THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman

Case No. 2020-CP-22-00356
Appellate Case No. 2023-001454

Ron Christmas,

Appellant,

v.

County of Georgetown, City of Georgetown, and South Carolina Department of Transportation,

Respondents.

INITIAL REPLY OF APPELLANT CHRISTMAS (TO ALL RESPONDENTS' BRIEFS)

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INTRODUCTION

Respondents' many attempts to backfill legitimacy into the Trial Court's directed verdicts pay lip service to the burdens of proof, standards of review, legal precedent, and the Court record, while repeatedly arguing inferences of fact adverse to the non-moving party and briefing the "weak[ness]" of Appellant's case in light of such adverse inferences. As previously briefed and supplemented below, the directed verdicts were improvidently granted and should be reversed and this matter remanded for trial.[1]

REPLY ARGUMENTS

I. In Considering the Tender of Castles as an Expert in Hydrology, the Trial Court Erred by A) Requiring a Non-Existent Specialized License or Certificate and B) Disregarding Castles's Hydrology Experience.

County alleges in its Brief that Appellant did not tender Castles as an expert in hydrology. (County Brief at p. 6.) That is not accurate. Appellant tendered Castles as an expert in three categories, one being hydrology. (Tr. 257:1-6.) After Respondent(s) misrepresented that hydrology requires a separate certification or licensure in South Carolina (see, e.g., Tr. 258:21-12), the Trial Court hedged on whether Castles could testify on the topic of hydrology (Tr. 271:22-272:2 & 275:4-6). As a result, Appellant Counsel stated he was "willing to modify the tender to make it easier for the Court." (Tr. 274:25-275:3.)

Modification should not have been necessary in the first place. Respondent(s) misled the Trial Court, resulting in the Trial Court using a non-existent litmus test in its analysis of Castles's

[1] Appellant stands on his original briefing in response to any of Respondents' opposition grounds not expressly addressed herein. Many reply arguments are initially directed at County, which filed the initial opposition brief. To the extent the later opposition briefs made similar arguments, the reply arguments apply equally to the later briefs.

qualification – whether a proposed expert possessed a specialty license or certification in the proposed area of testimony. (App. Initial Brief at p. 15, citing Hamilton v. Reg'l Med. Ctr., 440 S.C. 605, 623-24, 891 S.E.2d 682, 692 (Ct. App. 2023), reh'g denied (Sept. 21, 2023) ("The fact that a witness is not a specialist in the particular branch involved affects only the weight of the witness's testimony, and affords no basis for completely rejecting it.").) The correct analysis of Castles's qualifications should have included review and consideration of his experience. See, e.g., Rule 702, SCRE; Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 92, 754 S.E.2d 267, 271–72 (Ct. App. 2014) (finding the trial court erred in not qualifying Dawkins as an expert in the field of engineering and construction when he "had a lengthy career in the construction business and explained his extensive educational background[,]" noting "any defects in the amount of his education and experience, if any, go to the weight of his testimony and not its admissibility"). The Trial Court cannot fashion its own, more-narrow test to decide whether the expert witness's qualifications pass muster.

Moreover, had the right analysis been performed by the Trial Court, Castles's extensive experience doing hydrology work as a civil engineer would have been considered, and would have resulted in Castles being found qualified as an expert in the area of hydrology.[2] The Trial Court cannot ignore an expert's experience when qualifying an expert witness.

II. The Trial Court Erred in Implementing a Non-Existent Threshold Requirement of Authoring a Study Prior to Certification as an Expert.

[2] Frankly, the transcript reflects that Castles's horizontal engineering experience in Myrtle Beach is unparalleled.

County alleges that Castles's testimony "on the flow of water from East Bay Park to Christmas's property" could not be reliable testimony unless Castles performed a "surface water analysis or hydrology studies for water flows." (County Brief at p. 7.) The City makes the same argument. (City Brief at p. 27.) This is an unsupported, restrictive, and incorrect view of what constitutes reliable testimony of an expert witness. It incorrectly demands that any opinion pertaining to the flow of water must result from and be based on that expert performing one of two specific tests identified by County or the City (opposing parties) – 1) a surface water analysis or 2) a hydrology study. This argument incorrectly postulates that no other investigation or analysis could be reliable. If the tendered expert's opinions are based on his independent review of drainage calculations for the area by another engineer with expertise in hydrology, utilizing the City's own, undisputed drainage basin plan, and rooted in engineering principals, it is clearly admissible. The City and the County's arguments fail, because they do not reflect the reliability analysis that South Carolina courts perform when evaluating an expert's testimony. See State v. Jones, 423 S.C. 631, 640, 817 S.E.2d 268, 272 (2018) (concluding an expert's testimony met the threshold reliability requirement after analyzing the bases of her opinions; noting although she did not identify by name the articles serving as the basis for opinions, she indicated she could provide citations if given the opportunity to gather them; her opinions were supported by peer-reviewed professional journals and trade publications uniformly accepted by professionals in her field; she participated in the peer review process and had given presentations on the subject; and she was unaware of any organizations that found her methods unreliable).

