine whether their claims were subject to any discretionary immunity defenses of Respondent.

II. APPELLANTS' EXPERT WITNESS'S TESTIMONY ESTABLISHES A SIGNIFICANT CAUSAL LINK BETWEEN RESPONDENT'S NEGLIGENCE AND APPELLANTS' INJURIES AND DAMAGES.

Respondent argues that "the trial court correctly found that Appellants' expert failed to opine as to any alleged defect and causation between the alleged defect and the flooding." (Resp't Br. 5). "When expert testimony is the only evidence of proximate cause relied upon, the testimony must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 190, 805 S.E.2d 212, 214 (Ct. App. 2017) (quoting *Jamison v. Hilton*, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (Ct. App. 2015)). "Only on the rarest occasion should the [circuit] court determine the issue of proximate cause as a matter of law." *Id.* (quoting *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010)). Nevertheless, "in determining whether particular evidence meets this test it is not necessary that the expert actually use the words 'most probably.' It is sufficient that the testimony is such 'as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes.'" *Baughman v. American Tel. & Tel. Co.*, 306

S.C. 101, 111, 410 S.E.2d 537, 543 (1991) (quoting *Norland v. Washington General Hospital*, 461 F.2d 694, 697 (8th Cir.1972)).

In *Giannini*, the plaintiffs presented the deposition testimony of a highway transportation engineer. *Id.* The plaintiffs' expert testified that it was feasible to install three-cable median barriers prior to the car accident, and that such a barrier would have entrapped or redirected the tires of a car hitting it. *Id.* When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified,

"I think it is **highly likely** that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And **although there may have been some subsequent crash, it would not have been the crash that occurred.** The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

The *Gianinni* plaintiff's expert witness's testimony is almost identical to Appellants' expert witness's:

"So I – and that's really one of the ultimate conclusions is that, my opinion is that the new roadway is obviously much higher than the prior roadway in elevation, and it does – the fact that it's much higher, it has the ability to impound or cause the impoundment of flood waters on [Appellants'] property."

(Gregorie Dep. p. 60, ¶21 – p. 61, ¶2).

"And the significance is that all the information suggests that the prior US378, which was situated at a lower elevation water would have overtopped that road.

And when water overtopped that prior US378, it would have prevented or exceptionally reduced the amount of flooding on [Appellants'] property.

And because water can no longer overtop the road, because the new US378 is constructed significantly higher, that impounds water on the – helps impound water on [Appellants] property and can increase the flood depth on [Appellants'] property."

(*Id.*, p. 74, ¶¶18 – p. 75, ¶6).

“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.”

(*Id.*, p. 77, ¶¶14-20) (emphasis added).

“I can say to a reasonable degree of engineering certainty that the construction project ***contributed to the flooding. I believe that it increased the flood depth on the property[.]***”

(*Id.*, p. 79, ¶¶1-5) (emphasis added).

“What’s significant to me is the conditions by which the – any flood waters that were on the Marlowe property exited the Marlowe property, those conditions were altered by the construction project.”

(*Id.*, p. 81, ¶¶9-13).

“And the slope – I attribute the failure of the slope to it impeding the hydraulic efficiency of the culvert, and I attribute that loss of hydraulic efficiency to a contribution to the flooding on the Marlowe property.”

(*Id.*, p. 106, ¶¶18-22).

“I mean, basically, there’s no evidence that [the slope sheeting] was even attempted to be – it was never installed.”

(*Id.*, p. 110, ¶¶5-7).

“What I’m saying is that if the project had not been constructed, there would have been relief to the flooding because water would have overtopped the prior US378.”

(*Id.*, p. 109, ¶¶1-4).

“The simultaneous existence of the US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction were ... a ***substantial contributor*** to the flood damages to the Marlowe Property.”

(*R.* p. 110, ¶5-6) (emphasis added).

Here, as in *Giannini*, Appellants' expert witness states that it was highly – or substantially – likely that the injuries and damages to Appellants were exacerbated by, and would have been significantly less without, Respondent's actions and/or inactions. And although Appellants' expert witness may not have contributed Respondent's actions and/or inactions as the sole cause of Appellants' injuries and damages, this was not necessary in order to withstand Respondent's motion for summary judgment. See *Sims v. Hall*, 357 S.C. 288, 299, 592 S.E.2d 315, 319 (Ct. App. 2003) ("Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury."). Furthermore, in holding that similar expert testimony to that presented here, the *Giannini* Court held that any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury's consideration – and not the trial court. *Id.* at 454-55.

In sum, Respondent reserves the right to impeach or attack Appellants' expert witness's credibility at trial. The dispute in causation theories between Appellants' expert and Respondent, however, is quintessentially a genuine issue of material fact. Thus, reversal of the trial court's order is warranted, and these issues should be submitted to a jury for consideration.

III. SOUTH CAROLINA PRECEDENT IS CLEAR THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO APPELLANTS' INVERSE CONDEMNATION CLAIM.

In its brief, Respondent states the trial court's order granting summary judgment on Appellants' inverse condemnation claim was correct, raising the identical arguments made in its motion for summary judgment: (1) that "Appellants failed to show that [Respondent] and its employees had any affirmative, positive, and aggressive acts that

caused [] Appellants' alleged harm[;]" and (2) "Appellants failed to show that they suffered special damages, 'different in kind' from that suffered from the public at large as required in *Hardin*." (Resp't Br. 8-9).

A. Respondent failed to address its deficient motion for summary judgment where it failed to move for summary judgment on appellants' inverse condemnation claim.

Likely recognizing the clear case law on this issue, Respondent's brief did not address its failure to include Appellants' inverse condemnation claim its notice and motion for summary judgment. As previously stated in Appellants' initial brief, Respondent's notice and motion for summary judgment stated, "This motion is based upon the fact that [Respondent] is not liable to [Appellants] as a matter of law pursuant to 15-78-10 et seq." (R. p. 54). In its memorandum in support of the motion, Respondent restated this position and went on to argue, "there is no evidence that [Respondent] breached any alleged duty to [Appellants]." (R. p. 56). Neither Respondent's motion nor its memorandum referred to or even mentioned Appellants' inverse condemnation claim, but only discussed the negligence claims. At oral argument, Respondent raised, for the first time², a new argument that Appellants could not establish inverse condemnation. Undersigned counsel objected to this new argument being heard for the first time since it was not raised in either Respondent's notice, its motion, or its memorandum in support of the motion for summary judgment. Despite these glaring deficiencies, and Appellants' objection, the trial court ruled Respondent was entitled to summary judgment on the inverse condemnation claim.

² Most likely because Appellants made the trial court aware of this deficiency in their memorandum in opposition to Respondent's motion for summary judgment.

