

RECEIVED

Dec 06 2024

SC Court of Appeals

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.

**RECORD ON APPEAL
VOLUME I OF VII**

Justin O'Toole Lucey (SC Bar No.: 15438)
Sohayla R. Townes (SC Bar No.: 102814)
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
jlucey@lucey-law.com
stownes@lucey-law.com
Attorneys for the Appellant

M. Kirk Battle, Esq.
Michael W. Battle, Esq.
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
kbattle@battlelawsc.com
mbattle@battlelawsc.com
Attorneys for County of Georgetown

Andrew F. Lindemann, Esq.
Lindemann Law Firm, P.A.
P.O. Box 6923
Columbia, SC 29260
andrew@ldlawsc.com
Attorney for City of Georgetown

Lisa A. Thomas, Esq.
Carmen V. Ganjehsani, Esq.
Richardson Plowden
Office: 2103 Farlow Street
Myrtle Beach, SC 29577
Mailing Address: P.O. Box 3646
Myrtle Beach, SC 29578
lthomas@richardsonplowden.com
cganjehsani@richardsonplowden.com
*Attorneys for South Carolina Department of
Transportation*

INDEX

VOLUME I

Orders, Judgments, and Decisions Issued in This Case

1. Order Denying Respondent City of Georgetown’s (“City”) Motion to Dismiss (Stormwater Statute Claim) filed March 22, 2022.....R-0001
2. Amended Order Denying City’s Motion to Dismiss filed June 7, 2022.....R-0008
3. Form 4 Order (Directed Verdict) filed August 17, 2023.....R-0011

Pleadings, Motions, and Other Pre-Trial Matters

4. Summons and Complaint filed April 3, 2020.....R-0014
5. Amended Summons and Complaint filed November 11, 2021.....R-0023
6. City’s Answer to Amended Complaint filed December 22, 2021.....R-0033
7. City’s Notice of Motion and Motion to Dismiss, Motion to Strike Amended Complaint, and Motion to Strike filed December 23, 2021.....R-0043
8. City’s Memorandum in Support of Motion to Dismiss, Motion to Strike Amended Complaint, and Motion to Strike filed January 26, 2022.....R-0047
9. City’s Notice of Motion and Motion to Alter or Amend Order and/or Motion to Reconsider filed April 1, 2022.....R-0054
10. Stipulation of Dismissal of Green Wave Only with Prejudice filed November 8, 2022.....R-0059
11. Second Amended Summons and Complaint filed November 30, 2022.....R-0061
12. Respondent SCDOT’s Answer to Second Amended Complaint filed December 9, 2022.....R-0071
13. Respondent Georgetown County’s (“County”) Answer to Second Amended Complaint filed December 12, 2022.....R-0082
14. City’s Answer to Second Amended Complaint filed December 15, 2022.....R-0086
15. City’s Notice of Motion and Motion for Summary Judgment filed July 31, 2023.....R-0095
16. City’s Pre-Trial Brief filed August 11, 2023.....R-0100

17. County’s Pretrial Brief filed August 11, 2023.....	R-0107
18. Appellant Christmas’s (“Christmas”) Pretrial Brief filed August 11, 2023.....	R-0112
19. City’s Notice of Motion and Motion to Bifurcate filed August 12, 2023.....	R-0122
20. City’s Notice of Motion and Motion in Limine filed August 13, 2023.....	R-0124
21. Christmas’s Opposition to City’s Motion for Summary Judgment filed August 14, 2023.....	R-0128

VOLUME II

Transcripts

22. August 14 – 17, 2023, Amended Trial Transcript.....	R-0156
a. Pretrial Matters	
i. Rule 702, SCRCP, Motion to Exclude or Limit Testimony of Richard L. Castles Jr. (Tr. p. 146).....	R-0301
ii. Other Motions in Limine (Tr. p. 156).....	R-0311
b. Opening Statements (Tr. p. 183).....	R-0338
c. Testimony of Appellant Witness Richard Pope	
i. Pope Direct Examination by Mr. Lucey (Tr. p. 215).....	R-0370
ii. Pope Cross-Examination by Ms. Thomas (Tr. p. 231).....	R-0386
iii. Pope Cross-Examination by Mr. Battle (Tr. p. 235).....	R-0390
iv. Pope Redirect Examination by Mr. Lucey (Tr. p. 236).....	R-0391
v. Pope Recross-Examination by Mr. Kirk Battle (Tr. p. 238).....	R-0393

VOLUME III

d. Testimony of Appellant Expert Witness Richard L. Castles, Jr.	
i. Castles Direct Examination by Mr. Lucey (Tr. p. 242).....	R-0397
ii. Castles Voir Dire Examination by Mr. Lindemann (Tr. p. 257).....	R-0412
iii. Castles Voir Dire Examination by Mr. Battle (Tr. p. 261).....	R-0416
iv. Castles Voir Dire Examination by Ms. Thomas (Tr. p. 263).....	R-0418
v. Castles Voir Dire Examination by Mr. Lucey (Tr. p. 265).....	R-0420
vi. Castles Voir Dire Examination by Mr. Lindemann (Tr. p. 266).....	R-0421
vii. Castles Voir Dire Examination by Mr. Lucey (Tr. p. 269).....	R-0424
1. Motion to Exclude or Limit Testimony of Castles (Continued) (Tr. p. 271).....	R-0426
viii. Castles Proffer Examination by Mr. Lucey (Tr. p. 286).....	R-0441
1. Motion to Further Exclude or Limit Testimony of Castles (Tr. p. 289)	R-0444

- ix. Castles Proffer Examination Continued by Mr. Lucey (Tr. p. 294)...R-0449
- x. Castles Proffer Examination by Ms. Thomas (Tr. p. 303).....R-0458
- xi. Castles Proffer Examination by Mr. Lucey (Tr. p. 305).....R-0460
 - 1. Motion to Exclude or Limit Testimony of Castles (Continued) (Tr. p. 306).....R-0461
- xii. Castles Direct Examination Continued by Mr. Lucey (Tr. p. 307)....R-0462
 - 1. Motion to Further Exclude or Limit Testimony of Castles (Continued) (Tr. p. 344).....R-0499
- xiii. Castles Direct Examination Continued by Mr. Lucey (Tr. p. 347)....R-0502
- xiv. Castles Cross-Examination by Mr. Lindemann (Tr. p. 360).....R-0515
- xv. Castles Cross-Examination by Mr. Mike Battle (Tr. p. 409).....R-0564
- xvi. Castles Cross-Examination by Ms. Thomas (Tr. p. 421).....R-0576
- xvii. Castles Redirect Examination by Mr. Lucey (Tr. p. 426).....R-0581
 - 1. Motion to Exclude or Limit Testimony of Castles (Continued) (Tr. p. 446).....R-0601
 - 2. Bench Conference Encouraging Expediency (Tr. p. 454).....R-0609
- xviii. Castles Redirect Examination by Mr. Lucey (Continued) (Tr. p. 455).....R-0610
- e. Testimony of Appellant Witness The Honorable Robert Harry O'Donnell
 - i. O'Donnell Direct Examination by Mr. Evans (Tr. p. 457).....R-0612
 - ii. O'Donnell Cross-Examination by Mr. Kirk Battle (Tr. p. 474).....R-0629
 - iii. O'Donnell Cross-Examination by Mr. Lindemann (Tr. p. 481).....R-0636
 - iv. O'Donnell Redirect Examination by Mr. Evans (Tr. p. 486) R-0641

VOLUME IV

- f. Testimony of Appellant Expert Witness Stephen John Geiger
 - i. Geiger Direct Examination by Mr. Evans (Tr. p. 487).....R-0642
 - ii. Geiger Cross-Examination by Mr. Mike Battle (Tr. p. 516).....R-0671
 - iii. Geiger Cross-Examination by Mr. Lindemann (Tr. p. 523).....R-0678
 - iv. Geiger Redirect Examination by Mr. Evans (Tr. p. 533).....R-0688
 - v. Geiger Recross-Examination by Mr. Lindemann (Tr. p. 538).....R-0693
- g. Testimony of Appellant/Plaintiff Charlie Ronald Christmas
 - i. Christmas Direct Examination by Mr. Evans (Tr. p. 540).....R-0695
 - 1. Motion to Exclude or Limit Christmas's Testimony (Tr. p. 546).....R-0701
 - ii. Christmas Proffer Examination by Mr. Evans (Tr. p. 547).....R-0702
 - iii. Christmas Proffer Cross-Examination by Mr. Lindemann (Tr. p. 556).....R-0711
 - iv. Christmas Proffer Cross-Examination by Ms. Thomas (Tr. p. 560)...R-0715
 - v. Christmas Continued Direct Examination by Mr. Evans (Tr. p. 568).....R-0723
 - vi. Christmas Cross-Examination by Mr. Kirk Battle (Tr. p. 585).....R-0740
 - vii. Christmas Cross-Examination by Ms. Thomas (Tr. p. 594).....R-0749

viii. Christmas Cross-Examination by Mr. Lindemann (Tr. p. 600).....	R-0755
h. Close of Appellant’s Case in Chief (Tr. p. 615).....	R-0770
i. Respondents’ Directed Verdict Motions (Tr. p. 618).....	R-0773
j. Rulings on Directed Verdict Motions (Tr. p. 693).....	R-0848
k. Appellant’s Motion for New Trial (Tr. p. 699).....	R-0854

Charges

23. Christmas’s Proposed Jury Charges.....	R-0857
--	--------

VOLUME V

Exhibits

Appellant’s Exhibits:

24. Exh. 1: East Bay Park Lease.....	R-0888
25. Exh. 21: SCDOT Permit Encroachment.....	R-0895
26. (Defendants) Exh. 22: Video.....	R-0897
27. (Defendants) Exh. 25: Video.....	R-0898
28. (Defendants) Exh. 26: Video.....	R-0899
29. Exh. 38: Topographic Report.....	R-0900
30. Exh. 40: Robert Castles’ Report.....	R-0905
31. Exh. 41: Sea Level Rise.....	R-0907
32. Exh. 43: Survey.....	R-0911
33. Exh. 47: Photos of Tide.....	R-0912
34. Exh. 48: Photos Taken by Appellant.....	R-1032
35. Exh. 49: City Map.....	R-1050

VOLUME VI

36. Exh. 141: Final Construction Plans.....	R-1052
---	--------

37. Exh. 155: Photo of Cracking.....	R-1140
38. Exh. 163: Comparison of Road Plane.....	R-1166
39. Exh. 166: Tide Chart.....	R-1167
40. Exh. 176: Six Photos from Stephen Geiger Report.....	R-1172

Respondents' Exhibits:

41. Exh. 1: City Map.....	R-1175
42. Exh. 2: Soil Survey Map.....	R-1177
43. Exh. 3: Photo (Lindemann).....	R-1179
44. Exh. 4: Building Permit.....	R-1180
45. Exh. 5: Elevation Certificate.....	R-1181
46. Exh. 6: Deed.....	R-1183
47. Exh. 7: Deed to Wife.....	R-1188

Court's Exhibit

48. R. Castles Deposition Transcript.....	R-1194
---	--------

VOLUME VII

49. (Cont.) R. Castles Deposition Transcript.....	R-1302
---	--------

Other Materials or Documents

50. <i>Wiggins v. City of Charleston</i> , Civil Action Number 2018-CP-10-01494, June 4, 2022 Charleston County Court of Common Pleas Order Granting Defendant Town of Mt. Pleasant's Rule 12 Motions.....	R-1460
51. <i>McKittrick, et al. v. Tennyson at Park West Association, Inc., et al.</i> , Civil Action Number 2020-CP-10-04421, April 26, 2022 Charleston County Court of Common Pleas Order Granting Defendant City of Charleston's Motion for Summary Judgment.....	R-1469
Certificate of Appellant Counsel.....	R-1479

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey

Justin O'Toole Lucey (SC Bar No.: 15438)

Sohayla R. Townes (SC Bar No.: 102814)

415 Mill Street

Mount Pleasant, SC 29464

Telephone: (843) 849-8400

Attorneys for Appellant

Charleston, South Carolina
December 6, 2024

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FOR THE FIFTEENTH JUDICIAL
CIRCUIT CASE NO. 2020-CP-22-00356

Ron Christmas,)

Plaintiff,)

vs.)

County of Georgetown; City of Georgetown;)
Green Wave Contracting, Inc.; South)
Carolina Department of Transportation; and)
John Doe 1-10,)

Defendants.)