County argues that because Castles did not perform the various other studies (that would support County's various alternative causation theories), his testimony could not be reliable. (County Brief at p. 7.) This is a red herring. None of County's Castles-did-not-find-support-for-

our-affirmative-defenses arguments bear on whether or not the water flow opinions that Castles's was going to offer – but was never permitted to set out on the record for evaluation by the Trial Court – were reliable. (See App. Initial Brief at pp. 20-21.)

County then argues that Castles did not verify the information on the City maps and did not explain how the City maps are a reliable basis for the water flow damaging Appellant's property. (County Brief at p. 8.) This argument fails for many reasons. First, it is predicated upon two unsupported propositions – that an expert must first verify that the official, published town drainage plans and records are accurate and reliable; and, that the engineer did not implicitly do so as to the portions that matter when incorporating both the undisputed town plans and his personal observations and recordings, e.g., photographs, into his analysis. Second, to the extent there was an omission, it was because the Trial Court adopted the conclusory misstatements and generalizations made and parroted by Respondents about lack of qualifications and reliability and interrupted Castles' testimony. The Trial Court failed to permit the completion of the background and analysis of Castles's testimony on the flow of water. (See App. Initial Brief at pp. 20-21.) Importantly, the City was a co-Defendant, and if nothing else, the City drainage maps are an admission by a party opponent. Lastly, the County clearly relied upon the same maps in their cross-examination of Castles, without objection by co-Defendants City and SCDOT, and implicitly authenticated their reliability.

The Trial Court further erred by adopting arguments of Respondents as its evidentiary ruling when those arguments misconstrued facts and (expert) testimony, drew unfounded conclusions, and ignored the analytical framework required to analyze reliability. (E.g., App. Initial Brief at pp. 26-27; compare Tr. 273:21-25 with 275:5-6; compare 258:21-259:12 with 271:22-272:9.)

III. Appellant Was Prejudiced by the Evidentiary Limits Incorrectly Placed on Its Sole Drainage, Hydrology, and Causation Expert, Castles.

County avers that the limits on Castles's testimony did not prejudice Appellant because it did not exclude any matters that Castles observed firsthand, and that Appellant was permitted to "proffer all of Castles's opinions and testimony to the trial court." (County Brief at pp. 9-10.) County further stated that "Christmas's entire case" was heard at Trial. (County Brief at p. 10.) These averments are flatly wrong. Castles's testimony was extremely limited because of the Trial Court's erroneous evidentiary rulings and far less than Appellant's entire case was put on at Trial. (See App. Initial Brief at pp. 20-29; see also Tr. 699:11-700:24.) As documented elsewhere herein and in Appellant's principal brief, the limitations on Castles's testimony were extremely prejudicial at trial.

IV. Christmas's Proffered Testimony Included That His Conversations With Respondents' Representatives Led Him to Believe Help Was on the Way.

County avers that Appellant's arguments concerning the Trial Court's erroneous limitations on Christmas's testimony should not include it. (County Brief at p. 10.) It also argues that Appellant did not identify any conversations with County representatives that support Appellant's claims. (Id.) These statements are incorrect. Christmas testified that "he had multiple meetings about the flooding problems with representatives of the City, County, and State." (See App. Initial Brief at p. 43, citing Tr. 553:14-554:4 & 550:23-551:2.) Pope (SCDOT) recalled having many meetings with Christmas. (Id.) Christmas testified that Pope attended all of the meetings he had with City, County, and State representatives after the Park Project was underway. (Tr. 553:23-25, 554:1, & 554:3-4.) And Christmas believed that his conversations reporting more frequent flooding since the start of the Park Project to Pope would be passed on to Pope's successor. (Tr. 554:9-16.) Much like the prior discussions he had, including with Pope, he was led

to believe help was on the way. (Tr. 552:11-20.) During those post-Project conversations, Christmas was told by those representatives that, in addition to tennis courts, the Park Project was going to address drainage through a "diversion of water," so Christmas "assumed that they would work on that[.]" (Tr. 554:17-555:25.) It was clear that this group that Christmas was conversing with was acting on behalf of the responsible parties, be they the City, SCDOT, or County, or some combination thereof.