"One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "Ordinarily, a court may not grant relief beyond the limits or scope of such notice." *Id.*; see also, *Turbeville v. Floyd*, 288 S.C. 171, 341 S.E.2d 651 (Ct. App. 1986). However, our Supreme Court has indicated in *dicta* that the Circuit Court may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection. See *Salvo v. Hewitt, Coleman & Associates*, 274 S.C. 34, 260 S.E.2d 708 (1979). Because undersigned counsel objected to Respondent's raising of a new ground for summary judgment not contained in its notice or motion, and because Respondent failed to address this issue in its brief, the trial court's order granting summary judgment on Appellants' inverse condemnation claim should be reversed.

B. Respondent's conduct amounted to an affirmative, positive, and aggressive act under South Carolina precedent.

In its first contention, Respondent primarily relies on *Hawkins v. City of Greenville*, where this Court addressed inverse condemnation and municipal drainage systems. 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). In that case, the plaintiff filed suit against the defendant municipality asserting a cause of action for inverse condemnation and alleging the defendant's neglect in designing and maintaining its stormwater drainage system led to flooding which damaged his property. 358 S.C. at 285-86, 594 S.E.2d at 560. This Court found the plaintiff failed to allege any affirmative, positive, and aggressive acts by the defendant which damaged his property. *Id.* at 291, 594 S.E.2d at 562. Specifically, the Court found: (1) the acts the plaintiff alleged were merely failures to act; and (2) the only affirmative act the plaintiff cited as a basis for his inverse condemnation claim was

the replacement of a culvert and the installation of material around a nearby creek. *Id.* at 291, 594 S.E.2d at 562-63.

Specifically, the Court wrote, the plaintiff asserted the defendant improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the adjacent creek's drainage pipes beyond their capacity and then failed to replace those pipes. *Id.* at 291, 594 S.E.2d at 563. The Court found that the only affirmative acts the plaintiff cited as forming the basis of his inverse condemnation claim were the replacement of the double-box culvert with the large arched pipe in the adjacent creek and the installation of the riprap material along the banks of the creek. *Id.* The Court held there was no evidence in the record that either of these acts caused the flooding on the plaintiff's property. *Id.*

The Court noted that the plaintiff's own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. *Id.* Regarding the effect of the riprap material on drainage in the creek's basin, experts for both parties either offered no opinion on the impact of the riprap or opined that it was impossible to determine whether installing the riprap negatively or positively affected drainage. *Id.*

Initially, Appellants contend this case is distinguishable from *Hawkins* in that Appellants' expert witness testified that Respondent's maintenance, planning, and installation of the box culvert and the failure of the sheeting along the slopes of the project's road contributed to the flooding on Appellants' property:

"What's significant to me is the conditions by which the – any flood waters that were on the Marlowe property exited the Marlowe property, those conditions were altered by the construction project."

(*Id.*, p. 81, ¶¶9-13).

“And the slope – I attribute the failure of the slope to it impeding the hydraulic efficiency of the culvert, and I attribute that loss of hydraulic efficiency to a contribution to the flooding on the Marlowe property.”

(*Id.*, p. 106, ¶¶18-22).

“I mean, basically, there’s no evidence that [the slope sheeting] was even attempted to be – it was never installed.”

(*Id.*, p. 110, ¶¶5-7).

“What I’m saying is that if the project had not been constructed, there would have been relief to the flooding because water would have overtopped the prior US378.”

(*Id.*, p. 109, ¶¶1-4).

“The simultaneous existence of the US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction were ... a **substantial contributor** to the flood damages to the Marlowe Property.”

(*R.* p. 110, ¶5-6) (emphasis added). These opinions and testimony directly contradict the Court’s sole bases for dismissal of the inverse condemnation claims in *Hawkins*. For those reasons alone, this Court should determine that, taking the evidence in the light most favorable to Appellants, a genuine issue of material fact exists as to Appellants’ inverse condemnation claim.

However, this Court recently reviewed and addressed a case discussing *Hawkins* in *Ray v. City of Rock Hill, S.C.*, 428 S.C. 358, 834 S.E.2d 464 (Ct. App. 2019). In *Ray*, the plaintiff alleged the defendant municipality’s maintenance of drainage pipes situated under a street in front of her property constituted an affirmative act sufficient to give rise to a claim for inverse condemnation. *Id.* at 366, 834 S.E.2d at 468. She maintained the

defendant, after repairing several broken pipes under that street, reconnected the subject pipe to the defendant's storm water drainage system against her wishes. *Id.*

The plaintiff also asserted the defendant undertook a permanent public project to modernize its infrastructure along the street, and, as a result, the defendant took positive steps to direct its storm water system flow directly under her home. *Id.* at 366, 834 S.E.2d at 469. The defendant asserted there was no evidence it installed or owned the subject pipe or that any new construction or improvements upstream from the pipe resulted in an increase in the amount or flow rate of water toward the plaintiff's property. *Id.* The defendant contended its maintenance of the pipes under the street was not to the subject pipe or to a pipe directly connected to the subject pipe. *Id.* The defendant argued summary judgment was proper because the plaintiff was unable to produce any evidence to attribute the flow of water through the pipe to any action by the defendant. *Id.* at 367, 834 S.E.2d at 469.

The trial court in *Ray* determined the plaintiff's claim that the defendant collected water into its storm water drainage system and channeled it under her home did not support her claim of inverse condemnation. *Id.* at 366, 834 S.E.2d at 468. The trial judge found no positive, aggressive acts were committed by the defendant. *Id.* The trial judge also noted that the plaintiff did not allege the construction of any new improvements causing water to flow through the subject pipe under her property, and the plaintiff failed to cite any case law which would categorize maintenance of the storm water drainage system as a positive, aggressive act. *Id.*

This Court wrote that it believed *Hawkins* was distinguishable from the facts alleged in *Ray*. *Id.* In reversing summary judgment on the plaintiff's inverse condemnation

claim, this Court held that a genuine issue of material fact existed as to whether the defendant engaged in an affirmative, positive, and aggressive act in reconnecting defendant's pipes to the subject pipe after the defendant admitted it did not have an easement and the plaintiff told the defendant not to reconnect. *Id.*

Likewise, the trial court's, and Respondent's reliance on *Hawkins* was misplaced because, here, as Appellants' expert witness testified, *supra*, Respondent's actions and/or inactions increased the flood level on the Appellants' property. For those reasons, this case is distinguishable from *Hawkins* and is more analogous to a nearly identical factual scenarios in *Cutchin v. S.C. Dep't of Highways and Public Transp.* 301 S.C. 35, 389 S.E.2d 646 (1990) and *Tipperary Sales v. S.C. Dep't of Transp.*, 2016-UP-351 (Ct. App. filed June 30, 2016)³, which Appellants' counsel directed the trial court's attention to at oral argument on Respondent's motion for summary judgment.