**ORDER DENYING DEFENDANT CITY
OF GEORGETOWN'S MOTION TO
DISMISS**

This matter came before the Court on January 27, 2022, upon Defendant City of Georgetown's ("the City") December 23, 2021, Motion ("Motion"). The City's Motion was captioned as three Motions: a Motion to Dismiss, a Motion to Strike Amended Complaint, and a Motion to Strike (Paragraph 29(f) of Plaintiff's Amended Complaint)¹. The City essentially objects to the addition of the South Carolina Department of Transportation ("SCDOT") as a party defendant and the addition of a cause of action under the Stormwater Statute. Having reviewed the submissions of the parties, heard oral arguments, and taken the matter under advisement, this Court **DENIES** City of Georgetown's Motion to Dismiss.

BACKGROUND

This case arises from alleged flooding and flooding damages resulting from the renovations and improvements made to the East Bay Park ("the Park"). Plaintiff has alleged his home at 101 Greenwich Drive, located across the street from Winyah Bay and the East Bay Park, has been inundated with flooding as a result of the Park project. The City owns the Park, the County of

¹ Plaintiff admitted at the hearing that Paragraph 29(f) was added in error and stipulated the striking of Paragraph 29(f).

Georgetown (“County”) operates the Park pursuant to a long-term lease, and Green Wave Contracting, Inc. (“Green Wave”) was the contractor hired to build the tennis courts in the Park, including raising the elevation several feet above grade.

PROCEDURAL HISTORY

On September 30, 2021, Plaintiff filed his Motion to Amend to add claims against City and County for violation of South Carolina Code § 5-31-450 (stormwater drainage statute). On October 4, 2021, while the initial motion to amend was pending, Plaintiff filed his Amended Motion to Amend correcting a scrivener’s error. Plaintiff filed a Second Amended Motion to Amend on November 11, 2021, to assert claims against the SCDOT as owner of the roads that have been damaged, as previously suggested by both the City and the County. County and Green Wave consented to Plaintiff’s Second Amended Motion to Amend. The City refused to consent.

On November 12, 2021, at the hearing on Plaintiff’s motions, City initially objected to the Court hearing Plaintiff’s Second Amended Motion (adding SCDOT). However, Plaintiff and City proceeded with advocating their positions for and against the addition of SCDOT as a Defendant. City objected to the addition of SCDOT on the basis that it would prejudice City because counsel for City also historically has represented SCDOT. Plaintiff asserted that City’s counsel’s prejudice is not prejudice as contemplated by Rule 15, SCRCP, and that the alleged prejudice to City’s counsel was a personal issue, not pertinent to the City’s position. Upon inquiry by the Court, counsel for City conceded that he would not have a valid objection if City and SCDOT waived the conflict.

On November 24, 2021, the Court issued a Form 4 Order granting Plaintiff’s Amended Motion to Amend and simultaneously marked all of Plaintiff’s Motions as resolved, including Plaintiff’s Second Amended Motion to Amend adding SCDOT as a defendant.

On December 2, 2021, County filed its Answer to Plaintiff's Amended Complaint, including the claims against SCDOT, although Plaintiff had not yet filed the Amended Complaint.

On December 7, 2021, Plaintiff filed the Amended Complaint, including the claims against SCDOT, based on the Court having heard arguments on November 12, 2021, and the resulting Form 4 Order, the Court marking all motions "Completed" on November 24, 2021, and County filing its Answer with the addition of SCDOT on December 2, 2021. SCDOT filed its answer on January 7, 2022, and has not moved to dismiss the Amended Complaint.

ANALYSIS

I. The City has no standing to object to the addition of the SCDOT.

The City and SCDOT are separate Defendants and are each represented by separate counsel. The SCDOT could have objected to their addition to the suit, but it did not do so. As such, the City lacks standing to object to the addition of the SCDOT.

II. The City failed to move to amend the Order granting leave to amend.

The Order granting leave to amend found that Plaintiff could plead a cause of action for the violation of the stormwater statute and that SCDOT could be added as a Defendant. The Court granted its leave to amend in response to all pending motions and marked all as resolved. If the City believed there was any ambiguity in this, it should have moved to reconsider. As it did not, it cannot challenge the addition of SCDOT at this time. Further, the addition of SCDOT has been mooted by SCDOT's voluntary appearance and answer.

III. Plaintiff's proposed Amendment does not prejudice the City.

Rule 15(a), SCRCP, directs that "leave [to amend] shall be freely given when justice so requires and does not prejudice any other party." South Carolina courts have consistently construed Rule 15, SCRCP, to require pretrial amendments to pleadings "to be freely granted unless a

circumstance exists to justify refusal.” *Forrester v. Smith & Steele Builders. Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988) *citing Smith v. Traxler*, 224 S.C. 290, 78 S.E.2d 630 (1953).

Considering the liberal amended pleading standards, in addition to the fact that the SCDOT’s inclusion does not change the claims against, or defenses mounted by the City, Plaintiff’s Amendment did not prejudice the City.

IV. Plaintiff has complied with service of process under SCRCP Rule 4(d)(5).

Although Plaintiff may have initially failed to comply with Rule 4(d)(5), the City was aware of the lawsuit and had actual notice of it when Plaintiff served it initially by certified mail on April 20, 2020, and the City voluntarily appeared and answered May 15, 2020. Plaintiff thereafter re-served Defendants City and County personally on January 19, 2022, and SCDOT on January 20, 2022, curing any prior deficiency. Therefore, since the City received notice and was aware of this suit, voluntarily appeared and answered, and has been properly served, the City is not prejudiced by Plaintiff’s initial failure to serve them by personal service.

V. Striking the Plaintiff’s Sixth Cause of Action is not proper, and further, it’s not evident that the Stormwater statute is not impliedly repealed.

When a court rules on a SCRCP Rule 12(f) motion to strike, the court determines "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 95, 390 S.E.2d 370, 372 (Ct. App. 1990). A motion to strike under Rule 12(f), which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6). In reviewing a ruling on a motion to dismiss a claim, the court must base its decision solely on the allegations set forth on the face of the complaint. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010). Leave to amend may be denied in rare instances where the proposed amendment would be

futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697, S.E.2d 671, 681 (Ct. App. 2010) *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

Striking Plaintiff's Sixth Cause of Action under the stormwater statute is not proper because it would require looking outside the four corners of the Complaint, which is inappropriate when considering a Rule 12(f) motion.

Furthermore, there does not appear to be any legal precedent supporting the City's position that the legislature intended to repeal the stormwater statute. Repeal by implication is disfavored and is found only when two statutes are incapable of any reasonable reconciliation. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). A later statute on a given subject, not repealing an earlier one in terms, is *not* to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. *State v. Hood*, 181 S.C. 488, 188 S.E. 134, 136 (1936) (emphasis added). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. *City of Rock Hill v. South Carolina DHEC*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990).

The South Carolina Tort Claims ACT ("SCTCA" or the "Act") is not repugnant to the stormwater statute and does not fully embrace the whole subject matter. Therefore, this Court refuses to find that the stormwater statute is impliedly repealed.

VI. The City has a duty to provide sufficient drainage.

The stormwater statute directs that the city must manage the stormwater to stay off private lands. *See* S.C. Code Ann § 5-31-450. South Carolina courts have held that liability may be found under this section when there is some affirmative act by the municipality which alters the course or increases the amount of stormwater runoff onto private property. *See Brown v. Sch. Dist. Of*

Greenville County, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968). The statute contemplates positive action by a municipality to render it liable for damages. *Id.*

Plaintiff has adequately pled facts supporting his allegations that the City is responsible for the drainage and that the City has failed to provide sufficient drainage and engaged in affirmative acts, which altered the course and/or increased the amount of stormwater runoff onto Plaintiff's private property resulting in a duty by the City to provide sufficient drainage.

For the reasons stated above, the City's Motion is **DENIED**.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.

_____, 2022
Georgetown, South Carolina



Georgetown Common Pleas

Case Caption: Ron Christmas VS Georgetown County Of , defendant, et al

Case Number: 2020CP2200356

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2022-03-22 10:59:34 page 7 of 7

R-0007

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
)
Ron Christmas,)
)
Plaintiff,)
)
vs.)
)
County of Georgetown; City of Georgetown;)
Green Wave Contracting, Inc.; South)
Carolina Department of Transportation; and)
John Doe 1-10)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2020-CP-22-00356

**ORDER SUPERSEDING
THE PREVIOUS ORDER OF
THIS COURT ENTERED
MARCH 22, 2022**

This Court, having previously heard arguments on Defendant City of Georgetown's Motion to Dismiss on January 27, 2022, having entered an Order Denying the same on March 22, 2022, and having reviewed Defendant City of Georgetown's Motion to Alter or Amend Order and/or Motion to Reconsider, now hereby submits this Order, which supersedes the March 22 Order. After careful review and reconsideration of the record, arguments, and previous Order, the Court finds the following:

1. Plaintiff has adequately pled facts supporting his allegations that the City is responsible for the drainage and that the City has failed to provide sufficient drainage and engaged in affirmative acts, which altered the course and/or increased the amount of stormwater runoff onto Plaintiff's private property resulting in a duty by the City to provide sufficient drainage.
2. Plaintiff's admission that the inclusion of Paragraph 29(f) in the Amended Complaint was in error and stipulation of the striking of Paragraph 29(f) should be given full effect. The Court hereby strikes Paragraph 29(f) of the Amended Complaint.

3. The Court finds that the City's Motion to Dismiss the Second Amended Complaint should be denied.
4. To the extent the parties still believe a hearing is needed regarding Plaintiff's Second Amended Motion for Leave to Amend the Complaint, the parties may request one and be heard at the appropriate time before any presiding judge.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.

_____, 2022
Anderson, South Carolina



Georgetown Common Pleas

Case Caption: Ron Christmas VS Georgetown County Of , defendant, et al

Case Number: 2020CP2200356

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2022-06-07 12:47:22 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2200356

Ron Christmas
PLAINTIFF(S)

Georgetown County Of et al
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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ 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:

Court Grants Defendant City's Motion for Directed Verdict As to Plaintiff's Causes of Action 1-4.
Court Grants Defendant County's Motion for Directed Verdict As to Plaintiff's Causes of Action 1-4.
Court Grants Defendant SCDOT's Motion for Directed Verdict As to Plaintiff's Causes of Action 1-3.

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 08/17/2023 .

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.



Georgetown Common Pleas

Case Caption: Ron Christmas VS Georgetown County Of , defendant, et al

Case Number: 2020CP2200356

Type: Order/Electronic Form 4

15th Circuit Resident Judge

s/ B. Alex Hyman

Electronically signed on 2023-08-17 14:01:50 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Ron Christmas,

Plaintiff,

V.

County of Georgetown; City of Georgetown;
Green Wave Contracting, Inc.; and John Doe 1-
10,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-22-_____

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your answer to said Complaint upon the subscriber at his office at 415 Mill Street, Post Office Box 806, Mount Pleasant, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the remedy requested in the attached Complaint plus interest and costs.

JUSTIN O'TOOLE LUCEY, P.A.

s/Justin O. Lucey

Justin O. Lucey, Esq.

Joshua F. Evans, Esq.

P.O. Box 806

Mt. Pleasant, SC 29465

(843) 849-8400

(843) 849-8406 (fax)

jlucey@lucy-law.com

jevans@lucey-law.com

Attorneys for Plaintiff

April 3, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO.: 2020-CP-22-_____
	)	
Ron Christmas,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	(Jury Trial Demanded)
County of Georgetown; City of Georgetown;	)	
Green Wave Contracting, Inc.; and John Doe 1-	)	
10,	)	
	)	
Defendants.	)	

Plaintiff, Ron Christmas, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Ron Christmas is a citizen of Georgetown County, South Carolina, and is the owner of property and a home located at 101 Greenwich Drive, Georgetown, South Carolina 29440.

2. Plaintiff purchased the above-described real property in or around 1979.

3. This case concerns a series of improvements made in recent years to East Bay Park and adjacent areas, including the adjacent perimeter land areas, Morgan Park, and the boat landing and parking (hereinafter, collectively, the "Project").

4. Defendant County of Georgetown ("the County") is a governmental entity. Upon information and belief, at all times relevant to this action, the County planned, approved, implemented, executed, and controlled the Project, with the cooperation of the City of Georgetown.

5. Defendant City of Georgetown (“the City”) is a governmental entity. Upon information and belief, at all times relevant to this action, the City was, and is, responsible for the maintenance and repair of the drainage pipes along Greenwich Drive, and is the owner of the Project.