V. County Did Breach Duties Owed to Christmas.

County argues that it has not breached any duty owed to Christmas concerning "its management of surface water in East Bay Park." (County Brief at p. 11.) This is incorrect. All of the Respondents breached duties owed to Christmas, County included. (See, e.g., App. Initial Brief at pp. 41-43.)

County goes on to argue there is a lack of evidence in the record showing: A) the water in ditches or the grassy area in East Bay Park, that it mowed (which contributed to the drainage system failures and inundation of water in the immediate areas surrounding the Park), were cast onto Appellant's property; B) that its acts "factually caused" Appellant's injuries to his property; and C) "water runoff from the tennis court area or the grassy areas actually flowed north in a concentrated form onto [Appellant's] property." (Id.) It earlier argued Appellant put on its entire case; now it contradicts itself by arguing there was evidence missing at Trial. County's arguments identify the missing evidence by subject: A) drainage, B) causation, and C) the flow of water. Undoubtedly, all three are subjects for an expert witness. As discussed above, Appellant's expert witness, Castles, was (wrongly) prohibited from testifying about the flow of water or hydrology during Trial and was (improperly) limited when he attempted to testify about surface water drainage in the area surrounding Appellant's property. (App. Initial Brief at pp. 14-22 & 28-29;

see, e.g., Tr. 446:10-448:23.) His causation testimony was similarly (incorrectly) excluded during Trial. (App. Initial Brief at pp. 28-29; e.g., Tr.448:24-450:13.)

Notably, County concedes that it added three new tennis courts, and all the re-developed tennis courts were built at a higher elevation. (County Brief at p. 12.) Not only does the construction of re-developed tennis courts atop significant fill by the County constitute an affirmative aggressive positive act, it bears notable similarities to what occurred in Newsome. Newsome v. Town of Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989). The Newsome Court admitted expert opinion testimony on the flooding of a property that occurred after a nearby road was rebuilt at a higher elevation and based on the testimony at trial determined that a verdict in favor of the plaintiff homeowner on his inverse condemnation claim was proper. Newsome, 300 S.C. at 16, 386 S.E.2d at 275 ("From this evidence the jury could have easily concluded that the building up of Fifth Avenue satisfied the requirement of an overt or positive action by the Town necessary to prove a taking under a cause of action for inverse condemnation."). Castles attempted to present his opinions on the elevations in the Park and their impact on drainage and surface water diversion onto Christmas's property and drainage in the area immediately surrounding the Park, however, his testimony was excluded based on the earlier erroneous decision to exclude all hydrology testimony by him and an additional error: the baseless decision to prohibit Castles from presenting his drainage analyses and conclusions. (See App. Initial Brief at pp. 20-22.)

VI. Respondents Are Not Immune Under the South Carolina Tort Claims Act.

County argues that it entered evidence into the record showing that it is entitled to discretionary immunity for "quasi-judicial acts in connection with the tennis courts." (County Brief at p. 14.) That's incorrect. The only evidence County points to in support of this argument is Castles's testimony that he looked at "Stantec drawings" of the tennis courts. (County Brief at p.

14, citing Tr. 413-414.) This testimony does not demonstrate that County actually weighed competing considerations and made a conscious choice using accepted professional standards. This is fatal to County's immunity argument; a government defendant cannot invoke discretionary immunity when it fails to carry its burden of proof. See Sabb v. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002) ("Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.") (internal citations omitted).

County shifts to argue that its evidentiary basis is the "visual appearance of the tennis courts in the record" and that that "appearance" makes it "evident the County adopted Stantec's plans." (County Brief at p. 13.) This is tenuous if not entirely baseless and misses the mark. The drawings were not entered into the Trial record. County did not cite to a single photo or visual entered into the record in support of this argument. (See County Brief at p. 13.) Even so, there are around twenty pictures included of the tennis courts in the Trial record (see, e.g., Pl's Ex. 47 & 48), none of which evidence that the County weighed competing considerations and made a conscious choice that immunizes it from Appellant's negligence claim.