In *Cutchin*, the defendant in constructed a cement culvert, which was approximately 40 yards from the plaintiffs' home. *Id.* at 36. Later, the plaintiffs' yard was flooded by rainwater on several occasions. *Id.* Subsequently, during a rainstorm, flood waters rose above the windowsills of the plaintiffs' home, causing severe damage. *Id.* A second, similar flood occurred the next year. *Id.* The plaintiffs instituted an inverse condemnation against the defendant, alleging that the cement culvert was improperly constructed, causing damage to their home from the flood waters. *Id.* at 37. The plaintiffs received a jury award of \$70,000. *Id.*

³ Although an unpublished opinion, the Court of Appeals' decision in *Tipperary* involved similar facts as the instant case and relied on well-settled South Carolina law in determining Respondent's actions could constitute inverse condemnation.

On appeal, the defendant claimed it was entitled to directed verdict, in that (1) no evidence was presented that the culvert, as initially installed, was improperly constructed, or (2) that in no event did it proximately cause the damages. *Id.* at 38. The *Cutchin* Court disagreed. *Id.* In reaching its decision, the *Cutchin* Court noted that the plaintiffs' expert testified that the culvert was inadequate when built and inadequate at the time of its decision.⁴ *Id.* Additionally, the Court noted, there was uncontradicted evidence in the record that the State defendant's own maintenance engineer made the statement that the pipe in the culvert was too small. *Id.* Viewing this evidence in the light most favorable to the plaintiffs, the *Cutchin* Court held that the trial court correctly submitted the case to the jury. *Id.*

In *Tipperary*, the Court of Appeals held the circuit court erred in dismissing the plaintiff's inverse condemnation claim against the DOT. *Id.* at 6. In concluding the plaintiff's allegations against the DOT amounted to only a mere failure to act, the Court of Appeals found that the circuit court referenced the plaintiff's allegations about DOT's construction and installation of developments upstream from the plaintiff's store as well as DOT's alleged failure to remedy drainage defects caused by the flooding on the plaintiff's store premises. *Id.*

Citing *Hawkins*, the *Tipperary* trial court held that DOT's purported failure to act or to remedy the drainage defects did not constitute the type of affirmative, positive, aggressive acts by a governmental agency that would result in liability for inverse condemnation. *Id.* This Court held, however, that the trial court appeared to ignore the

⁴ Likewise, here, Respondent admitted (in its 30(b)(6) deposition) that the box culvert adjacent to Appellants' home was inadequate. (Resp't Dep. p. 11, ¶¶17-20) ("The existing culvert was undersized.")

plaintiff's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding the plaintiff's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that the DOT had installed; (3) in September 2002, the DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by the DOT's resident engineers indicated the project would add 13.7 acres of impermeable surface adjacent to the choke point in the DOT's right-of-way, which in turn could result in flooding which would exceed the capacity the existing drainage system could handle. *Id.* For those reasons, the Court held the DOT's alleged conduct could constitute an affirmative, positive, and aggressive act that would support the plaintiff's inverse condemnation claim. *Id.*

This Court also reversed the trial court's dismissal of the plaintiff's inverse condemnations against the defendant municipality, finding that the plaintiff alleged the defendant municipality's construction of nearby streets directly led to the flooding of its store because the defendant municipality's construction, maintenance, and operation of graded streets and thoroughfares caused storm water to collect directly in front of and behind the plaintiff's store. *Id.* at 7. The Court held that unlike the situation in *Hawkins*, then, the defendant municipality's conduct that the plaintiff complained of amounted to an affirmative, positive, and aggressive act that could support a claim for inverse condemnation. *Id.*

The facts in *Tipperary* are nearly identical to the facts in this case, and, thus, Respondent's conduct could constitute an affirmative, positive, and aggressive act that would support Appellants' inverse condemnation claim. Here, Respondent admitted it had the information necessary in 2013 to determine that the existing culvert adjacent to

Appellants' property could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on Plaintiff's property. (R. p. 148, ¶¶1-5). Respondent admitted the existing culvert was undersized. (R. p. 123, ¶¶17-20).

Furthermore, not only was Respondent aware that the existing culvert was undersized, Respondent knew or should have known that the existing US378 roadway served as an outlet for water for Appellants' property, even at 25-year rainfall levels. (R. p. 139, ¶¶15-19). Respondent knew this was unsafe. (R. p. 140, ¶¶4-6). Despite its own models indicating overflow, Respondent took no steps to speak to Appellants or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (R. p. 147, ¶¶1-4; R. p. 165, ¶¶2-11). Respondent did not even consider contacting them whatsoever. (R. p. 165, ¶¶17-19).

Finally, as Appellants' expert witness's report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to Appellants' property both showed rainfall events greater than 10-year but less than 25-years. (See R. p. 99). Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, the evidence showed that Respondent knew the existing culvert would likely cause injuries and damages to Appellants.

In sum, the facts of this case are nearly identical to those presented in *Cutchin* and *Tipperary*, and Respondent's actions increased the flood hazard to which the Appellants' property was historically exposed. Thus, taking the evidence in the light most favorable to Appellants, whether Respondent's conduct reached the level of an affirmative, positive, and aggressive act is a genuine issue of material fact, and the trial court's ruling should be reversed and remanded for trial.

C. *Hardin*'s "Special Injury" test has been abandoned.

In support of its inverse condemnation argument, Respondent next contends that Appellants "failed to show that they suffered special damages, 'different in kind' from that suffered from the public at large as required in *Hardin*." (Resp't Br. 9). Again, Respondent's reliance on *Hardin* is misplaced because that case, and the "special injury" test, has been abandoned. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citing *Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 609, 641 S.E.2d 437, 443 (2007)).

In *Hardin*, the plaintiffs filed an inverse condemnation action against SCDOT alleging the closure of a break in the median of an abutting highway deprived the traffic leaving their properties of the ability to cross the highway and constituted a taking. 371 S.C. at 603, 641 S.E.2d at 440. The trial court ruled the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *Id.* at 603, 641 S.E.2d at 440. The Supreme Court reversed the Court of Appeals and found there was no taking. *Id.* at 610, 641 S.E.2d at 444.

Prior to *Hardin*, "a landowner's ability to recover damages as a result of a re-configuration of road access depended on the location of his land with reference to the road vacated and the effect of the vacation on his rights as an abutting landowner." *Carolina Chloride*, 391 S.C. at 433, 706 S.E.2d at 503 (citing *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946)). "The *Cothran* Court held a landowner is not entitled to recover damages unless he has sustained a 'special injury,' which is an injury different in kind and not merely in degree from that suffered by the public at large." *Id.* (citing *Cothran*, 209 S.C. at 368–69, 40 S.E.2d at 243–44). "In *Hardin*, the Court **abandoned**

the ‘special injury’ analysis which previously existed in this state's jurisprudence, and specified that the focus in these cases should be how ***any road re-configuration*** affects a property owner's easements." *Id.* (citing *Hardin*, 371 S.C. at 609, 641 S.E.2d at 443) (emphasis added).