6. Defendant Green Wave Contracting, Inc. (“Green Wave”) is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Green Wave was engaged in the business of general contracting/construction in Georgetown County, South Carolina.

7. Upon information and belief, Green Wave served as the general contractor for part of the Project.

8. Upon information and belief, John Doe Defendants 1-10 are other who were involved in the planning, approval, implementation, execution, and maintenance of the Project, though the addresses and identities of these John Doe Defendants 1-10 are unknown at this time.

9. This Honorable Court has jurisdiction over all subject matter alleged herein, over all parties hereto, and venue is proper in this forum.

FACTUAL ALLEGATIONS

10. On or around July 11, 2006, the County leased the East Bay Park property from the City for a term of twenty (20) years and subject to renewal on an annual basis.

11. The lease agreement included “land, facilities, recreational equipment, and *improvements* located within the confines of East Bay Park and circled by Greenwich Drive, Front Street, and East Bay Street in the City of Georgetown” (emphasis added).

12. In recent years, the County sought to improve the Project, including filling, raising, improving, and reconstructing the Project. The project appears to have concluded recently with

the removal of the existing three (3) tennis courts, and the raising and construction of six (6) new tennis courts surrounded by a raised, paved walking path.

13. One or more of the Defendants participated in the Project as aforementioned.

14. Defendants raised the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff's property.

15. The Project has altered the course of, and increased the amount of, surface water flooding onto Plaintiff's property.

16. The Project has altered the natural flow of waters, causing increased flooding onto Plaintiff's property.

17. The project execution and flooding have damaged and lowered Greenwich Drive, causing additional flooding.

18. The storm water drainage system(s) along Greenwich Drive have not been maintained by the City. As a result, the drainage pipes back-up, back fill, and fail to manage the waters that are damaging Greenwich Drive and Plaintiff's property. As of recently, the storm water drainage system facilitates the intrusion of river waters more often than it facilitates the discharge of storm waters.

19. The cumulative and combined effect of the foregoing is an ever worsening flooding condition at and near the intersection of Greenwich Drive and Center Street, and further deterioration, including subsidence caused by wet dry cycles, to nearby properties.

20. The excessive flooding onto Plaintiff's property has severely damaged Plaintiff's property and has adversely affect the property value.

21. As a direct and proximate result of Defendants' acts and omissions, Plaintiff is being harmed by the excessive flooding onto and into his property.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence/Gross Negligence)

22. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

23. It was reasonably foreseeable to Defendants that its aforementioned positive, overt and aggressive actions, omissions, and misconduct would result in damages to the Plaintiff. The Defendants owed a duty to Plaintiff to conduct themselves in a manner that would not cause injury to Plaintiff. The Defendants had actual or constructive notice of the damaging nature and/or defectiveness of their actions, inactions, and conduct.

24. The injuries and damages incurred by Plaintiff were proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless, consciously indifferent, and unlawful acts of the Defendants in the following particulars:

- a) raising the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff's property;
- b) altering the course of, and increasing the amount of, surface water flooding onto Plaintiff's property;
- c) altering the natural flow of waters, causing increased flooding onto Plaintiff's property;
- d) in failing to take such action as a reasonable and prudent person would do to prevent excessive flooding;
- e) in failing to properly operate and maintain the storm water drainage systems; and
- f) in all other particulars revealed during the discovery process or resulting trial.

25. One or more of the above actions were in violation of industry standards, the rules of regulatory agencies, and the laws and common law of the State of South Carolina.

26. As a direct and proximate result of Defendants' negligence as described above, Plaintiff has suffered and continues to suffer damages to be determined by a jury.

FOR A SECOND CAUSE OF ACTION AGAINST GREEN WAVE AND JOHN DOE 1-10
(Nuisance)

27. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

28. By the aforementioned actions, the Defendants created conditions that caused and are causing damage to the Plaintiff's property on a continuing and reoccurring basis.

29. Defendants created a condition tending to both cause damage to Plaintiff's property and create a danger of future damage.

30. In light of the conditions thereby created, Defendants' use of the property cannot be considered lawful or reasonable, but rather constitute a nuisance. The Defendants' conduct has hurt, inconvenienced, damaged, or otherwise essentially interfered and interferes with the land of the Plaintiff, and the Defendants' conduct has substantially interfered with the Plaintiff's use and enjoyment of property.

31. The Defendants' conduct in continuing to allow the conditions or nuisance to continue with full knowledge that it would severely damage the Plaintiff is outrageous and reckless.

32. This nuisance will continue until the Defendants are compelled to abate the nuisance by performing sufficient remedial corrective and clean-up activities to restore the Plaintiff's property and the surrounding area to their natural state and perform ongoing maintenance of the system in the future.

33. This nuisance has resulted in the deterioration and devaluation of the Plaintiff's property.

34. That as a direct and proximate result of the Defendants' nuisance, Plaintiff has suffered and continue to suffer actual damages, and should be compensated in an amount and manner to be determined at trial.

FOR A THIRD CAUSE OF ACTION AGAINST GREEN WAVE AND JOHN DOE 1-10
(Trespass)

35. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

36. The Defendants foregoing activities have forced water onto Plaintiff's land, which is a trespass to his property.

37. Defendants intended, knew, or had substantial reason to know that their aforesaid actions would cause excessive water to physically intrude upon Plaintiff's property in a manner in which it did not naturally do.

38. That the aforesaid actions of the Defendants amounted to a deliberate physical invasion, interference with, intermeddling of, injury to, and a taking of Plaintiff's property and property rights for a substantial period of time tantamount to a continuous taking or damaging of Plaintiff's property.

39. The unwarranted entries complained of in this lawsuit resulting from the Defendants' actions or omissions were not sanctioned or permitted by Plaintiff at any time.

40. These invasions of the Plaintiff's property have resulted in the deterioration and devaluation of the Plaintiff's property. Further, the invasions have interfered with the Plaintiff's right to exclusive, peaceful possession of his property.

41. That as a direct and proximate result of Defendants' negligence, nuisance, and trespass, the Plaintiff has suffered both actual and punitive damages in an amount to be determined

by the Triers of Fact, together with the costs and interest, and the attorney fees incurred in this action.

FOR A FIFTH CAUSE OF ACTION AGAINST THE COUNTY AND THE CITY
(Inverse Condemnation)

42. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

43. The South Carolina Constitution and state law prohibit Defendants from taking Plaintiff's private property for a public use without payment of just compensation.

44. Upon information and belief, Defendants' actions above described constitute the taking of Plaintiff's private property for a public use without just compensation.

45. The result of the foregoing affirmative acts was a taking of Plaintiff's property for public use.

46. As a result of Defendants' inverse condemnation, Plaintiff has suffered an ascertainable damage to his property and have incurred legal costs, attorneys' fees, and other expenses and damages.

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Injunction)

47. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

48. The influx of flooding caused by the Defendants' acts and omissions has caused and will continue to cause Plaintiff irreparable harm in the form of ongoing and continued flooding of his property.

49. Based on the foregoing allegations, Plaintiff has demonstrated that he is likely to succeed in his claims.

50. Plaintiff does not have an adequate remedy at law for the foregoing misfeasance, malfeasance, and non-feasance by Defendants.

51. Plaintiff is entitled to mandatory temporary and permanent injunctive relief, ordering Defendants to remove all fill and raised areas from the Project, and to repair Greenwich Drive and adjacent storm water drainage systems.

WHEREFORE, Plaintiff demands a trial by jury and prays for actual and punitive damages for Defendants' unlawful trespass, nuisance, negligent acts or omissions; reasonable attorneys' fees; costs of suit; prejudgment interest; temporary and permanent injunction; and granting such further relief as the Court deems just and proper.

JUSTIN O'TOOLE LUCEY, P.A.

s/Justin O. Lucey
Justin O. Lucey, Esq.
Joshua F. Evans, Esq.
P.O. Box 806
Mt. Pleasant, SC 29465
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com

Attorneys for Plaintiff

April 3, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-22-00356

Ron Christmas,

Plaintiff,

v.

County of Georgetown; City of Georgetown;
 Green Wave Contracting, Inc.; **South Carolina**
Department of Transportation; and John Doe
 2-10,

Defendants.

AMENDED SUMMONS

(Jury Trial Demanded)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 415 Mill Street, Mt. Pleasant, South Carolina 29464, within fifteen (15) days after the date of such service, exclusive of the day of service. If you fail to answer the Amended Complaint within the above-described time, judgment by default will be rendered against you for the relief demanded in the Complaint.

JUSTIN O'TOOLE LUCEY, P.A.

s/Justin O. Lucey

Justin O. Lucey, Esq.
 Joshua F. Evans, Esq.
 P.O. Box 806
 Mt. Pleasant, SC 29465
 (843) 849-8400
 (843) 849-8406 (fax)
 jlucey@lucey-law.com
 jevans@lucey-law.com
Attorneys for Plaintiff

_____, 2021
 Charleston, South Carolina

**PLAINTIFF'S
 EXHIBIT**

A

exhibitsicker.com

R-0023

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-22-00356

Ron Christmas,

Plaintiff,

v.

County of Georgetown; City of Georgetown;
 Green Wave Contracting, Inc.; **South Carolina**
Department of Transportation; and John Doe
 2-10,

Defendants.

AMENDED COMPLAINT

(Jury Trial Demanded)

Plaintiff, Ron Christmas, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Ron Christmas is a citizen of Georgetown County, South Carolina, and is the owner of property and a home located at 101 Greenwich Drive, Georgetown, South Carolina 29440.

2. Plaintiff purchased the above-described real property in or around **2002**.

3. This case concerns a series of improvements made in recent years to East Bay Park and adjacent areas, including the adjacent perimeter land areas, Morgan Park, and the boat landing and parking, **and the unintended results of the improvements and fill** (hereinafter, collectively, the "Project").

4. Defendant County of Georgetown ("the County") is a governmental entity. Upon information and belief, at all times relevant to this action, the County planned, approved, implemented, executed, and controlled the Project.

5. Defendant City of Georgetown (“the City”) is a governmental entity. Upon information and belief, at all times relevant to this action, the City was, and is, responsible for the maintenance and repair of the drainage pipes along Greenwich Drive and is the owner of the Project.

6. **Defendant South Carolina Department of Transportation (“DOT”), previously identified as John Doe No. 1, is a governmental entity or a division of a governmental entity. Upon information and belief, at all times relevant to this action, DOT owns the roads at and adjacent to the intersection of Front Street and Greenwich Drive.**

7. **Defendants County and City have taken the position that the matters complained of herein cannot be properly addressed without the involvement and cooperation of DOT.**

8. **Defendants County and City have taken the position that the road defects complained of herein are the responsibility of DOT.**

9. **Defendants County and City have taken the position that the road defects complained of herein cannot be fixed without the cooperation and involvement of DOT.**

10. Defendant Green Wave Contracting, Inc. (“Green Wave”) is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Green Wave was engaged in the business of general contracting/construction in Georgetown County, South Carolina.

11. Upon information and belief, Green Wave served as the general contractor for part of the Project.

12. Upon information and belief, John Doe Defendants 2-10 are other who were involved in the planning, approval, implementation, execution, and maintenance of the Project, though the addresses and identities of these John Doe Defendants 2-10 are unknown at this time.

13. This Honorable Court has jurisdiction over all subject matter alleged herein, over all parties hereto, and venue is proper in this forum.

FACTUAL ALLEGATIONS

14. On or around July 11, 2006, the County leased the East Bay Park property from the City of Georgetown for a term of twenty (20) years and subject to renewal on an annual basis.

15. The lease agreement included “land, facilities, recreational equipment, and *improvements* located within the confines of East Bay Park and circled by Greenwich Drive, Front Street, and East Bay Street in the City of Georgetown” (emphasis added).

16. **In approximately 2016, the City and County planned improvements (“the Project”), including filling, raising, improving, and reconstructing the Project.**

17. **Construction of the known improvements began in 2017; the County constructed six (6) new tennis courts and accessories; and the City constructed the new raised, paved walking path, ball fields, boat ramp parking, and accessories.**

18. Defendants raised the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff’s property.

19. The Project has altered the course of, and increased the amount of, surface water flooding onto Plaintiff’s property.

20. The Project has altered the natural flow of waters, causing increased flooding onto Plaintiff’s property.

21. The Project execution and flooding have damaged and lowered Greenwich Drive, causing additional flooding.

22. The storm water drainage system(s) along Greenwich Drive have not been maintained by the City. As a result, the drainage pipes back-up, back fill, and fail to manage the waters that are damaging Greenwich Drive and Plaintiff's property. As of recently, the storm water drainage system facilitates the intrusion of river waters more often than it facilitates the discharge of storm waters.