County then implies that the drawings immunize its "acts in connection with the tennis courts" because they were an "adoption of a general plan or system of drainage[.]" (County Brief at pp. 13-14.) This is misleading and without supporting evidence in the record. First, installation of renovated tennis courts on top of fill placed above prior grade in the Park is not the same as adopting a "general plan of drainage" or deciding "when and where sewers shall be built, of what size and at what level." (App. Initial Brief at pp. 36-38.) Second, courts look to the *evidence in the*

record to determine whether a government entity has shown it actually exercised discretion. See, e.g., Sabb v. S.C. State Univ., 350 S.C. 416, 428–29, 567 S.E.2d 231, 237 (2002) (reviewing testimony of state University officials, noting there was no evidence in the record that University actually "weighed competing considerations and alternatives when deciding not to discipline or remove Chief White" or when it made attempts to change the hostile environment, concluding the trial court properly denied the motions for directed verdict and JNOV). County has not, nor can it, point to any evidence entered by the close of Appellant's case – when the Trial Court heard and ruled on the directed verdict motions that are the subject of this appeal – showing that County carried its burden of proof. As a result, County cannot invoke discretionary immunity.

County also argues that under the snow and ice exemption at South Carolina Code Section 15-78-60(8), "the burden of proving that intermittent tidal flooding was caused by some negligent act of the County should be shifted back to Christmas[.]" (County Brief at p. 14.) The plain language of the exemption does not support County's argument. See S.C. Code Ann. § 15-78-60(8) ("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[.]"). Nor does South Carolina precedent; it is the government entity who must carry the burden of proof in establishing its affirmative defense. See, e.g., Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994) ("The burden of establishing a limitation upon liability or an exception to the waiver of immunity [including under §15-78-60] is upon the governmental entity asserting it as an affirmative defense.").

City and SCDOT also argue that the snow and ice exemption immunize them. (City Brief at pp. 14-15; SCDOT Brief at pp. 33-34.) SCDOT and the City avers, as it has *ad nauseum* in this

case, that tidal flooding is the cause of the water damaging Christmas's home, ignoring the evidence that water did not reach Christmas's property and flood it until after the Park project's completion and by taking a single quote from Christmas's expert out of context. (See App. Initial Brief at pp. 4-7.) This far from carries SCDOT's and the City's burden of proof. The overwhelming evidence was that the Park improvements and road damage caused during those improvements shifted the flooding from the center of the Park to the Intersection and Appellant's property. (See above.)[3]

VII. Respondents Are Liable for Inverse Condemnation As They Acted Affirmatively.

County contends that it is not liable for inverse condemnation because it "only acted to install 3 additional new tennis courts and replace 3 existing tennis courts" at the Park. (County Brief at p. 16.) This contention implies that there is a minimum size or scale of a government entity's affirmative, aggressive, positive act for it to be liable under South Carolina law for inverse condemnation. That proposition is not supported in legal precedent. See Ray v. City of Rock Hill, 434 S.C. 39, 47, 862 S.E.2d 259, 263 (2021) (recognizing defendant-city's reconnection of pipes during a Sewer Project was an affirmative, positive, aggressive act because when the severed pipes were reconnected, it directed water into the catch basin and through a terra cotta pipe beneath Ray's property and noting plaintiff's expert – a structural engineer's – opinion that "there would be increased water flow…after the City reconnected its three pipes to the catch basin,

[3] The City also argues the nuisance exemption is an "additional sustaining ground" even though Christmas has not brought a nuisance cause of action. S.C. Code Ann. § 15-78-60(7). The City cannot evade liability based on this exemption when a nuisance is not claimed in the case.

which…would create a risk of increased structural damage to Ray's home" precluding summary judgment).

County goes on to state that there was no Trial evidence "that water on Christmas's property originated from the tennis courts." (Id.)[4] This averment ignores testimony in the record. Castles testified that when the tennis courts were raised, "then the water just completely comes off the courts as soon as it hits the courts. So, it drains quicker to the low end, which is down around Front Street and Greenwich Drive." (Tr. 343:21-344:5.) The Trial Court immediately thereafter noted that this testimony was nearly a violation of its prior (erroneous) evidentiary rulings – that Castles was prohibited from testifying on hydrology and limited in the drainage opinions he could offer. (Tr. 344:16-345:25.) This stripped Appellant of a means to enter Castles's complete testimony into evidence and show the causal link between County's acts and the water diverted onto Christmas's property.