Thus, the trial court relied on an abandoned test in granting summary judgment on Appellants’ inverse condemnation claim, which alone warrants reversal. See *Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc.*, 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988) (circuit court order applying wrong standard of review reversed and remanded for redetermination). However, because the cases cited herein establish that Respondent’s conduct was a taking of Appellants’ property, including their land and home, they are entitled to all injuries resulting from that taking, and were not required to establish special and peculiar damages. For those reasons, the trial court’s order warrants reversal and the inverse condemnation claim should be submitted to the jury.

IV. THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION DOES NOT APPLY TO THE FACTS OF THIS CASE AND RESPONDENT’S INTERPRETATION OF THE ACT IS AN EXPANSION OF THE GENERAL ASSEMBLY’S INTENT.

In its brief, Respondent essentially regurgitates the same arguments made to the trial court in support of its motion for summary judgment. Again, Respondent argues that South Carolina’s Stormwater Management and Sediment Reduction Act⁵ (hereinafter the “Stormwater Act”) “does not impose any liability on [Respondent] and [its] agents or employees for the road construction near the Appellants’ residence.” (Resp’t Br. 10). The trial court cited no authority for its conclusion or holding in this respect; Respondent’s brief

⁵ S.C. Code Ann. § 48-14-10, *et seq.*

cites no authority therefore, and Appellants' research has so far disclosed no such authority for such a broad interpretation of the Stormwater Act. *Pamplico Bank & Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972).

The Stormwater Act provides that:

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 for damages caused by such action or failure to act; or
- (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity.

S.C. Code Ann. § 48-14-160(2). Based on the Stormwater Act's clear language, *supra*, Respondent's position is simply not contained in the statute, and neither is the trial court's reliance thereon contained in its order granting summary judgment. In their complaint and amended complaint, Appellants did not allege any deficiency in Respondent's obtaining of a permit under the Stormwater Act, nor did Appellants allege any deficiency in Respondent's deviation (or lack thereof) from its stormwater management and sediment control plan, which was submitted to South Carolina's Department of Health and Environmental Control ("DHEC").

For those reasons, despite Respondent's insistence that the Stormwater Act explicitly provides immunity in this case, the clear language of the Stormwater Act only address permitting and plan approval processes, and not maintenance, construction, and installation of roads, bridges, and culverts. Furthermore, though, despite Respondent's insistence, the Stormwater Act also expressly states that it does not relieve Respondent from its liability "arising from or incident to the **operations associated with** the land

disturbing activity.” *Id.* (emphasis added). Reading the clear language of the statute, Respondent’s – and the trial court’s – interpretation of the Stormwater Act is simply wrong, and the lack of any precedent or statutory authority to support Respondent’s position is revealing.

However, because Appellants must address Respondent’s interpretation of the Stormwater Act, Respondent essentially asks this Court to read, interpret, and expand the Stormwater Act to provide immunity for any and all “road construction” operations carried out in this State. (See Resp’t Br. 9-10). The Stormwater Act requires a person who intends to engage in a land disturbing activity⁶ to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The Stormwater Act further requires DHEC to promulgate regulations for the “types of activities that require a stormwater . . . permit” and for “permit application and approval requirements.” *Id.* § 48-14-50(C)(3) & (9).

Reading the Stormwater Act to require Respondent’s seemingly unlimited immunity would result in adding language to the statute, rather than merely interpreting it. See *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) (“Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.”). If the General Assembly intended to provide immunity for **all** road construction activities undertaken in this State, and not just actions

⁶ “Land disturbing activity’ means any use of the land by any person that results in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality and quantity of the stormwater runoff.” S.C. Code Ann. § 48-14-20(8).

related to permitting of land distributing activities and approval of stormwater plans, it could have done so with clear, express language. *Gov't Emps. Ins. Co. v. Poole*, 424 S.C. 1, 817 S.E.2d 283 (2018) (emphasis added). The General Assembly did not, though, and chose only to provide immunity to the State and its agencies for the recovery of damages caused by any “action or failure to act” insofar as it concerns the permitting and approval provisions stated in S.C. Code Ann. § 48-14-30 and § 48-14-50. Accordingly, the Stormwater Act is inapplicable to the facts and issues in this case, and the trial court’s reliance on it in granting Respondent’s motion for summary judgment was a clear error of law that amounted to an abuse of discretion. Thus, the trial court’s Order should be reversed.

CONCLUSION

Based upon the foregoing, Appellants respectfully request the trial court’s order granting summary judgment be reversed and remanded for trial on the merits for all of Appellants’ claims. Additionally, Appellants would ask that the judgment be reversed for any other reason appearing in the record of the case.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-000614

James Marlowe and Lori Marlowe, individually, and as Next Friends of K.P., H.M., and B.M., Minors under the age of Eighteen (18) years,

Appellants,

v.

South Carolina Department of Transportation,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

James Marlowe and Lori Marlowe, Appellants,

v.

South Carolina Department of Transportation (SCDOT),
Respondent.

Appellate Case No. 2020-000614

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 6028
Heard June 7, 2023 – Filed September 27, 2023

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Joseph Clay Hopkins, of Charleston, for Appellants.

John B. McCutcheon, Jr., of Thompson & Henry, PA, of
Conway; Carmen Vaughn Ganjehsani, of Richardson
Plowden & Robinson, PA, of Columbia; and S. Ashley
Gwin, of Conway; all for Respondent.

GEATHERS, J.: In this action, Appellants James Marlowe and Lori Marlowe appeal the circuit court's order granting Respondent South Carolina Department of Transportation (SCDOT)'s motion for summary judgment. The Marlowes argue summary judgment was inappropriate because (1) SCDOT's negligence was a question for the jury; (2) the acts performed by SCDOT were sufficient to support a

finding of inverse condemnation; and (3) the Stormwater Management and Sediment Reduction Act (Stormwater Act) does not apply. We affirm in part, reverse in part, and remand.

FACTS

The Marlowes are the owners of property located in Pamplico, South Carolina (the Property). In August 2013, SCDOT conducted a hydraulic design study in preparation for a project to widen sections of U.S. Highway 378 (the Project). As a part of the study, the SCDOT examined various conditions related to the roadway abutting the Property and concluded that existing bridge box culverts in the area would continue to protect against a 100-year flood event.¹ SCDOT also planned to replace the existing culvert near the Property with a larger one to alleviate drainage issues associated with the Project. While the specific dates are unclear, the parties agree that construction had begun in 2015 and that by 2016, the new elevated roadway had been laid adjacent to the existing highway.

On October 4, 2015, torrential rain poured across South Carolina during what came to be known as "the thousand-year-flood."² During this cataclysmic event, the Property experienced high levels of flooding. The Marlowes salvaged some of their

¹ To meet SCDOT's hydraulic requirements, a culvert must be able to divert water away from one side of a highway to another up to a "100-year flood."