23. **DOT has failed to maintain the roads at and adjacent to the intersection of Front Street and Greenwich Drive, which have subsided and are permitting increased tidal flooding.**

24. The cumulative and combined effect of the foregoing is an ever, worsening flooding condition at and near the intersection of Greenwich Drive **and Front Street**, and further deterioration, including subsidence caused by wet dry cycles, to nearby properties.

25. The excessive flooding onto Plaintiff's property has severely damaged Plaintiff's property and has adversely affected the property value.

26. As a direct and proximate result of Defendants' acts and omissions, Plaintiff is being harmed by the excessive flooding onto his property.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence/Gross Negligence as to all Defendants)

27. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

28. It was reasonably foreseeable to Defendants that its aforementioned positive, overt, and aggressive actions, omissions, and misconduct would result in damages to the Plaintiff. The Defendants owed a duty to Plaintiff to conduct themselves in a manner that would not cause injury

to Plaintiff. The Defendants had actual or constructive notice of the damaging nature and/or defectiveness of their actions, inactions, and conduct.

29. The injuries and damages incurred by Plaintiff were proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless, consciously indifferent, and unlawful acts of the Defendants in the following particulars:

- a) raising the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff's property;
- b) altering the course of, and increasing the amount of, surface water flooding onto Plaintiff's property;
- c) altering the natural flow of waters, causing increased flooding onto Plaintiff's property;
- d) in failing to take such action as a reasonable and prudent person would do to prevent excessive flooding;
- e) in failing to properly operate and maintain the storm water drainage systems; and
- f) in all other particulars revealed during the discovery process or resulting trial.

30. One or more of the above actions were in violation of industry standards, the rules of regulatory agencies, and the laws and common law of the State of South Carolina.

31. As a direct and proximate result of Defendants' negligence as described above, Plaintiff has suffered and continues to suffer damages to be determined by a jury.

FOR A SECOND CAUSE OF ACTION AGAINST GREEN WAVE AND JOHN DOE 2-10
(Nuisance as to Green Wave Contracting)

32. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

33. By the aforementioned actions the Defendants created conditions that caused and are causing damage to the Plaintiff's property on a continuing and reoccurring basis.

34. Defendants created a condition tending to both cause damage to Plaintiff's property and create a danger of future damage.

35. In light of the conditions thereby created, Defendants' use of the property cannot be considered lawful or reasonable, but rather constitute a nuisance. The Defendants' conduct has hurt, inconvenienced, damaged, or otherwise essentially interfered and interferes with the land of the Plaintiff, and the Defendants' conduct has substantially interfered with the Plaintiff's use and enjoyment of property.

36. The Defendants' conduct in continuing to allow the conditions or nuisance to continue with full knowledge that it would severely damage the Plaintiff is outrageous and reckless.

37. This nuisance will continue until the Defendants are compelled to abate the nuisance by performing sufficient remedial corrective and clean-up activities to restore the Plaintiff's property and the surrounding area to their natural state and perform ongoing maintenance of the system in the future.

38. This nuisance has resulted in the deterioration and devaluation of the Plaintiff's property.

39. That as a direct and proximate result of the Defendants' nuisance, Plaintiff has suffered and continue to suffer actual damages, and should be compensated in an amount and manner to be determined at trial.

FOR A THIRD CAUSE OF ACTION AGAINST GREEN WAVE AND JOHN DOE 2-10
(Trespass as to Green Wave Contracting)

40. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

41. The Defendants foregoing activities have forced water onto Plaintiff's land, which is a trespass to his property.

42. Defendants intended, knew, or had substantial reason to know that their aforesaid actions would cause excessive water to physically intrude upon Plaintiff's property in a manner in which it did not naturally do.

43. That the aforesaid actions of the Defendants amounted to a deliberate physical invasion, interference with, intermeddling of, injury to, and a taking of Plaintiff's property and property rights for a substantial period of time tantamount to a continuous taking or damaging of Plaintiff's property.

44. The unwarranted entries complained of in this lawsuit resulting from the Defendants' actions or omissions were not sanctioned or permitted by Plaintiff at any time.

45. These invasions of the Plaintiff's property have resulted in the deterioration and devaluation of the Plaintiff's property. Further, the invasions have interfered with the Plaintiff's right to exclusive, peaceful possession of his property.

46. That as a direct and proximate result of Defendants' negligence, nuisance, and trespass, the Plaintiff has suffered both actual and punitive damages in an amount to be determined by the Triers of Fact, together with the costs and interest, and the attorney fees incurred in this action.

FOR A FOURTH CAUSE OF ACTION AGAINST THE COUNTY AND THE CITY
(Inverse Condemnation as to City, County, and DOT)

47. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

48. The South Carolina Constitution and state law prohibit Defendants from taking Plaintiff's private property for a public use without payment of just compensation.

49. Upon information and belief, Defendants' actions above described constitute the taking of Plaintiff's private property for a public use without just compensation.

50. The result of the foregoing affirmative acts was a taking of Plaintiff's property for public use.

51. As a result of Defendants' inverse condemnation, Plaintiff has suffered an ascertainable damage to his property and have incurred legal costs and other expenses and damages.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Injunction as to all Defendants)

52. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

53. The influx of flooding caused by the Defendants' acts and omissions has caused and will continue to cause Plaintiff irreparable harm in the form of ongoing and continued flooding of his property.

54. Based on the foregoing allegations, Plaintiff has demonstrated that he is likely to succeed in his claims.

55. Plaintiff does not have an adequate remedy at law for the foregoing misfeasance, malfeasance, and non-feasance by Defendants.

56. Plaintiff is entitled to mandatory temporary and permanent injunctive relief, ordering Defendants to remove all fill and raised areas from the Project, and to repair Greenwich Drive and adjacent storm water drainage systems.

FOR A SIXTH CAUSE OF ACTION
(Violation of South Carolina Code § 5-31-450 against City and County)

57. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

58. Defendants failed or refused to carry out the provisions of Section 5-31-450 of the South Carolina Code by failing to provide sufficient drainage for surface water, thus failing to prevent the passage of such water onto Plaintiff's property. As a direct result of Defendants' violation of Section 5-31-450 of the South Carolina Code, Plaintiff has suffered actual damages.

WHEREFORE, Plaintiff demands a trial by jury and prays judgment against all Defendants for actual damages; diminution of value; costs of suit; temporary and permanent injunction; and granting such further relief as the Court deems just and proper. Plaintiff additionally seeks an award of punitive damages against Green Wave and prejudgment interest.

_____, 2021
 Charleston, South Carolina

JUSTIN O'TOOLE LUCEY, P.A.
/s/Justin O. Lucey
 Justin O. Lucey, Esq.
 Joshua F. Evans, Esq.
 P.O. Box 806
 Mt. Pleasant, SC 29465
 (843) 849-8400
 (843) 849-8406 (fax)
 jlucey@lucey-law.com
 jevans@lucey-law.com
Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Ron Christmas,)
Plaintiff,)

Civil Action No. 2020-CP-22-0356

v.)

**ANSWER TO AMENDED COMPLAINT
OF DEFENDANT CITY OF GEORGETOWN**

County of Georgetown, City of)
Georgetown, Green Wave Contracting, Inc.,)
South Carolina Department of)
Transportation; and John Doe 2-10,)
Defendants.)

The Defendant City of Georgetown, reserving all rights under its Motion to Dismiss, Motion to Strike Amended Complaint, and Motion to Strike filed contemporaneously herewith, answers the Plaintiff's Amended Complaint (filed December 7, 2021) herein as follows:

FOR A FIRST DEFENSE

1. The Defendant City denies each and every allegation of the Plaintiff's Amended Complaint not hereinafter specifically admitted, qualified, or explained.

2. As to the allegations set forth in Paragraph 1 of the Plaintiff's Amended Complaint, the Defendant City admits only that the Plaintiff is one of the titled owners of the property located at 101 Greenwich Street, Georgetown, South Carolina.

3. The allegations set forth in Paragraph 2 of the Plaintiff's Amended Complaint are denied.

4. The allegations set forth in Paragraph 3 of the Plaintiff's Amended Complaint are merely a characterization or description of the lawsuit. To the extent a response is required, the Defendant City denies any assertions of liability as stated or suggested in Paragraph 3.

5. As to the allegations set forth in Paragraph 4 of the Plaintiff's Amended Complaint, the Defendant City admits that the Defendant Georgetown County is a governmental entity and that the Defendant County has leased the property known as East Bay Park from the Defendant City. The remaining allegations set forth in Paragraph 4 are denied as stated.

6. As to the allegations set forth in Paragraph 5 of the Plaintiff's Amended Complaint, the Defendant City admits that the City of Georgetown is a governmental entity and is the owner of property known as East Bay Park. The remaining allegations set forth in Paragraph 5 are denied.

7. As to the allegations set forth in the first sentence of Paragraph 6 of the Plaintiff's Amended Complaint, the Defendant City admits that the Defendant South Carolina Department of Transportation, which was not properly joined to this action, is a state agency of the State of South Carolina. As to the allegations set forth in the second sentence of Paragraph 6, the Defendant City admits that the Front Street and Greenwich Drive at and near the intersection of the two streets are owned by the Defendant South Carolina Department of Transportation. Further answering, the Defendant City denies that Defendant South Carolina Department of Transportation was previously identified in the original Complaint as John Doe No. 1.

8. The allegations set forth in Paragraph 7 of the Plaintiff's Amended Complaint are denied as stated.

9. The allegations set forth in Paragraphs 8 and 9 of the Plaintiff's Amended Complaint are denied. Further answering, the Defendant City denies the existence of any road defects as claimed.

10. As to the allegations set forth in Paragraphs 10 and 11 of the Plaintiff's Amended Complaint, the Defendant City lacks sufficient information to admit or deny those allegations.

11. As to the allegations set forth in Paragraph 12 of the Plaintiff's Amended Complaint, the Defendant City lacks sufficient information to admit or deny those allegations.

12. The allegations set forth in Paragraph 13 of the Plaintiff's Amended Complaint are jurisdictional in nature, to which no response is required.

13. The allegations set forth in Paragraph 14 of the Plaintiff's Amended Complaint are admitted. Further answering, the Defendant City craves reference to the Lease Agreement for the specific terms and provisions of that lease of the East Bay Park property.

14. As to the allegations set forth in Paragraph 15 of the Plaintiff's Amended Complaint, the Defendant City craves reference to the Lease Agreement for the specific terms and provisions of that lease of the East Bay Park property.

15. As to the allegations set forth in Paragraphs 16 and 17 of the Plaintiff's Amended Complaint, the Defendant City admits that improvements have been made to the East Bay Park property in 2015 and 2016, including the replacement of the existing tennis courts which was undertaken by the Defendant County and improvements to other portions of East Bay Park for which the City craves reference to the plans and specifications for the work.

16. The allegations set forth in Paragraphs 18, 19, 20, 21, 22, 23, 24, 25, and 26 of the Plaintiff's Amended Complaint are denied.

17. As to the allegations set forth in Paragraph 27 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein.

18. The allegations set forth in Paragraph 28 of the Plaintiff's Amended Complaint are denied.

19. The allegations set forth in Paragraph 29 of the Plaintiff's Amended Complaint, including all subparts, are denied. Further answering, the Plaintiff has improperly re-pled what was formerly Paragraph 24(f) in the original Complaint as Paragraph 29(f) in the Amended Complaint in violation of the law of the case as established by the Consent Order Granting Motion to Strike filed August 19, 2020 and issued by Circuit Court Judge Benjamin Culbertson.

20. The allegations set forth in Paragraphs 30 and 31 of the Plaintiff's Amended Complaint are denied.

21. As to the allegations set forth in Paragraph 32 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

22. The allegations set forth in Paragraphs 33, 34, 35, 36, 37, 38, and 39 of the Plaintiff's Amended Complaint are not directed against the Defendant City, and therefore, do not require a response. However, to the extent these allegations attempt to establish liability or wrongdoing on the part of the Defendant City, those allegations are denied.

23. As to the allegations set forth in Paragraph 40 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

24. The allegations set forth in Paragraphs 41, 42, 43, 44, 45, and 46 of the Plaintiff's Amended Complaint are not directed against the Defendant City, and therefore, do not require a response. However, to the extent these allegations attempt to establish liability or wrongdoing on the part of the Defendant City, those allegations are denied.