Further, County glosses over its concessions that it *added* three tennis courts and *raised all* of the courts' elevation. (County Brief at p. 12.) These facts (R. p. ___), coupled with Castles's uncontroverted testimony that the tennis courts' development caused water to quickly move to the area immediately surrounding Christmas's property as it drained (see above), should have resulted in the denial of Respondents' inverse condemnation directed verdict motion at the close of Appellant's case. To be clear, there is no competing expert testimony or evidence in the record showing the water did not drain and move in this way after the County's tennis court elevation; this was it. In other words, on the factual issues of whether there was an affirmative aggressive act

[4] The City argues a similar position about the walking trail (see City Brief at p. 11).

that caused the damage to Christmas's property, the record evidence only supported one ruling: denial of a directed verdict at that stage of Trial, yet the Trial Court ignored the record and entered a contrary ruling. See The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (factual rulings by trial court must be based on evidence in the record; error occurs when trial court rules absent evidentiary basis for its determination); see also Newsome v. Town of Surfside Beach, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989) (reviewing the expert *testimony* before determining that there was *evidence* in the trial record that could satisfy the requirement that an overt or positive action by the defendant town occurred); Ray v. City of Rock Hill, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (acknowledging "[e]ven though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law[;]" concluding there was sufficient *evidence* to overcome summary judgment that 1) when the city reconnected the three pipes to the catch basin, it directed water into the catch basin through the pipe, and 2) the resumption of the flow of water through the pipe caused damage to plaintiff's property).

Similarly, the City participated in the elevation of the tennis courts[5] and itself installed an elevated walking trail and added fill to the frisbee golf course.[6] SCDOT provided and the City installed the flap gate/tidal valve which permitted the saturation of the roads, road base, and Appellant's property.[7] The City took control of the area and preserved it as a drainage basin and holding pond during flooding events by erecting temporary, then permanently accessible,

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[5] July 11, 2006, Lease Agreement at Pl's Ex. 1A (requiring City approval of major improvements and demolition).
[6] (See Tr. 251:14-252:9; 349:20-350:3; 365:9-23.)
[7] (See Tr. 343:21-344:5; 548:13-24.)

barricades.[8] SCDOT permitted the City to take control of these two streets and use them in this manner. All three Respondents represented to Appellant and affirmatively acted to find a solution and solve the problem; and apparently, after the funding was procured, all three permitted the diversion of that funding. (See App. Initial Brief.)

VIII. Appellant Has Applied the Correct Standard of Review to the Trial Court's Inverse Condemnation Decision.

County argues that Christmas applied the "wrong standard of review" because Cobb states "the trial judge will determine whether a claim [for inverse condemnation] has been established; the issue of compensation may then be submitted to a jury[.]" (County Brief p. 16.) The City argues similarly. (City Brief at p. 12.) This is incorrect. The South Carolina Supreme Court made it clear in 2021 that a taking is a fact issue. See, e.g., Ray v. City of Rock Hill, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) ("Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law. 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.") (emphasis in original).

County also alleges that "the trial court determined that Christmas did not meet his burden of establishing inverse condemnation on the part of the County." (Id.) The City argues similarly. Analysis of an inverse condemnation claim presented at trial when a directed verdict motion is made **requires** review of the evidence entered during the Trial. Similarly, a ruling cannot be plucked out of thin air; it **must** be based on the evidence entered at Trial. See The Huffines Co.,

[8] (See Tr. 466:7-468:11; see also App. Initial Brief at p. 5.)

LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (In ruling on motions for directed verdict, the trial court is required to view the *evidence* and the inferences that reasonably can be drawn therefrom and must deny the motions when the *evidence* yields more than one inference or its inference is in doubt.) Neither a proper analysis nor ruling based on the evidence occurred here. Instead, the Trial Court misread the Hawkins case, analyzed the Hawkins evidence (incorrectly), then applied its error-ridden conclusions to this case – without one iota of consideration for Christmas's evidence entered during **this** Trial – to conclude there was no taking. (Tr. 696:4-24; see App. Initial Brief at pp. 35-39.)