The term "100-year flood" is used in an attempt to simplify the definition of a flood that statistically has a 1-percent chance of occurring in any given year. Likewise, the term "100-year storm" is used to define a rainfall event that statistically has this same 1-percent chance of occurring.

Water Science School, *The 100-Year Flood*, U.S. Geological Surv., <https://www.usgs.gov/special-topics/water-science-school/science/100-year-flood> (June 7, 2018).

² Referring to the 2015 weather event as the "thousand-year flood" is a misnomer because, as will be discussed later in this opinion, the likelihood that this event will occur in a given year is more than 1 in 1,000. Thus, to avoid confusion, we will refer to this event as the "2015 event."

belongings and moved out of their residence. After extensive work was performed on the Property with assistance from the Federal Emergency Management Agency, the Marlowes were able to move back to the Property. On October 5, 2016, approximately eight weeks after the Marlowes moved back, Hurricane Matthew (2016 event) hit South Carolina and the Property flooded again with approximately 15 to 16 inches of rain. The Marlowes have been unable to return to the Property.

On February 22, 2019, at the request of the Marlowes' counsel, Applied Building Sciences (ABS) conducted an engineering evaluation assessing the impact of the flood on the property (ABS report).

Using data collected from volunteer precipitation measuring stations³, ABS discovered that during the 2015 event,

[t]he two stations closest to the subject property recorded a peak 24-hour precipitation of 5.96[inches to 6.52[inches, which corresponds to a return interval⁴ of greater than 10[years but less than 25[years; [and] . . .

³ These stations are commonly known as "CoCoRaHS stations." According to the CoCoRaHS website, "CoCoRaHS is an acronym for the Community Collaborative Rain, Hail and Snow Network. CoCoRaHS is a unique, non-profit, community-based network of volunteers of all ages and backgrounds working together to measure and map precipitation (rain, hail and snow)." *About Us*, Cmty. Collaborative Rain, Hail & Snow Network, <https://www.cocorahs.org/Content.aspx?page=aboutus> (last visited Sept. 25, 2023).

⁴ "The recurrence [or return] interval is based on the probability that the given event will be equaled or exceeded in any given year." *Floods: Recurrence intervals and 100-year floods*, U.S. Geological Surv., <https://www.usgs.gov/centers/new-jersey-water-science-center/floods-recurrence-intervals-and-100-year-floods> (last visited Sept. 25, 2023). At each return interval, precipitation frequency estimates vary by time. For example, at the Property's location, a 100-year event occurs when 9.346 inches of rain fall within the peak 24 hours of a storm. See *NOAA Atlas 14 Point Precipitation Frequency Estimates: SC*, NOAA's Nat'l Weather Serv.: Hydrometeorological Design Studies Ctr., https://hdsc.nws.noaa.gov/pfds/pfds_map_cont.html?bkmrk=sc (last visited Sept. 25, 2023). However, a 100-year event also occurs when 11.6 inches of rain fall within the peak four days of a storm. See *id.*

[t]he two stations closest to the subject property recorded a 4-day precipitation of 12.76[inches to 14.16[inches, corresponding to a return interval of between 200[to 500[years[.]

ABS found that during the 2016 event,

[t]he two stations closest to the subject property recorded a peak 24-hour precipitation of 6.24[inches to 6.30[inches, which corresponds to a return interval of greater than 10[years but less than 25[years; [and] . . . [t]he station closest to the subject property with four consecutive days of data available recorded a total of 11.37[inches, corresponding to a return interval of between 100[to 200[years[.]⁵

In 2016, SCDOT received a customer service complaint from the Marlowes asking for an explanation of some of the design elements of the Project. Brian Dix, the program manager of the project, called the Marlowes to explain the Project's construction status. Specifically, Dix explained that a new culvert was being installed that should assist with drainage, but that the culvert could not be fully implemented until a nearby bridge over the Lynches River was completed. Dix stated that the bridge's construction needed to be prioritized due to traffic difficulties.

In January 2017, the bridge was completed, the old roadway was removed, and the new culvert was fully constructed to support the new elevated highway. Later that year, SCDOT began to receive complaints from property owners affected by the 2015 and 2016 weather events. In response to these complaints, SCDOT conducted a more detailed survey of the area that included the Property. Based on more accurate data than was available in their original survey conducted in 2013, SCDOT found that before the construction began, the existing culvert would be at capacity when impacted by "a flood associated with the 25-year return interval and potentially the ten-year interval." Floods of greater magnitude would result in a phenomenon known as "overtopping." Overtopping occurs where an overburdened drainage system fails to divert water away from a roadway and as a result, the roadway becomes flooded with the excess water.

⁵ We note that the second closest station with 4-day peak range data available recorded a total of 13.7 inches corresponding to a return interval of 200 to 500 years.

On May 3, 2017, the Marlowes brought this action against the SCDOT, Southern Asphalt, Inc., and United Infrastructure Group, Inc., alleging causes of action for inverse condemnation, conversion, due process, and negligence. According to the Marlowes, two consent orders were later filed dismissing all claims against Southern Asphalt, Inc., and United Infrastructure Group, Inc.⁶

On February 10, 2020, a hearing was held in response to SCDOT's motion for summary judgment. On March 25, 2020, the circuit court issued an order granting the motion. In its order, the circuit court included the following excerpt from the deposition testimony of Jason Gregorie, the Marlowes' expert witness and a representative of ABS.

[I]f 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 [P]roperty, and I believe the impact on the [P]roperty would have been less. [I]t's possible that it would have been prevented [altogether]. (Gregorie depo, page 77)

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

A: Well, . . . to a reasonable degree of certainty, I [believe] that [the Project] has affected . . . the flood depth of the property. I think [] that it . . . may have or there was a possibility it would have prevented the flooding inside the structure altogether.

Q: May have?

A. That's correct.

⁶ These consent orders are not in the record before us.

Q: So[,] . . . you agree that even with the old [highway] with these two rain events[,] the [P]roperty still could have flooded?

A: It's possible, yes.

(Gregorie depo, page 84)

(Emphasis removed). This appeal followed.

ISSUES ON APPEAL

- I. Did the circuit court err in granting summary judgment on SCDOT's liability under the Tort Claims Act (TCA)?
- II. Did the circuit court err in granting summary judgment on whether SCDOT's conduct amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation?
- III. Did the circuit court err in granting summary judgment under the Stormwater Management and Sediment Reduction Act?

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court." *Hawkins v. City of Greenville*, 358 S.C. 280, 289, 594 S.E.2d 557, 562 (Ct. App. 2004). "The proper standard [under Rule 56(c)] is the genuine issue of material fact standard." *Kitchen Planners, LLC v. Friedman*, Op. No. 28173 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sh. No. 33, 11, 17) (internal quotations omitted) (rejecting the "mere scintilla" standard for summary judgment). "Summary judgment is proper when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 562 (quoting Rule 56(c), SCRCPP). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Id.* at 288, 594 S.E.2d at 561 (quoting *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the

light most favorable to the nonmoving party." *Id.* (quoting *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361–62, 563 S.E.2d 331, 333 (2002)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333). "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634–35, 776 S.E.2d 434, 437 (Ct. App. 2015).