25. As to the allegations set forth in Paragraph 47 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

26. The allegations set forth in Paragraph 48 of the Plaintiff's Amended Complaint state a legal conclusion to which no response is required. Further answering, the Defendant City denies any taking of the Plaintiff's property for a public use.

27. The allegations set forth in Paragraphs 49, 50, and 51 of the Plaintiff's Amended Complaint are denied.

28. As to the allegations set forth in Paragraph 52 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

29. The allegations set forth in Paragraphs 53, 54, 55, and 56 of the Plaintiff's Amended Complaint are denied.

30. As to the allegations set forth in Paragraph 57 of the Plaintiff's Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

31. The allegations set forth in Paragraph 58 of the Plaintiff's Amended Complaint are denied. Further answering, S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act and is also in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution

32. The allegations and relief sought in the Prayer for Relief are denied.

FOR A SECOND DEFENSE

33. The Plaintiff's Amended Complaint, in whole or in part, fails to state a cause of action upon which relief may be granted. The Defendant City reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCP, and/or Rule 12(c), SCRCP.

FOR A THIRD DEFENSE

34. The Plaintiff's claims are, in whole or in part, barred based upon operation of the common enemy rule.

FOR A FOURTH DEFENSE

35. The Plaintiff's claims are, in whole or in part, barred based upon the defense of laches.

FOR A FIFTH DEFENSE

36. The Plaintiff's claims are, in whole or in part, barred by the applicable statute of limitations and statute for repose.

FOR A SIXTH DEFENSE

37. The Plaintiff's claims are, in whole or in part, barred based upon the defense of Act of God.

FOR A SEVENTH DEFENSE

38. The Plaintiff's claims are barred by the defense of comparative negligence, including the Plaintiff's assumption of the risk and the Plaintiff's failure to exercise reasonable care for his own property. In the alternative, the Plaintiff's recovery should be reduced by the Plaintiff's proportion of fault.

FOR AN EIGHTH DEFENSE

39. The Defendant City asserts the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act, including but not limited to the definition of "loss" as set forth in S.C. Code Ann. § 15-78-30(f), the damages caps set forth in S.C. Code Ann. § 15-78-120 and the bar on the recovery of pre-judgment interest, punitive damages and attorney's fees.

FOR A NINTH DEFENSE

40. The Defendant City is absolutely immune from suit pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, specifically the immunities set forth in S.C. Code Ann. § 15-78-60(1), (2), (4), (5), (7), (8), (9), (13), (16), and (20).

FOR A TENTH DEFENSE

41. The Defendant City asserts the defense of sovereign immunity as to all claims for money damages.

FOR AN ELEVENTH DEFENSE

42. The Defendant City is entitled to absolute immunity under *Long v. Seabrook* and its progeny.

FOR A TWELFTH DEFENSE

43. The Defendant City is immune from suit pursuant to the Stormwater Management and Sediment Reduction Act. In particular, S.C. Code Ann. § 48-14-160(1) provides in pertinent 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 THIRTEENTH DEFENSE

44. The Plaintiff has failed to mitigate his damages, thereby barring his recovery in whole or in part.

FOR A FOURTEENTH DEFENSE

45. The Defendant City alleges that any damages alleged to have been caused by any tortfeasors, which are specifically denied, must be apportioned between the Defendant City and all other tortfeasors, pursuant to S.C. Code Ann. § 15-78-100(c).

FOR A FIFTEENTH DEFENSE

46. The Defendant City is absolutely immune from the Plaintiff's tort claims pursuant to S.C. Code Ann. §§ 15-78-40 and/or 15-78-50(b) of the South Carolina Tort Claims Act.

FOR A SIXTEENTH DEFENSE

47. The Plaintiff's claims are barred by the public duty rule.

FOR A SEVENTEENTH DEFENSE

48. The Plaintiff's claims are, in whole or in part, barred based upon the defense of ripeness and the Plaintiff's failure to exhaust available administrative remedies.

FOR AN EIGHTEENTH DEFENSE

49. The Plaintiff has failed to join indispensable party under Rule 19, specifically the Plaintiff's spouse, Deborah S. Christmas, who has an ownership interest in the 101 Greenwich Street property. The Defendant City reserves its right to file a motion pursuant to Rule 12(b)(7), SCRCP.

FOR A NINETEENTH DEFENSE

50. Service of process upon the Defendant City was insufficient and not in compliance with the strict requirements of Rule 4(d)(5), SCRCP, which does not permit service by certified mail

on a governmental entity. The Defendant City reserves its right to move to dismiss pursuant to Rule 12(b)(2) and 12(b)(5), SCRCP.

FOR A TWENTIETH DEFENSE

51. To the extent deemed an avoidance, the Defendant City pleads that S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act.

FOR A TWENTY-FIRST DEFENSE

52. The Plaintiff's Sixth Cause of Action for a violation of S.C. Code Ann. § 5-31-450 and that statute, on its face and as applied, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution.

FOR A TWENTY-SECOND DEFENSE

53. The Defendant City objects to the filing of this Amended Complaint which was filed and served without obtaining compliance with the requirements of Rule 15(a) prior to the filing, specifically either (1) that leave of court was obtained or (2) that the Plaintiff obtained written consent of all adverse parties prior to filing. For this reason, the Amended Complaint should be stricken and deemed null and void. The Defendant City reserves its right to file a motion pursuant to Rule 12(b)(4), SCRCP.

FOR A TWENTY-THIRD DEFENSE

54. The Defendant City reserves its right to oppose the Plaintiff's request for a trial by jury.

WHEREFORE, the Defendant City of Georgetown prays that the Plaintiff's Amended Complaint be stricken or otherwise dismissed with prejudice; for the denial of all monetary and injunctive relief as sought by the Plaintiff; for a ruling that S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act; for a ruling that S.C.

Code Ann. § 5-31-450, on its face and as applied, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution; for the costs of this action; and for such other and further relief as the Court deems just and proper.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

December 22, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) **IN THE COURT OF COMMON PLEAS**

Ron Christmas,)
Plaintiff,) Civil Action No. 2020-CP-22-0356

v.)

County of Georgetown, City of) **NOTICE OF MOTION AND**
Georgetown, Green Wave Contracting, Inc.,) **MOTION TO DISMISS, MOTION TO**
South Carolina Department of) **TO STRIKE AMENDED COMPLAINT,**
Transportation; and John Doe 1-20,) **AND MOTION TO STRIKE OF**
Defendants.) **DEFENDANT CITY OF GEORGETOWN**

TO: JUSTIN O. LUCEY AND JOSHUA F. EVANS, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for the Defendant City of Georgetown ("City") will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Georgetown County Judicial Center, Georgetown, South Carolina, at such time and place as may be set by the Court, for an Order:

- (1) Striking or otherwise dismissing the Plaintiff's Amended Complaint filed December 7, 2021, pursuant to Rule 12(b)(1), Rule 12(b)(4), Rule 12(f), and Rule 21, SCRCP;
- (2) Dismissing the Plaintiff's Amended Complaint, pursuant to Rule 12(b)(2) and Rule 12(b)(5), SCRCP;
- (3) Dismissing the Sixth Cause of Action as pled in the Plaintiff's Amended Complaint, pursuant to Rule 12(b)(6), SCRCP; and
- (4) Striking Paragraph 29(f) from the Amended Complaint, pursuant to Rule 12(f), SCRCP.

The Defendant City's motions are based upon the following grounds:

1. The Plaintiff's Amended Complaint filed December 7, 2021, should be stricken or otherwise dismissed under Rule 12(b)(1), Rule 12(b)(4), Rule 12(f), and Rule 21, SCRCP, based upon the misjoinder and failure of the Plaintiff to obtain leave of Court as required for the filing of the Amended Complaint. The Amended Complaint was filed and served without obtaining compliance with the requirements of Rule 15(a) prior to the filing, specifically either (1) that leave of court was obtained or (2) that the Plaintiff obtained written consent of all adverse parties prior to filing. The record shows that the Plaintiff filed an Amended Motion for Leave to Amend Complaint on October 4, 2021. With that motion, the Plaintiff sought to amend his original Complaint to assert a new cause of action based upon S.C. Code Ann. § 5-31-450 against the Defendants City of Georgetown and Georgetown County. A proposed Amended Complaint was filed on October 4, 2021, as an exhibit to the motion showing precisely the amendments the Plaintiff was seeking to make with that motion. That motion was heard on November 12, 2021, by Circuit Court Judge Steven DeBerry. By Form Order filed November 24, 2021, Judge DeBerry wrote: "Plaintiff's Amended Motion for Leave to Amend Complaint is granted."

On November 11, 2021, which was one day before the scheduled hearing, the Plaintiff filed an additional motion captioned "Second Amended Motion for Leave to Amend Complaint," which the Defendant City opposes. At the hearing Judge DeBerry chose not to hear the Second Amended Motion for Leave to Amend Complaint which has been pending for one day, and his Form Order filed November 24, 2021, did not adjudicate that motion. Yet, in disregard of the Form Order, on December 7, 2021, the Plaintiff filed the Amended Complaint that was attached to the Second Amended Motion for Leave to Amend Complaint. That Amended Complaint was not authorized for filing under Rule 15(a) either by court order or by the written consent of all

parties. As a result, the Amended Complaint filed December 7, 2021 should be stricken or otherwise dismissed.

2. Service of process upon the Defendant City was insufficient and not in compliance with the strict requirements of Rule 4(d)(5), SCRCP, which does not permit service by certified mail on a governmental entity. On that basis, the Amended Complaint should be dismissed for lack of personal jurisdiction and insufficiency of service of process.

3. The Plaintiff's Sixth Cause of Action for a violation of S.C. Code Ann. § 5-31-450 is barred because that Code section was impliedly repealed by the enactment of the South Carolina Tort Claims Act.

4. If the Court determines that S.C. Code Ann. § 5-31-450 has not been impliedly repealed, the Plaintiff cannot prove a claim under that Code section because the roads at issue, specifically Greenwich Drive and Front Street, are not City-owned roads, as the Plaintiff has pled. The Defendant City has no legal duty under S.C. Code Ann. § 5-31-450 to remove water from state-owned or county-owned roads.

5. The Plaintiff improperly re-pled what was formerly Paragraph 24(f) in the original Complaint as Paragraph 29(f) in the Amended Complaint in violation of the law of the case as established by the Consent Order Granting Motion to Strike filed August 19, 2020 and issued by Circuit Court Judge Benjamin Culbertson.

The Defendant City of Georgetown's motion is based upon the pleadings filed in this case; the Affidavit of Service filed April 20, 2020; the Consent Order Granting Motion to Strike filed August 19, 2020; a memorandum of law as may be filed with the Court; rules of Court; and such other matters as may be properly presented to the Court at or before the time of the hearing.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

December 22, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Ron Christmas,)
Plaintiff,)

Civil Action No. 2020-CP-22-0356

v.)

County of Georgetown, City of)
Georgetown, Green Wave Contracting, Inc.,)
South Carolina Department of)
Transportation; and John Doe 2-10,)
Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS, MOTION TO
TO STRIKE AMENDED COMPLAINT,
AND MOTION TO STRIKE OF
DEFENDANT CITY OF GEORGETOWN**

The Defendant City of Georgetown submits the following memorandum of law in support of its Rule 12 Motions:

I. The Plaintiff's Amended Complaint filed December 7, 2021 should be stricken or otherwise dismissed.

The Plaintiff's Amended Complaint filed December 7, 2021, should be stricken or otherwise dismissed under Rule 12(b)(1), Rule 12(b)(4), Rule 12(f), and Rule 21, SCRPC, based upon the misjoinder and failure of the Plaintiff to obtain leave of Court as required for the filing of the Amended Complaint. The Amended Complaint was filed and served without obtaining compliance with the requirements of Rule 15(a) prior to the filing, specifically either (1) that leave of court was obtained or (2) that the Plaintiff obtained written consent of all adverse parties prior to filing.

The record shows that the Plaintiff filed an Amended Motion for Leave to Amend Complaint on October 4, 2021. With that motion, the Plaintiff sought to amend his original

Complaint to assert a new cause of action based upon S.C. Code Ann. § 5-31-450 against the Defendants City of Georgetown and Georgetown County. A proposed Amended Complaint was filed on October 4, 2021, as an exhibit to the motion showing precisely the amendments the Plaintiff was seeking to make with that motion. That motion was heard on November 12, 2021, by Circuit Court Judge Steven DeBerry. By Form Order filed November 24, 2021, Judge DeBerry wrote: "Plaintiff's Amended Motion for Leave to Amend Complaint is granted."