Adding to what was already a complete miss, the Trial Court appeared to be oblivious to the fact that it was its own erroneous expert limitations that resulted in the presentation of only part of Christmas's expert's causation and drainage opinions during Trial. (App. Initial Brief at pp. 18-28.). In other words, even if the Trial Court did review the record evidence (which it did not) and concluded that what was in this Trial record was insufficient, it was the Trial Court who ensured the record was incomplete by (arbitrarily and incorrectly) placing prohibitions on Christmas's expert's testimony, leaving Christmas without an expert to testify about the water's altered drainage path, the *causal* link between the Respondents' acts altering the volume and speed of water and water congregating at the low point in the area, which is the Intersection at Christmas's property[9] and the damage to Christmas's property. (See, e.g., App. Initial Brief at pp. 21 & 28.)

IX. The SCDOT Cannot Add Language to the Trial Court's Inverse Condemnation Ruling; Its Attempt to Do So Should be Rejected.

[9] SCDOT admits that Christmas's property is the natural low point for the area. (SCDOT Brief at p. 4.)

Nowhere in the Trial Court's ruling on inverse condemnation did it state "SCDOT engaged in no conduct which equaled an affirmative positive, aggressive act" or similar. (Compare SCDOT Brief at p. 14 and id. at p. 3 with Tr. 696:4-24.) SCDOT's argument that "it does not appear Christmas has challenged" that (non-existent) inverse condemnation ruling is without basis. The Trial Court made no such ruling; it ruled in reliance on Hawkins (erroneously) and, contrary to SCDOT's argument, made no reference to SCDOT in its inverse condemnation analysis. (See Tr. 696:4-24.)

X. SCDOT Was Not Entitled to Directed Verdict Rulings As a Matter of Law.

SCDOT argues that it was "entitled to directed verdict as a matter of law on the inverse condemnation, negligence, and writ of mandamus claims without regard to the excluded testimony of Castles." (SCDOT Brief at p. 34.) Directed verdict motions turn on the evidence. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E. 2d 125, 130 (Ct. App. 2005) ("In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence."). To issue a proper ruling, a court is required to examine the evidence in the record. See, e.g., Ray v. City of Rock Hill, 434 S.C. 39, 45, 862 S.E.2d 259, 262 ("Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law."); see also Newsome v. Town of Surfside Beach, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989) (reviewing testimony of the plaintiff and his expert witness, the latter of which was in part based on topography maps that showed the plaintiff's property became the lowest place along the street after the defendant-town raised the level of the road seventeen inches). The Trial Court's exclusion of Castles's testimony as to surface water movement (and hydrology generally) and

causation, and the limits placed on Castles drainage opinions, ensured that Christmas's case in chief at trial was missing necessary evidence to prove the elements of his inverse condemnation and negligence claims, and his mandamus claim as well. Any ruling using the wrong analysis and "rationales" that do not exist in South Carolina precedent, as the Trial Court employed here, warrants appellate reversal.

XI. Mandamus Is Proper Against the County, the City, and SCDOT.

County argues mandamus should not apply to it because County does not have jurisdiction or the authority to repair roads or drainage in the City of Georgetown (County Brief at p. 17). However, this ignores County's duties which arose from its renovations at the Park. As noted above, County's re-development of the Park altered the drainage pathways for water at the Park causing flooding of Christmas's property. (See Tr. 342:18-344:5.) Since County was authorized to do its re-development work, and it continues as the lessee in possession of the altered property, it is likewise authorized to correct the problems it caused and regardless, responsible for the problems it caused. (See App. Initial Brief at pp. 42-43.)

Similarly, the City's actions noted above, redirected water onto Christmas's property culminating in Christmas moving out of his home in 2019. (Tr. 575:18-576:18.) The City should not be permitted to walk away from its voluntary undertakings including at the Park, as noted above, when its undertakings increased the flooding immediately around and onto Christmas's property and caused damage, rather than correcting it. (See App. Initial Brief at pp. 42-43.) The City argues that it "may" at its choosing undertake repairs or maintenance, but that it has "no obligation" to do so. (City Brief at p. 19.) This argument entirely ignores the governing law (set forth in Appellant's jury charges) and the City's voluntary undertakings at the Park and that altered and increased surface waters that now flood Christmas's property. (Id.)