LAW/ANALYSIS

I. Tort Claims Act

The Marlowes argue that the circuit court erred in finding that SCDOT was not liable for damages under the TCA, specifically, S.C. Code Ann. § 15-78-60 (2005). We disagree.

A. Maintenance and Design Immunity

The Marlowes argue that because the existing bridge box culvert had a defect or condition and the defect or condition was not cured after adequate notice, SCDOT is liable for the Marlowes' damages.

"The [TCA] waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 121, 542 S.E.2d 736, 739 (Ct. App. 2001). However, section 15-78-60 of the TCA provides a list of exceptions to the state's waiver of sovereign immunity.

Under section 15-78-60(15), "[g]overnmental entities are not liable for the design of highways and other public ways." Further,

[g]overnmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not

corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice[.]

Id. Portions of a highway under construction are still under design and are not yet subject to maintenance. *See Summer v. Carpenter*, 328 S.C. 36, 44–45, 492 S.E.2d 55, 59 (1997) (finding that because an "intersection was still under construction[,] . . . the intersection was still under design and not subject to maintenance by [SCDOT].").

Before construction began on the Project, SCDOT's hydraulic design study found no functional deficiencies with the existing culvert. Because SCDOT was not informed of a defect or condition by alternative means, and was not aware of any potential deficiencies until the 2017 study, SCDOT could not have been put on notice as required by section 15-78-60(15). Once construction began, the Project was "under design and not . . . subject to maintenance." *Summer*, 328 S.C. at 44–45, 492 S.E.2d at 59. Any alleged defects or conditions arising during this time—including the 2015 and 2016 weather events—were not yet subject to maintenance and are thereby protected by design immunity. Therefore, under section 15-78-60(15), the SCDOT is not liable for any damages which occurred during or before the construction process.

B. Discretionary Immunity

The Marlowes argue that the question of whether SCDOT or its employees caused the flooding to the Property was a question for the jury. SCDOT argues that its and its employees' actions were protected by discretionary immunity. We agree with SCDOT.

1. *Preservation*

The Marlowes assert that SCDOT's discretionary immunity argument is unpreserved because it was not raised and ruled upon by the circuit court. We disagree.

"[I]t is not always necessary for a respondent—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). This approach

is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal.

2. *Merits*

Under the TCA, a governmental entity is not liable for loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee[.]" § 15-78-60(5).

In *Hawkins v. City of Greenville*, a property suffered flooding damage after a record rainfall event. 358 S.C. at 287, 594 S.E.2d at 561. The property owner sued the city of Greenville arguing in part that the city was negligent in failing to replace drainage pipes after allowing the development of neighboring parcels which altered the elevation and added strain to the existing pipes. *Id.* at 291, 594 S.E.2d at 562–63. Our court found that the decision was within the city's discretion, noting that

[t]he 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 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. at 294, 594 S.E.2d at 564. (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997)).

Here, the flooding incident is similar to the events that unfolded in *Hawkins*. The process of altering the highway elevation near the property increased the risk of flooding to the surrounding areas. SCDOT had plans to install the new culvert during the construction process; however, the new culvert was not installed until after the two major weather events. Like 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. Therefore, SCDOT and its individual employees have discretionary immunity from the Marlowes' negligence claim.

II. Inverse Condemnation

The Marlowes argue that the circuit court erred in granting summary judgment on their inverse condemnation claim.⁷ We agree.

"Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562. "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.'" *Id.* (quoting *Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002)).

A. Affirmative, Positive, and Aggressive Act

⁷ The Marlowes also argue that the circuit court erred in including inverse condemnation in its order because it was not raised in SCDOT's motion for summary judgment. "[T]he [c]ircuit [c]ourt may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection." *Turbeville v. Floyd*, 288 S.C. 171, 174, 341 S.E.2d 651, 652–53 (Ct. App. 1986). Although counsel for the Marlowes brought this deficiency to the court's attention, counsel proceeded on the merits of inverse condemnation without obtaining a ruling from the court. *See State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon."); *cf. Dixon v. Ford*, 362 S.C. 614, 625, 608 S.E.2d 879, 885 (Ct. App. 2005) (finding that a proper objection to a jury charge "requires an objection on the record, opportunity for discussion, and a specific ruling by the trial court"). Therefore, the circuit court did not err in including inverse condemnation in its order.

The Marlowes first argue that there was a genuine issue of material fact that SCDOT's conduct in this case amounted to an affirmative, positive, aggressive act. We agree.

"[T]o prevail in an inverse condemnation action, 'a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property.'" *Ray*, 434 S.C. at 47, 862 S.E.2d at 263 (quoting *WRB Ltd. P'ship v. Cnty of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006)). An "affirmative act" only amounts to an "affirmative, positive, aggressive act" when it has been proven to have caused or precipitated the damage in question. *See id* at 47–48, 862 S.E.2d at 264. Also, "[a]llegations of mere failure[s] to act are insufficient." *Hawkins*, 358 S.C. at 291, 594 S.E.2d at 563. "If a genuine issue of material fact exists as to whether the government entity committed an affirmative, positive, aggressive act causing damage to private property, summary judgment is not proper." *Ray*, 434 S.C. at 45, 862 S.E.2d at 262.

The focus of the Marlowes' complaint is SCDOT's alleged failure to install an adequate culvert and its construction of an elevated highway. The failure to install an adequate culvert is, by its very nature, not an affirmative act. The construction of an elevated highway is an affirmative act,⁸ but whether it is an "affirmative, positive, aggressive act" for the purposes of inverse condemnation depends on causation. *See Ray*, 434 S.C. at 47–48, 862 S.E.2d at 264 (observing the distinction made in *Hawkins* between mere affirmative acts and "affirmative, positive, aggressive" acts causing damage for purposes of inverse condemnation).

The Marlowes argue that there is evidence in the record that could suggest that the construction of the elevated highway caused the flooding on the property. We agree.

By SCDOT's own assessment conducted in January 2017, the existing culvert would be at capacity during a storm with a 25-year or greater return interval and all excess floodwater would soon rise to the elevation of the existing highway. At this point, the excess water would overtop the existing highway, acting as an additional outlet for the water to escape the Property.

⁸ *Cf. Hawkins*, 358 S.C. at 291, 594 S.E.2d at 563 (finding that the replacement of a double-box culvert with a large arched pipe and installation of riprap material were affirmative acts).