On November 11, 2021, which was one day before the scheduled hearing, the Plaintiff filed an additional motion captioned "Second Amended Motion for Leave to Amend Complaint," which the Defendant City opposes. At the hearing Judge DeBerry chose not to hear the Second Amended Motion for Leave to Amend Complaint which has been pending for one day, and his Form Order filed November 24, 2021, did not adjudicate that motion. Yet, in disregard of the Form Order, on December 7, 2021, the Plaintiff filed the Amended Complaint that was attached to the Second Amended Motion for Leave to Amend Complaint. That Amended Complaint was not authorized for filing under Rule 15(a) either by court order or by the written consent of all parties. As a result, the Amended Complaint filed December 7, 2021 should be stricken or otherwise dismissed.

II. The Plaintiff's Sixth Cause of Action for a violation of S.C. Code Ann. § 5-31-450 is barred because that Code section was impliedly repealed by the enactment of the South Carolina Tort Claims Act.

The Plaintiff's Sixth Cause of Action alleges a violation of S.C. Code Ann. § 5-31-450, which is a statute that pre-dates the South Carolina Tort Claims Act and the waiver of sovereign immunity. The Defendant City contends that S.C. Code Ann. § 5-31-450 was impliedly repealed by the adoption of the Tort Claims Act, which reinstated sovereign immunity then waived it with

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

In response to the Supreme Court's abrogation of sovereign immunity in *McCall*, the General Assembly enacted the Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. Section 15-78-20(b) of the Tort Claims Act provides that "[t]he General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, **immunity from liability and suit for any tort except as waived by this chapter.**" S.C. Code Ann. § 15-78-20(b). (Emphasis added). The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated.

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

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

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

The Supreme Court has explained that "[a] later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter." *State v. Hood*, 181 S.C. 488, 188 S.E. 134, 136 (1936). There can be no question that the Tort Claims Act "fully embraces the whole subject matter" of governmental liability. The history set forth in *Murphy* shows that the Tort Claims Act was intended to reinstate sovereign immunity in full thereby eliminating the "scattered patchwork of sovereign liability" that preexisted it, which includes S.C. Code Ann. § 5-31-450. By fully embracing the whole subject matter, statutes such as S.C. Code Ann. § 5-31-450 were impliedly repealed. This is likewise evident from the express language of the Tort Claims Act providing that "[n]otwithstanding any provision of law, this chapter, the South Carolina Tort Claims Act, is the *exclusive and sole remedy* for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."

S.C. Code Ann. § 15-78-200. (Emphasis added).¹ The use of phrase "notwithstanding any provision of law" compels the conclusion that the Tort Claims Act is the exclusive and sole remedy regardless of any other provision of law, which would necessarily include S.C. Code Ann. § 5-31-450.

Although there is no South Carolina appellate decision addressing the implied repeal of S.C. Code Ann. § 5-31-450,² the federal courts have specifically looked at whether the Tort Claims Act impliedly repealed part of the "scattered patchwork of sovereign liability" referred to in *McCall*. Of particular significance is *Sadek v. Lambert*, 2014 WL 117671 (D.S.C. 2014), in which Judge Terry Wooten adopted a magistrate judge's report and agreed with the very analysis offered by the City of Georgetown in the present case, except that Judge Wooten was addressing the implied repeal of S.C. Code Ann. § 16-5-60. Judge Wooten concluded that "the Tort Claims Act impliedly repealed § 16-5-60." 2014 WL 117671, *3. The federal court determined that S.C. Code Ann. § 16-5-60 is irreconcilable with the Tort Claims Act. The court recognized that "the Tort Claims Act expressly and completely restores sovereign immunity" which is "incapable of reconciliation with § 16-5-60's unlimited waiver of a county's immunity from suit based on wrongful acts of third parties." *Id.* Judge Wooten also explained that "the Tort Claims Act provides for limited liability of a governmental entity for the wrongdoing of its own employees whereas § 16-5-60 contrarily provides for unlimited and strict liability of a county for

¹ Similarly, S.C. Code Ann. § 15-78-20(b) states that the Tort Claims Act is the "exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b). The exceptions as set forth in S.C. Code Ann. § 15-78-70(b) have no applicability here.

² See, *Kubric v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 785 S.E.2d 595, 598 (2016) ("Although our Court has held that 'important questions of novel impression should not be decided on a motion to dismiss,' this general rule does not apply when the determinative facts are not in dispute. Where, as here, the question is one of simple statutory construction, a trial court should not deny a meritorious motion merely because the question is one of first impression"). (Citation omitted).

the acts of others. Such a result is contrary to both the plain language of the Tort Claims Act and the recorded legislative intent of the Act.” *Id.* Ultimately, the federal court ruled “that § 16-5-60, enacted to provide strict liability of counties for constitutional torts committed by others, is repugnant to and therefore was impliedly repealed by the South Carolina Tort Claims Act’s complete restoration of sovereign immunity and limited waiver for certain torts committed by governmental employees. The plaintiff’s cause of action against York County under § 16-5-60 therefore fails to state a claim upon which relief can be granted.” 2014 WL 117671, *6.³

As reflected by Judge Wooten's analysis in *Sadek v. Lambert*, the position taken by the City in the case at bar is a correct one. With the adoption of the Tort Claims Act and its restoration of sovereign immunity in full followed by a limited waiver, the "scattered patchwork of sovereign liability" from pre-Tort Claims Act times was wiped clean. S.C. Code Ann. § 5-31-450, as part of that archaic "scattered patchwork," was impliedly repealed. As S.C. Code Ann. § 15-78-200 makes clear with its use of phrase "notwithstanding any provision of law," the Tort Claims Act is the exclusive and sole remedy for any tort committed by a governmental entity and S.C. Code Ann. § 5-31-450 cannot co-exist with the Tort Claims Act by providing a different tort claim or remedy against the City. On this basis, the Plaintiff's Sixth Cause of Action should be dismissed.

Moreover, as an alternative position, even if S.C. Code Ann. § 5-31-450 remains viable, the Plaintiff cannot prove a claim under that Code section because the roads at issue, specifically Greenwich Drive and Front Street, are not City-owned roads, as the Plaintiff has pled. The

³ Other federal judges have addressed the same issue and agree with Judge Wooten’s analysis. See, *Doe v. Charleston County Sheriff’s Office*, 2018 WL 4224063 (D.S.C. 2018) (Judge Richard Gergel); *Doe v. McGowan*, 2017 WL 659938 (D.S.C. 2017) (Judge Richard Gergel); *Mial v. Charleston County Sheriff’s Department*, 2018 WL 4725288, adopted in 2018 WL 4701366 (D.S.C. 2018) (Judge Joseph F. Anderson, Jr.).

Defendant City has no legal duty under S.C. Code Ann. § 5-31-450 to remove water from state-owned or county-owned roads. On this additional basis, the Plaintiff's Sixth Cause of Action should be dismissed.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

Counsel for Defendant City of Georgetown

January 26, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 Ron Christmas,	)	
	)	Civil Action No. 2020-CP-22-0356
Plaintiff,	)	
	)	
v.	)	
	)	NOTICE OF MOTION AND
County of Georgetown, City of	)	MOTION TO ALTER OR AMEND ORDER
Georgetown, Green Wave Contracting, Inc.,	)	AND/OR MOTION TO RECONSIDER
South Carolina Department of	)	
Transportation; and John Doe 2-10,	)	
	)	
Defendants.	)	
_____	)	

TO: THE HONORABLE J. CORDELL MADDOX, JR.

JUSTIN O. LUCEY AND JOSHUA F. EVANS, COUNSEL FOR PLAINTIFF

M. KIRK BATTLE AND MICHAEL W. BATTLE, COUNSEL FOR DEFENDANT
GEORGETOWN COUNTY

JEFFREY A. ROSS AND PHILIP P. CRISTALDI, III, COUNSEL FOR DEFENDANT
GREEN WAVE CONTRACTING, INC.

LISA A. THOMAS, COUNSEL FOR DEFENDANT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant City of Georgetown will move before the Honorable J. Cordell Maddox, Jr. at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCF, altering, amending, and reconsidering the Order Denying Defendant City of Georgetown's Motion to Dismiss filed on March 22, 2022. The Defendant City of Georgetown's counsel received written notice of entry of the Order Denying Defendant City of Georgetown's Motion to Dismiss on that same date.

The Defendant City of Georgetown's motion is based on the following grounds:

1. In its Order filed March 22, 2022, the Court found that the City has no "standing" to oppose a Rule 15(a) motion to amend and that only SCDOT, which was the Defendant to be added had "standing" to oppose the amendment. The Court cites no authority for that ruling. Any existing litigant, including here the City of Georgetown, has standing to oppose a Rule 15(a) motion. To the contrary, SCDOT, which was a non-party to the case, is not in a position to make an appearance and oppose a motion to amend. The Court is respectfully asked to reconsider that ruling which has no basis in the Rules of Civil Procedure nor is supported by any case law.

2. In its Order filed March 22, 2022, the Court found that the City failed to seek reconsideration of any order granting the Plaintiff's motion to amend. That ruling overlooks the fact that there was never any order issued by Judge Steven DeBerry granting the Plaintiff's Second Amended Motion for Leave to Amend Complaint, and as a result, there was no order upon which the City could even seek reconsideration. In effect, the Court is holding the Defendant City to a legal impossibility.

To reiterate the procedural background, the record shows that the Plaintiff filed an Amended Motion for Leave to Amend Complaint on October 4, 2021. With that motion, the Plaintiff sought to amend his original Complaint to assert a new cause of action based upon S.C. Code Ann. § 5-31-450 against the Defendants City of Georgetown and Georgetown County. A proposed Amended Complaint was filed on October 4, 2021, as an exhibit to the motion showing precisely the amendments the Plaintiff was seeking to make with that motion. That motion was heard on November 12, 2021, by Circuit Court Judge Steven DeBerry. By Form Order filed November 24, 2021, Judge DeBerry wrote: "Plaintiff's Amended Motion for Leave to Amend Complaint is granted."

On November 11, 2021, which was one day before the scheduled hearing, the Plaintiff filed an additional motion captioned "Second Amended Motion for Leave to Amend Complaint," which the Defendant City opposes. At the hearing Judge DeBerry chose not to hear the Second Amended Motion for Leave to Amend Complaint which has been pending for only one day, and his Form Order filed November 24, 2021, did not adjudicate that motion. Yet, in disregard of the Form Order, on December 7, 2021, the Plaintiff filed the Amended Complaint that was attached to the Second Amended Motion for Leave to Amend Complaint. That Amended Complaint was not authorized for filing under Rule 15(a) either by court order or by the written consent of all parties.

The Plaintiff's Second Amended Motion for Leave to Amend Complaint was never adjudicated. It was not heard by Judge DeBerry at the hearing held on November 12, 2021. This Court is plainly incorrect in ruling that "[t]he Court [meaning Judge DeBerry] granted its leave to amend in response to all pending motions and marked all as resolved." It is well settled that "one circuit court judge may not reverse or modify the order of another circuit court judge." *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d 838, 843 (Ct. App. 2002). To this point, the Court has not cited to any Form Order or other order issued by Judge DeBerry that actually ruled on or granted the Plaintiff's Second Amended Motion for Leave to Amend Complaint. Most respectfully, that is because there is none. The only Form Order issued by Judge DeBerry is the one filed November 24, 2021, on which Judge DeBerry wrote: "Plaintiff's Amended Motion for Leave to Amend Complaint is granted." That Order says nothing about the Plaintiff's Second Amended Motion for Leave to Amend Complaint. Moreover, as the Court is well aware, motions are not "marked as resolved" by the presiding judge. That is a clerical function by the Clerk of Court, and if the Clerk of Court inadvertently marked the Second Amended Motion for Leave to Amend

Complaint as "completed" in the Public Index, that is not evidence or proof that the motion was fully adjudicated nor should that have formed the basis for this Court to find – in absence of any order – that the Second Amended Motion for Leave to Amend Complaint was heard and granted. The Public Index is not a substitute for an order signed by a judge.

In short, the Plaintiff's Amended Complaint filed December 7, 2021, should be stricken or otherwise dismissed under Rule 12(b)(1), Rule 12(b)(4), Rule 12(f), and Rule 21, SCRCP, based upon the misjoinder and failure of the Plaintiff to obtain leave of Court as required for the filing of the Amended Complaint. The Amended Complaint was filed and served without obtaining compliance with the requirements of Rule 15(a) prior to the filing, specifically either (1) that leave of court was obtained or (2) that the Plaintiff obtained written consent of all adverse parties prior to filing.