The City further argues that no "ministerial duty" has been shown on the part of the City. (City Brief at p. 19.) Much like the duty to conduct a "thorough" investigation before closing a file was ministerial in Jensen (see App. Initial Brief at pp. 39-40), Respondents should be required to complete surface water drainage improvements, as they undertook to do when they renovated the Park, since those efforts failed and damaged Christmas. (App. Initial Brief at pp. 41-42.) Completion of the work Respondents voluntarily undertook and did not complete[10] is ministerial; that is what is sought by Christmas. The City's attempts to avoid correcting the problems it, along with the other Respondents, created should be rejected. The same reasoning applies to repairs needed (and overdue) by the SCDOT; its original resurfacing efforts were successful but eventually needed reconditioning. SCDOT should have *timely* repaired the road conditions reported to it which are contributing to the flooding at and on Christmas's property and preventing access.

XII. SCDOT Ignores That Christmas's Testimony Concerning SCDOT Attendees at Meetings Gives Rise to More Than One Inference.

SCDOT argues that Christmas did not testify that a SCDOT representative made assurances to him about the flooding issues while he met with local officials. (See, e.g., SCDOT Brief at pp. 19-20.) However, this is not accurate. Christmas testified that once the Park project was underway, he did again go and talk to City, County, or State folks, and specifically, "Mr. Pope, I think was at all of those meetings." (Tr. 553:23-554:4.) An inference from evidence that is in doubt should not be decided against the non-movant; similarly, credibility issues should not be

[10] (E.g., Tr. 550:23-551:16 & 555:11-21.)

resolved against the non-movant, they should be submitted to the fact finder. See The Huffins Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E. 2d 125, 129 (Ct. App. 2005).

XIII. SCDOT Ignores the Directed Verdict Standard and Its Obligations to Timely Repair Road Conditions Once Reported.

SCDOT argues that it was "unreasonable as a matter of law for Christmas to have believed that the SCDOT was going to fix the flooding issues at his property. (SCDOT Brief at p. 25.) It makes this argument while disregarding Christmas's clear testimony that he met and reported and discussed the flooding problems as they worsened; his repeated reports were to the government actors, including Pope on behalf of SCDOT; and the government actors met with him collectively and appeared to be working in concert to organize corrective work. (Tr. 549:19-552:3.) SCDOT's declaration that it believes it should have been absolved of liability as a matter of law because it views the conversations that occurred as an "unreasonable" basis for Christmas's belief strays entirely from the directed verdict standard. It also ignores that there is at a minimum an inference that arises from Christmas's testimony: that the repeated, collective meetings between Christmas and representatives of Respondents, including Pope, led Christmas to believe that the SCDOT, in this circumstance, would be repairing the road defects contributing to the flooding, alongside the City and County. Otherwise, it raises questions about why SCDOT repeatedly attended and participated in those meetings.

Christmas's reports of the worsening flooding issues, in conjunction with SCDOT's duty to repair road conditions or defects contributing to damages to his property, and the collective meetings of the Respondents raise a second inference also: at a minimum, Christmas was diligent and had reason to believe from the actions and the responses and planning and repairs he received and saw from the Respondents collectively, that a suit would not be necessary, help was in the works. (See App. Initial Brief at pp. 7-8.) As previously briefed, as the Act gives the government

a reasonable amount of time to make the repairs, which were expected to be subject to a design and permitting process, it is a question of fact for the jury as to when the statute of limitations should have commenced running against Appellant's claims.

XIV. The Use of Contractors Does Not Absolve the City or the County of Their Liability.

Respondents argue that they are immune from liability, for example, for the work at the Park and use of dump trucks to carry mucked out debris and fill dirt on Greenwich Drive, because they hired contractors to perform on their behalf. (County Brief at pp. 14-15 & City Brief at p. 28, fn. 7.) This is misconstruing Christmas's claims. It was the Respondents' agents, independent contractors or otherwise, who damaged the roads carrying heavy loads to and from the Park renovation projects. It was the Respondents that created the "perfect storm" of increased water flowing from every direction, who represented they would repair the flooding issues, who spoke to Christmas about repairs and assured him when he observed the worsening flood conditions at his property once the Park project began that water diversion was part of the Park renovations. (See, e.g., R. p. ___) The Park project was organized and implemented under leadership of the City and County; the flooding damages caused by the elevated courts and other renovations and damaged roads are likewise the responsibility of the City and County. (See App. Initial Brief at pp. 5-6).