However, the new roadway construction project was built adjacent to, and almost two feet above, the existing roadway. The Marlowes allege that during a storm with a 25-year or greater return interval, the new elevated roadway acted as a barrier to the excess floodwater that would have previously been able to exit the Property via overtopping. According to the eleven nearest volunteer precipitation measuring stations that had four-day precipitation data available, the October 2015 storm ranged from a 100- to 200-year return interval at a minimum and a 200- to 500-year return interval at a maximum. In comparison, the October 2016 storm ranged from a 200-year to 500-year return interval at a minimum and greater than a 1,000-year return interval at a maximum. Thus, both of these events produced floodwater that exceeded the capacity of the existing culvert at the time of the weather events.

However, it is less clear if, and to what extent, the flooding on the property could have been averted had the new, elevated roadway not been built. Jason Gregorie, the Marlowes' expert witness, testified to the following:

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.

We find that these statements demonstrate a genuine dispute of material fact as to whether the construction caused the flooding of the Property. *See Kitchen Planners, LLC v. Friedman*, Op. No. 28173 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sh. No. 33, 11, 17). Also, further inquiry into the cause of the flooding is necessary to clarify whether the construction of the elevated highway was an affirmative, positive, aggressive act. *See Ray*, 434 S.C. at 45, 862 S.E.2d at 262 ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." (quoting *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333)). Therefore, viewed in the light most favorable to the

Marlowes, Gregorie's statements create a genuine issue of material fact as to whether the highway construction amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation.

B. Legitimate Government Actions

Alternatively, the circuit court concluded that the Marlowes failed to demonstrate that an affirmative, positive, aggressive act occurred because the installation of culverts and construction to public roadways are "legitimate government actions" under *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 675 S.E.2d 439 (2009). This was in error.

"An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). In its order, the circuit court heavily relied on *Kiriakides*, which addressed the government-imposed limitations on the use of private property, otherwise known as regulatory inverse condemnation. This category is separate and distinct from the government's physical appropriation of private property, also known as physical inverse condemnation. Apart from the type of government action used to condemn private property, the major difference between the two categories is that, contrary to a physical inverse condemnation, "there are only two elements to a regulatory inverse condemnation: affirmative conduct and a taking." *Id.* at 657, 620 S.E.2d at 80; *see also id.* at 657, 620 S.E.2d at 79 (holding that the "some degree of permanence" and "public use" elements from the traditional four-element inverse condemnation test do not apply to regulatory inverse condemnation).

In *Kiriakides*, the owner of a vacant theater sought damages for regulatory inverse condemnation, alleging that the threat of condemnation proceedings stigmatized and devalued his property. 382 S.C. at 12, 15, 675 S.E.2d at 441, 443. Our supreme court found this unpersuasive because "[t]he mere institution of condemnation proceedings does not constitute a taking, as it is a legitimate exercise of the government's authority." *Id.* at 17, 675 S.E.2d at 443. The court also reasoned that the inverse condemnation claim would "preclude the government from engaging in normal activities incident to a condemnation," such as surveying property and obtaining an appraisal. *Id.* at 19, 675 S.E.2d at 445.

In the present case, the Marlowes are seeking recovery for flooding damage under a theory of physical inverse condemnation. Denying recovery based on the supposed legitimacy of SCDOT's actions would provide de facto immunity for any physical actions regularly undertaken by governmental bodies. This is in clear contravention to South Carolina precedent. *See e.g., WRB Ltd. P'ship v. Cnty. of Lexington*, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (finding that there was a genuine issue of material fact that capping a landfill was an affirmative, positive, and aggressive act that may have caused the migration of methane on an owner's property); *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that the removal of a public sidewalk and the excavation of trenches leading to a business's basement were affirmative, positive, aggressive acts that caused flooding damage). Therefore, we find that applying the *Kiriakides* legitimacy analysis to this case was erroneous as a matter of law. *See* Rule 56(c) ("[Summary] judgment sought shall be rendered forthwith if . . . the moving party is entitled to a judgment as a matter of law.").

III. The Stormwater Act

The Marlowes argue that the circuit court erred in using the Stormwater Management and Sediment Reduction Act (Stormwater Act)⁹ as a basis for granting summary judgment. We agree.

"The [Stormwater Act] requires a person who intends 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, unless an exemption applies." *Responsible Econ. Dev. v. S.C. Dep't of Health & Env't Control*, 371 S.C. 547, 551, 641 S.E.2d 425, 427 (2007) (footnotes omitted).

In its order, the circuit court found, as a basis for immunity, that "the [Stormwater Act] does not impose any liability upon the state or government entity for acting or failing to act under the [Stormwater Act]." This section read in full states

[n]othing contained in this chapter and no action or failure to act under this chapter may be construed:

⁹ S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2022).

(1) to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees thereof for the recovery of damages caused by such action or failure to act; or

(2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity.

§ 48-14-160. Section 48-14-160(1) is not a catch-all provision that provides unchecked immunity to governmental entities once a Stormwater Act permit has been obtained. Instead, a comprehensive reading of the provision reveals the opposite—that the Stormwater Act neither imposes nor relieves liability for actions or failures to act. Therefore, because the circuit court relied upon the Stormwater Act in granting summary judgment, it was in error as a matter of law. See Rule 56(c) ("[Summary] judgment sought shall be rendered forthwith if . . . the moving party is entitled to a judgment as a matter of law.").

CONCLUSION

Based on the foregoing, we find that a genuine issue of material fact existed as to whether SCDOT's conduct amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation, and as a result, we reverse and remand this issue for further proceedings. Additionally, we find that granting summary judgment based on the Stormwater Act was in error as a matter of law; therefore, we reverse summary judgment on this issue. Lastly, we affirm the circuit court's decision to grant summary judgment on SCDOT's liability under the TCA.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, C.J., and VERDIN, J., concur.

166028

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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

OCT 12 2023

SC Court of Appeals

APPELLATE CASE NO. 2020-000614
CIVIL ACTION NO. 2017-CP-21-01168

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

James Marlowe and Lori Marlowe,

APPELLANTS,

versus

South Carolina Department of Transportation,

RESPONDENT.

PETITION FOR REHEARING

The Respondent, South Carolina Department of Transportation ("SCDOT"), respectfully petitions the Court for a rehearing of its Opinion No. 6028 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

Procedural and Factual Background

The appeal in this matter stems from the flooding of the Marlowes' home located in Pamplico, South Carolina during the historic and torrential rains which occurred in October 2015 and October 2016. The Marlowes brought an action against the SCDOT

alleging that construction to U.S. Highway 378 near their home caused the flooding of their home. The Marlowes alleged causes of action for inverse condemnation, conversion, due process violations, and negligence. The SCDOT filed a motion for summary judgment on the Marlowes' claims which the Trial Court granted based upon the immunities of the South Carolina Tort Claims Act, the Stormwater Management and Sediment Reduction Act (the "Stormwater Act"), and the failure of the Marlowes to prove that the construction to U.S. Highway 378 caused the flooding of the Marlowes' home.