In the alternative, the Court is respectfully requested to leave this issue for adjudication by Judge DeBerry, who knows what he intended, which motions he heard on November 12, 2021, and which motions he carried over to another term of court – specifically the Second Amended Motion for Leave to Amend Complaint which has only been filed the day before the hearing, was not on Judge DeBerry's docket, and for which ten days notice had not been given. If the Court is not willing to leave this issue to Judge DeBerry, then the Court should at least withhold ruling until the transcript of the November 12, 2021 hearing is made available for the Court's review.

3. The Plaintiff's Second Amended Motion for Leave to Amend Complaint was not scheduled before the Court for a hearing, and as a result, the Court should not have provided the alternative ruling that the proposed amendment did not prejudice the City. That motion was not docketed to be heard nor was that motion heard by this Court at the hearing held on January 27,

2022. Because the Plaintiff's Second Amended Motion for Leave to Amend Complaint was not before this Court, the City was denied of its due process rights by the Court proceeding to now adjudicate that motion by ruling that the City did not show legal prejudice.

4. In footnote 1 of the Order filed March 22, 2022, the Court acknowledges that the Plaintiff consented to striking Paragraph 29(f) of the Amended Complaint, but the Order does not give effect to that ruling. Instead, the Order denies the City's motion in its entirety. On reconsideration, the Court is respectfully asked to strike Paragraph 29(f) of the Amended Complaint, which would be consistent with the Consent Order Granting Motion to Strike filed August 19, 2020 and issued by Circuit Court Judge Benjamin Culbertson.

The Defendant City of Georgetown's motion is based upon the pleadings filed in this case; the Order Denying Defendant City of Georgetown's Motion to Dismiss filed March 22, 2022; the rules of court; and such other matters as may be properly presented to the Court at or before the time of the hearing.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

April 1, 2022

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Ron Christmas,

Plaintiff,

v.

County of Georgetown, City of Georgetown,
Green Wave Contracting, Inc., South
Carolina Department of Transportation, and
John Doe 2-10,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
Case No. 2020-CP-22-00356

**STIPULATION OF DISMISSAL WITH
PREJUDICE AS TO GREEN WAVE
CONTRACTING, INC. ONLY
(Does Not End Case)**

PURSUANT to Rule 41(a) of the South Carolina Rules of Civil Procedure, Plaintiff in the above-captioned case, by and through his undersigned Counsel, hereby stipulates to the dismissal with prejudice of all claims which were or could have been asserted against Green Wave Contracting, Inc., and Green Wave Contracting, Inc. only, with each party to bear its own costs. The parties further stipulate that each party shall be responsible for their own attorneys' fees and costs arising out of the case.

Defendant County of Georgetown consents to this Stipulation and dismiss with prejudice all crossclaims, which were brought against Green Wave Contracting, Inc.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/Justin Lucey
Justin O'Toole Lucey
Joshua F. Evans
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400 phone
jlucey@lucey-law.com
jevans@lucey-law.com

November 8, 2022
Charleston, South Carolina

WE SO CONSENT:

/s/ Jeffrey A. Ross

Jeffrey A. Ross, Esq.
Philip P. Cristaldi, III, Esq.
Benjamin Gilchrist, Esq.
Ross & Cristaldi, LLC
863 Coleman Blvd., Suite B
Mount Pleasant, SC 29464
jross@rclawsc.com
pcristaldi@rclawsc.com
bgilchrist@rclawsc.com
Counsel for Green Wave Contracting, Inc.

/s/M. Kirk Battle

M. Kirk Battle, Esq.
Michael W. Battle, Esq.
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
(843) 248-4321
(843) 248-4512 (fax)
kbattle@battlelawsc.com
mbattle@battlelawsc.com
Counsel for County of Georgetown

/s/Andrew F. Lindemann

Andrew F. Lindemann, Esq.
Lindemann & Davis, P.A.
P.O. Box 6923
Columbia, SC 29260
(803) 881-8921
andrew@ldlawsc.com
Counsel for City of Georgetown

/s/Lisa A. Thomas

Lisa A. Thomas, Esq.
Richardson Plowden
Office: 2103 Farlow Street
Myrtle Beach, SC 29577
Mailing Address: P.O. Box 3646
Myrtle Beach, SC 29578
lthomas@richardsonplowden.com
Counsel for SCDOT

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-22-00356

Ron Christmas,

Plaintiff,

v.

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

Defendants.

SECOND AMENDED SUMMONS

(Jury Trial Demanded)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Second Amended Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 415 Mill Street, Mt. Pleasant, South Carolina 29464, within fifteen (15) days after the date of such service, exclusive of the day of service. If you fail to answer the Second Amended Complaint within the above-described time, judgment by default will be rendered against you for the relief demanded in the Complaint.

JUSTIN O'TOOLE LUCEY, P.A.

s/Justin O. Lucey

Justin O. Lucey

Joshua F. Evans

415 Mill Street

Mt. Pleasant, SC 29464

Phone: (843) 849-8400

jlucey@lucey-law.com

jevans@lucey-law.com

Attorneys for Plaintiff

November 30, 2022

Charleston, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-22-00356

COUNTY OF GEORGETOWN

Ron Christmas,

Plaintiff,

v.

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

Defendants.

SECOND AMENDED COMPLAINT

(Jury Trial Demanded)

Plaintiff, Ron Christmas, complaining of the Defendants named herein, would respectfully
 allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Ron Christmas is a citizen of Georgetown County, South Carolina, and is the owner of property and a home located at 101 Greenwich Drive, Georgetown, South Carolina 29440.

2. Plaintiff purchased the above-described real property in or around 2002.

3. This case concerns a series of improvements made in recent years to East Bay Park and adjacent areas, and the unintended results of the improvements and fill (hereinafter, collectively, the "Project"); and the condition of the road and drainage infrastructure at the intersection of Front Street and Greenwich Drive and within six hundred feet thereof ("the Intersection").

4. Defendant County of Georgetown (“the County”) is a governmental entity. Upon information and belief, at all times relevant to this action, the County planned, approved, implemented, executed, and controlled the Project.

5. Defendant City of Georgetown (“the City”) is a governmental entity. At all times relevant to this action, the City was the owner of the property upon which the Project was constructed and performed various other improvements to the property in coordination with the County.

6. Defendant South Carolina Department of Transportation (“DOT”) is a governmental entity or a division of a governmental entity. Upon information and belief, at all times relevant to this action, DOT owns the roads at the Intersection.

7. Defendants County and City have taken the position that the matters complained of herein cannot be properly addressed without the involvement and cooperation of DOT; therefore, DOT was added to this suit as a Defendant in December of 2021.

8. Defendants County and City have taken the position that the road defects complained of herein are the responsibility of DOT.

9. Defendants County and City have taken the position that the road defects complained of herein cannot be fixed without the cooperation and involvement of DOT.

10. It appears that the roads at the Intersection are owned by the State; and that DOT is responsible for the repair and maintenance of any stormwater pipes under the State-owned roads.

11. The City owns and maintains the water management systems, ditches, and drain pipes that are not under the State owned roads.

12. The City has installed flap valves at some but not all of the stormwater outfalls along Greenwich and East Bay, to prevent surface waters from backflowing into the drainage systems from the river/bay.

13. The County has assumed the maintenance of the open stormwater ditches in and at the Perimeter of East Bay Park that feed into the drainage at or near the Intersection.

14. Upon information and belief, the City and County have shared the maintenance of the wetlands water retention area at the North end of East Bay Park.

15. This Honorable Court has jurisdiction over all subject matter alleged herein, over all parties hereto, and venue is proper in this forum.

FACTUAL ALLEGATIONS

16. On or around July 11, 2006, the County leased the East Bay Park property from the City of Georgetown for a term of twenty (20) years and subject to renewal on an annual basis.

17. The lease agreement included “land, facilities, recreational equipment, and *improvements* located within the confines of East Bay Park and circled by Greenwich Drive, Front Street, and East Bay Street in the City of Georgetown” (emphasis added).

18. In approximately 2016, the City and County planned the Project, including filling, raising, improving, and reconstructing the Project.

19. Concurrently, the City planned and made other improvements and changes to East Bay Park, including converting additional pervious surfaces to impervious surfaces. However, during this planning, the City removed various water management features from the planned improvements.

20. Construction of the Project began in 2017; the County constructed six (6) new, raised tennis courts and accessories; and the City constructed the new, raised, paved walking path, ball fields, boat ramp parking, and accessories.

21. Defendants County and City raised the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff's property.

22. The Project has altered the course of, and increased the amount of, surface water flooding onto Plaintiff's property.

23. The Project has altered the natural flow of waters, causing increased flooding onto Plaintiff's property and adjacent to the Intersection.

24. Concurrently therewith, the Defendants' failure to maintain the drainage infrastructure and wetlands at and near the Intersection has also caused increased flooding at the Intersection.

25. The increased flooding has caused the soils under Greenwich Drive to consolidate which has caused Greenwich drive to subside at the Intersection, causing additional flooding.

26. The surface water drainage system(s) and components along Greenwich Drive and at the Intersection have not been maintained by the Defendants. As a result, the drainage pipes back-up, back fill, and fail to manage the waters that are damaging Greenwich Drive, the Intersection, and Plaintiff's property. As of recently, the drainage system facilitates the intrusion of river waters more often than it facilitates the discharge of stormwaters.

27. DOT has failed to maintain the roads at and adjacent to the Intersection, which have subsided and are now permitting increased tidal flooding.

28. The cumulative and combined effect of the foregoing is an ever, worsening flooding condition at and near the intersection of Greenwich Drive and Front Street, and further deterioration, including subsidence caused by wet dry cycles, to nearby properties.

29. The excessive flooding has severely damaged Plaintiff's property, has adversely affected the property value, and prevents Plaintiff from transiting the roads to access his property.

30. Prior to filing this suit, Plaintiff brought the foregoing problems to the Defendants' attention.

31. Defendants again received notice of these problems by the service of this suit and the Castles' deposition.

32. In December of 2021, at the suggestion of the Defendants, Plaintiff filed maintenance requests with DOT.

33. The foregoing notices to the Defendants have not resulted in any repairs, maintenance, or solutions.

34. Defendants' agents have testified that they have been aware of the problems at the Intersection and have not taken any remedial action.

35. Defendants owed Plaintiff statutory and common law duties not to increase the discharge of surface water onto Plaintiff's property, to maintain the drainage systems, and to maintain the roads.

36. Additionally, Defendant City undertook a duty to manage the surface waters at and feeding to the Intersection and installed and maintained a drainage system (which it mostly owns), and therefore had a duty to exercise due care in the maintenance of that system.

37. Additionally, Defendant County undertook a duty to maintain the drainage ditches swales, and other features in and around East Bay Park, including those discharging into and under the Intersection, and therefore had a duty to use due care in the maintenance of those features.

38. Additionally, Defendant DOT undertook a duty to install and maintain the roads in and adjacent to the Intersection, and to maintain the drainage pipes under the roads, and therefore had a duty to use due care in the maintenance of those features.

39. Additionally, in undertaking the installation and maintenance of roads and surface water control systems, Defendants owed a special duty to immediate adjoining property owners not to damage their property or their access to their property.

40. As shown by the foregoing recitation of facts, each of the foregoing duties has been breached by these defendants.

41. As a direct and proximate result of Defendants' acts and omissions, Plaintiff is being harmed by the excessive flooding onto his property, and a lack of road access to his property.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to all Defendants)

42. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

43. It was reasonably foreseeable to Defendants that its aforementioned positive, overt, and aggressive actions, omissions, and negligence would result in damages to the Plaintiff.

44. The Defendants owed a duty to Plaintiff to conduct themselves in a manner that would not cause injury to Plaintiff.

45. The Defendants had actual or constructive notice of the damaging nature and/or defectiveness of their actions, inactions, and conduct.

46. The injuries and damages incurred by Plaintiff were proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless, consciously indifferent, and unlawful acts of the Defendants in the following particulars:

- a) raising the Project substantially above the previous existing grade, causing excessive flooding onto Plaintiff's property;
- b) altering the course of, and increasing the amount of, surface water flooding onto Plaintiff's property;
- c) altering the natural flow of waters, causing increased flooding onto Plaintiff's property;
- d) in failing to maintain the roads and drainage;
- e) in failing to take such action as a reasonable and prudent person would do to prevent excessive flooding; and,
- f) in failing to properly operate and maintain the stormwater drainage systems.