XV. County Is Subject to the Stormwater Statute at South Carolina Code Section 5-31-450.

County argues that the definition of municipality in S.C. Code Ann. § 5-1-20 demonstrates that the County is not a municipality subject to § 5-31-450. (County Brief at p. 20.) However, Section 5-1-20 states that its definition of municipality only applies to Chapters 1 through 17 of Title 5. See S.C. Code Ann. § 5-1-20 ("As used in Chapters 1 through 17 of this title, unless the context clearly indicates otherwise: (1) "Municipality" means a city or town issued a certificate of

incorporation, or township created by act of the General Assembly."). The Stormwater Statute is, of course, at Chapter 31. Therefore, the definition that County advances does not apply to save it from the Stormwater Statute's application. If the General Assembly had intended 5-1-20(1) to apply to the Stormwater Statute, it would not have limited its application to Chapters 1 through 17 expressly.

XVI. Appellant's Pre-Trial Settlement With Non-Government Entity Green Wave Contracting Does Not Constitute an Additional Sustaining Ground.

City argues that Section 15-78-70(d) of the South Carolina Tort Claims Act bars the claims Appellant brought against it because a pre-trial settlement with a non-government defendant was reached. (City Brief at p. 30.) The City's argument is misplaced and its reading of the statute incorrect. The Act purely indicates that if you settle with the at fault government body, you cannot thereafter sue an employee of the government body for the same claim, or vice versa. Despite the eloquent prose of counsel, it has no applicability to the Green Wave settlement.

The plain language of section 15-78-70(d) does not support the City's reading. S.C. Code Ann. § 15-78-70(d) ("A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence."). The provision prohibits "further action… against an employee or governmental entity." Id. There is no "further action." This suit is litigating Appellant's original claims against the respective municipalities (the Respondent City, Respondent County, etc.), none of which have settled.

Christmas's settlement with a non-governmental entity or employee does not fall within the ambit of the Tort Claims Act. See, e.g., Wade v. Berkeley Cnty., 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (finding "Section 15–78–70(d) is ambiguous because it is unclear what phrase

"under this chapter" modifies[,]" concluding that a settlement between a plaintiff and an individual in his non-government capacity did not preclude the plaintiff from pursuing a later claim against the government entity under the Tort Claims Act).

The City repeatedly harped on this ground at Trial, and the Trial Court repeatedly rejected this argument. The Trial Court recognized that the Tort Claim Act distinguishes between government employees and independent contractors. The Act and Wade prevent a claimant from suing the government on the same claim after settling with the government's employee. Wade v. Berkeley County, 348 SC 224, 559 S.E.2nd 586 (2002). That proposition has no application here – Green Wave was an independent contractor, specifically excluded from the coverage of the Act. S.C. Code Sec. 15-78-30(c) (employee defined to exclude independent contractor); S.C. Code Ann. § 15-78-70(d) (bar applies to actions under the act brought against a government entity and its employees). The S.C. Code Ann. § 15-78-70(d) bar expressly excludes independent contractors by the Act's definitions.

The City adds another confusing spin. The City argues that interpreting S.C. Code Ann. § 15-78-70(d) other than the way the City advocates would frustrate S.C. Code Ann. § 15-78-100(c), which mandates allocation of any verdict. This is grasping at straws – the two statutes have different subject matter. And, as a plaintiff may only recover its damages once, the damages caused by and paid by the independent contractor will not constitute part of the enrolled verdict and judgment against the non-settling defendants.

Additionally, Appellant's Stormwater Statute claim, under S.C. Code Ann. § 5-31-450, could not be settled against Green Wave, as the Statute only applies to municipalities, not private entrepreneurs, like Green Wave.

CONCLUSION

For all the reasons set out above and those set out in Appellant's Initial Brief, this Court should reverse the Trial Court's erroneous rulings and remand this case for a new trial.

Respectfully submitted,

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November 6, 2024
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman

Case No. 2020-CP-22-00356
Appellate Case No. 2023-001454

Ron Christmas, Appellant,

v.

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

PROOF OF SERVICE

I, the undersigned, attorney for Appellant Ron Christmas, do hereby certify that I have this date served the foregoing **CONSOLIDATED REPLY OF APPELLANT RON CHRISTMAS** by personally serving the same upon the following counsel using the primary email addresses as listed via the Attorney Information System on November 6, 2024.

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