The Marlowes appealed the Trial Court's grant of summary judgment to this Court. This Court heard the matter on June 7, 2023. On September 27, 2023, this Court issued its Opinion affirming in part, reversing in part, and remanding to the Trial Court. This Court affirmed the Trial Court's ruling that the immunities of the Tort Claims Act barred the Marlowes' tort claims. This Court, however, reversed the Trial Court's grant of summary judgment to the SCDOT on the inverse condemnation claim and also held the Stormwater Act did not provide a basis of immunity to the SCDOT. The SCDOT now petitions this Court for a rehearing of its holdings as to the inverse condemnation claim and the applicability of the Stormwater Act.

Argument

- I. The Marlowes did not present evidence showing the existence of a genuine issue of material fact as to causation for their inverse condemnation claim; therefore, the Trial Court properly granted summary judgment to the SCDOT on this claim.**

In reversing the Trial Court's grant of summary judgment to the SCDOT on the Marlowes' inverse condemnation claim, this Court concluded that 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 for the purposes of inverse

condemnation. This Court 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.” This Court 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. This Court properly recognized that the failure to install an adequate culvert could not be an affirmative act giving rise to an inverse condemnation claim.

This Court, however, determined that 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 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.

The SCDOT submits that this Court 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.

The Marlowes submitted evidence showing that during the October 2015 storm, the two Community Collaborative Rain, Hail & Snow Network (CoCoRaHS) stations closest to the Marlowes' home recorded four (4) day totals of rain corresponding to 200 to 500 year intervals. In the region, the greatest four (4) day precipitation recorded corresponded to a return interval of greater than 1000 years. [R.pp. 99-100.]

In October 2016, the station closest to the Marlowes' home with four (4) consecutive days of data available recorded a return interval between 100 to 200 years. In the region, the greatest four (4) day precipitation recorded corresponded to a return interval between 200-500 years. [R.pp. 99-100.]

Evidence in the record established that there was no design of a culvert large enough to 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 or anything that the SCDOT could have done with this road construction project to have prevented the flooding during these catastrophic events. [R.pp. 168, 316, 349-350.]

Additionally, the Marlowes' expert, Jason Gregorie, PE, 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 can 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.

[R.pp. 4-5 (emphasis added).]

In his report, Mr. Gregorie also could 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.” [R.p. 106 (emphasis added).]

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 v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004) (internal citations omitted).

An inverse condemnation claims 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.

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 massive flooding events in October 2015 and October 2016. The testimony of Mr. Gregorie upon which this Court relies to create an issue of material fact on the question of causation fails to meet the competency for an expert opinion on causation, and as such, cannot create an issue of material fact on causation for an inverse condemnation claim.

This State's Supreme Court has held 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). The Supreme 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, the Supreme 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*" and thus not reliable or admissible. Id. (emphasis in original).

Mr. Gregorie's opinion here does not ascend beyond the realm of possibility. He can only opine that it was **possible** the flooding might have been prevented without the road construction or a **possibility** that without the road construction that flooding might have been prevented inside the Marlowes' home. [R.pp. 4-5.] He could not "definitely" state that if the road construction project had not existed, the flooding would have been

prevented. [R.p. 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.

[R.p. 5.]

As the Supreme Court's directs in Baughman, this 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. His 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).

Accordingly, there is no sufficient evidence in the record that the SCDOT road construction caused the flooding of the Marlowes' home, and without causation, a claim for inverse condemnation cannot lie as a matter of law. The Trial Court's grant of summary judgment to the SCDOT on the inverse condemnation claim should be affirmed.

II. The Trial Court correctly relied upon the Stormwater Act in granting the SCDOT's motion for summary judgment.

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, Respondent SCDOT respectfully requests that the Court grant its Petition for Rehearing, withdraw the Opinion of the Court, and affirm the Trial Court's Order granting summary judgment to the SCDOT in its entirety.

Respectfully submitted,

/s Carmen V. Ganjehsani
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**ATTORNEYS FOR RESPONDENT
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION**

October 12, 2023.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, South Carolina Department of Transportation, do hereby certify that I have this date served the foregoing Petition for Rehearing, dated October 12, 2023, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

J. Clay Hopkins
 171 Church Street, Suite 150
 Charleston, SC 29401
clay@hopkinsfirm.com
Attorneys for Appellants

A copy of the sent e-mail is attached to this Certificate of Service.

/s Carmen V. Ganjehsani
 Carmen V. Ganjehsani
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**ATTORNEYS FOR RESPONDENT
 SOUTH CAROLINA DEPARTMENT OF
 TRANSPORTATION**

Dated: October 12, 2023.

RECEIVED
 OCT 12 2023
 SC Court of Appeals

From: [Carmen Ganjehsani](#)
To: clay@hopkinsfirm.com
Subject: 2020-000614 Marlowe v. SCDOT
Date: Thursday, October 12, 2023 1:10:00 PM
Attachments: [2020-000614 Marlowe v. SCDOT \(Petition for Rehearing\) \(3091560\).pdf](#)

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Petition for Rehearing in the above-referenced appeal on behalf of the Respondent South Carolina Department of Transportation.

Carmen Ganjehsani

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October 12, 2023

Filed via e-mail (ctappfilings@sccourts.org) and hand delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**Re: James Marlowe v. SCDOT
Appellate Case No. 2020-000614
RPR File No.: 181-01065**

RECEIVED

OCT 12 2023

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing on behalf of Respondent South Carolina Department of Transportation in the above-referenced case, along with our Certificate of Service. We are also filing this Petition electronically with the Court of Appeals via e-mail at ctappfilings@sccourts.org pursuant to Section (b)(2) of the Supreme Court's May 6, 2022 Order.

Also enclosed is our firm's check in the amount of \$50.00 for the filing fee in this matter.

We have served this Petition for Rehearing on counsel for Appellants upon their primary email addresses listed in the Attorney Information System.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

/s Carmen V. Ganjehsani

Carmen V. Ganjehsani

Encs.

cc: Joseph Clay Hopkins (via e-mail at clay@hopkinsfirm.com)

The South Carolina Court of Appeals

James Marlowe and Lori Marlowe, Appellants,

v.

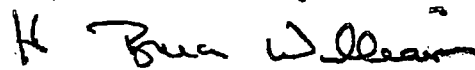
South Carolina Department of Transportation (SCDOT),
Southern Asphalt, Inc., Defendants,

of which South Carolina Department of Transportation
(SCDOT) is the Respondent.

Appellate Case No. 2020-000614

ORDER

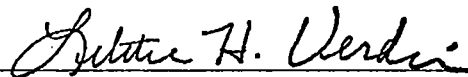
After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

FILED
Oct 24 2023

Joseph Clay Hopkins, Esquire
John B. McCutcheon, Jr., Esquire
S. Ashley Gwin, Esquire
Carmen Vaughn Ganjehsani, Esquire
The Honorable Michael G. Nettles