47. One or more of the above actions were in violation of industry standards, the rules of regulatory agencies, and the laws and common law of the State of South Carolina.

48. As a direct and proximate result of Defendants' negligence as described above, Plaintiff has suffered and continues to suffer damages to be determined by a jury.

FOR A SECOND CAUSE OF ACTION
(Inverse Condemnation as to All Defendants)

49. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

50. The South Carolina Constitution and state law prohibit Defendants from taking Plaintiff's private property for a public use without payment of just compensation.

51. Upon information and belief, Defendants' actions above described constitute the taking of Plaintiff's private property for a public use without just compensation.

52. The result of the foregoing affirmative acts was a taking of Plaintiff's property for public use.

53. As a result of Defendants' inverse condemnation, Plaintiff has suffered an ascertainable damage to his property and have incurred legal costs and other expenses and damages.

FOR A THIRD CAUSE OF ACTION
(Injunction/Mandamus as to all Defendants)

54. The previous allegations of the complaint are realleged and asserted as if restated verbatim herein.

55. The influx of flooding caused by the Defendants' acts and omissions has caused and will continue to cause Plaintiff irreparable harm in the form of ongoing and continued flooding of his property and loss of ingress and egress on the roads.

56. Based on the foregoing allegations, Plaintiff has demonstrated that he is likely to succeed in his claims.

57. Plaintiff does not have an adequate remedy at law for the foregoing misfeasance, malfeasance, and non-feasance by Defendants. Plaintiff is entitled to mandatory and permanent injunctive/mandamus relief, ordering Defendants to repair the roads and drainage at the Intersection and adjacent water management features.

FOR A FOURTH CAUSE OF ACTION
(Violation of South Carolina Code § 5-31-450 against City and County)

58. The previous allegations of the Complaint are realleged and asserted as if restated verbatim herein.

59. Defendants failed or refused to carry out the provisions of Section 5-31-450 of the South Carolina Code by failing to provide sufficient drainage for surface water, thus failing to

prevent the passage of such water onto Plaintiff's property. As a direct result of Defendants' violation of Section 5-31-450 of the South Carolina Code, Plaintiff has suffered actual damages.

WHEREFORE, Plaintiff demands a trial by jury and prays judgment against all Defendants for actual damages; diminution of value; costs of suit; temporary and permanent injunction/mandamus; and granting such further relief as the Court deems just and proper.

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin O. Lucey

Justin O. Lucey, Esq.

Joshua F. Evans, Esq.

P.O. Box 806

Mt. Pleasant, SC 29465

(843) 849-8400

(843) 849-8406 (fax)

jlucey@lucey-law.com

jevans@lucey-law.com

Attorneys for Plaintiff

November 30, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

FIFTEENTH JUDICIAL CIRCUIT

C/A NO.: 2020-CP-22-00356

Ron Christmas,)

Plaintiff,)

DEFENDANT SOUTH CAROLINA

vs.)

DEPARTMENT OF TRANSPORTATION'S

ANSWER TO PLAINTIFF'S SECOND

AMENDED COMPLAINT

County of Georgetown; City of)

Georgetown; and South Carolina)

Department of Transportation,)

Defendants.)

[Jury Trial Requested]

TO: PLAINTIFF NAMED ABOVE AND JUSTIN O. LUCEY, ESQUIRE, AND JOSHUA F. EVANS, ESQUIRE, HIS ATTORNEYS OF RECORD

This Defendant, by and through their undersigned attorney, answers the Plaintiff's Second Amended Complaint, and would show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiff's Second 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 paragraphs 1, 2 and 3 of the Plaintiff's Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

3. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 4 and 5 of the Plaintiff's Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

4. In answering paragraph 6 of the Plaintiff's Second Amended Complaint, this

Defendant asserts that pursuant to Sections 57-1-20 and 57-1-30 of the S.C. Code of Laws of South Carolina, 1976, SCDOT is established as an administrative agency of state government having as its functions and purposes the systematic planning, construction, maintenance, and operation of the state highway system. The “state highway system” consists of the roads, streets, and bridges owned and maintained by SCDOT pursuant to law. See Chapter 5, Title 57 of the S.C. Code of Laws of South Carolina, 1976. Upon information and belief, this Defendant admits they own Front Street and Greenwich Drive where the two roads intersect.

5. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 7, 8 and 9 of the Plaintiff’s Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof

6. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 10, 11, 12, 13, and 14 of the Plaintiff’s Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

7. In answering paragraph 15 of the Plaintiff’s Second Amended Complaint, this Defendant does not contest venue.

8. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 16, 17, 18, 19, 20, 21, 22, and 23 of the Plaintiff’s Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

9. This Defendant denies the allegations contained in paragraphs 24 and 25 of the Plaintiff’s Second Amended Complaint and demands strict proof thereof.

10. This Defendant denies the allegations contained in paragraphs 26, 27, and 28 of the Plaintiff’s Second Amended Complaint and demands strict proof thereof.

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

allegations contained in paragraph 29 of the Plaintiff's Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

12. This Defendant denies the allegations contained in paragraphs 30 and 31 of the Plaintiff's Second Amended Complaint and demands strict proof thereof.

13. This Defendant admits only so much of paragraph 32 of the Plaintiff's Second Amended Complaint as to that a maintenance request was filed with the DOT. All other allegations contained in said paragraph are denied and strict proof demanded thereof.

14. This Defendant denies the allegations contained in paragraphs 33 and 34 of the Plaintiff's Second Amended Complaint and demands strict proof thereof.

15. In answering paragraph 35 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the allegations contained therein constitute legal conclusions which require no response from this Defendant. To the extent a response is deemed necessary, those allegations are denied and strict proof demanded thereof.

16. This Defendant lacks sufficient information to form a belief concerning the allegations contained in paragraphs 36 and 37 of the Plaintiff's Second Amended Complaint, and, therefore, denies the same and demands strict proof thereof.

17. This Defendant denies the allegations contained in paragraphs 38, 39, 40, and 41 of the Plaintiff's Second Amended Complaint and demands strict proof thereof.

18. In answering paragraph 42 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the foregoing responses and defenses are incorporated herein by reference as fully as if repeated verbatim.

19. In answering paragraphs 43, 44, and 45 of the Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein as to this Defendant only and

demands strict proof thereof.

20. In answering paragraph 46, including sub-parts (a.) through (f.), and in answering paragraphs 47 and 48 of the Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein as to this Defendant only and demands strict proof thereof.

21. In answering paragraph 49 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the foregoing responses and defenses are incorporated herein by reference as fully as if repeated verbatim.

22. In answering paragraph 50 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the allegations contained therein constitute legal conclusions which require no response from this Defendant. To the extent a response is deemed necessary, those allegations are denied and strict proof demanded thereof.

23. This Defendant denies the allegations contained in paragraphs 51, 52, and 53 of the Plaintiff's Second Amended Complaint and demands strict proof thereof.

24. In answering paragraph 54 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the foregoing responses and defenses are incorporated herein by reference as fully as if repeated verbatim.

25. This Defendant denies the allegations contained in paragraphs 55, 56, and 57 of the Plaintiff's Second Amended Complaint and demands strict proof thereof.

26. In answering paragraph 58 of the Plaintiff's Second Amended Complaint, this Defendant asserts that the foregoing responses and defenses are incorporated herein by reference as fully as if repeated verbatim.

27. This Defendant denies the allegations contained in paragraph 59 of the Plaintiff's Amended Complaint and demands strict proof thereof.

28. This Defendant denies that the Plaintiff is entitled to the relief requested in the paragraph beginning “Wherefore...” within the Plaintiff’s Amended Complaint and demands strict proof thereof.

FOR A SECOND AND FURTHER DEFENSE
(Statute of Limitations)

29. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

30. This Defendant asserts Plaintiff’s claims are barred by the applicable statute(s) of limitations.

FOR A THIRD AND FURTHER DEFENSE
(Public Duty Rule)

31. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

32. This Defendant pleads the public duty rule.

FOR A FOURTH AND FURTHER DEFENSE
(Not Liable for Nuisance)

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

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

FOR A FIFTH AND FURTHER DEFENSE
(Discretionary Immunity)

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

36. This Defendant pleads discretionary immunity pursuant to §15-78-60(5) of the

South Carolina Tort Claims Act.

FOR A SIXTH AND FURTHER DEFENSE

(Design Immunity)

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

38. 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 SEVENTH AND FURTHER DEFENSE

(Apportionment of Damages)

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

40. 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(c), South Carolina Tort Claims Act.

FOR AN EIGHTH AND FURTHER DEFENSE

(Sovereign Immunity)

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

42. This Defendant asserts the defense of sovereign immunity as a complete bar on Plaintiff's non-tort claims. The South Carolina General Assembly has not waived sovereign immunity for such claims. Alternatively, this Defendant asserts the defense of sovereign immunity as a complete bar to all claims that arose prior to the partial abrogation of sovereign immunity in 1986.

FOR A NINTH AND FURTHER DEFENSE

(Storm Water Management and Sediment Reduction Act)

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

44. 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 TENTH AND FURTHER DEFENSE

(Mitigation of Damages)

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

46. Plaintiff has failed to mitigate his damages.

FOR AN ELEVENTH AND FURTHER DEFENSE

(Tort Claim Act)

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

48. This Defendant is immune from suit pursuant to the immunity sections of the South Carolina Tort Claims Act, S.C. Code Anno. 15-78-60, subsections (1), (2), (4), (5), (9), (13), (15), (17), and (20).

49. This Defendant reserves its right to name any other defenses and immunities provided under the South Carolina Tort Claims Act as further investigation and discovery may reveal.

FOR A TWELFTH AND FURTHER DEFENSE

50. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

51. The Plaintiff's Second Amended Complaint fails to state facts sufficient to constitute a cause of action and/or a claim upon which relief can be granted against this Defendant and, therefore, should be dismissed, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRTEENTH AND FURTHER DEFENSE

52. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

53. The incidents referred to in the Plaintiff's Second Amended Complaint and alleged damages therefrom were due to and caused by an Act of God for which this Defendant is in no way liable. Plaintiff, therefore, is not entitled to recover from this Defendant in this action.

FOR A FOURTEENTH AND FURTHER DEFENSE

54. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

55. The incidents referred to in the Plaintiff's Amended Complaint and alleged damages therefrom were due to and caused by, the negligence, gross negligence, recklessness, willfulness and wantonness of the Plaintiff 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.

56. Therefore, this Defendant pleads the Plaintiff's negligence, contributory negligence and/or negligence greater than that of this Defendant and the contributory gross negligence,

recklessness, willfulness and wantonness of the Plaintiff as a complete defense to the Plaintiff's action herein and that should a determination be made that the Plaintiff's 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 Plaintiff's negligence, gross negligence, recklessness, willfulness and wantonness and to a reduction of any amount awarded to the Plaintiff in proportion to the amount thereof, pursuant to the South Carolina Doctrine of Comparative Negligence.

FOR A FIFTEENTH AND FURTHER DEFENSE

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

58. Any damages to the Plaintiff were not the natural and probable consequence of any conduct of this Defendant, but were due to and caused by the actions and conduct of others, unattributable to this Defendant, which intervened to prevent any conduct by this Defendant from becoming the proximate cause of any of the damages alleged.

59. The alleged damages of the Plaintiff were caused by an intervening, superseding action for which this Defendant is in no way liable. Plaintiff, therefore, is not entitled to recover from this Defendant in this action.

FOR A SIXTEENTH AND FURTHER DEFENSE

60. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

61. This Defendant asserts it is not liable for a 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 pursuant to S.C. Code Ann. §15-78-60(5).

FOR A SEVENTEENTH AND FURTHER DEFENSE

62. The foregoing defenses and responses are incorporated herein by reference as fully as if repeated verbatim.

63. Any damages suffered by Plaintiff, which are denied, were caused by the acts or omissions of parties or third-parties other than this Defendant, over whom this Defendant had no authority or control

RESERVATION AND NON-WAIVER

64. 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, having fully answered the Plaintiff's Second Amended Complaint, this Defendant prays that the Second Amended Complaint be dismissed, that it have its costs and disbursements, and for such other and further relief as this Honorable Court deems just and proper.

Lisa A. Thomas, SC Bar #66458
Attorney for Defendant SCDOT

s/ Lisa A. Thomas
Richardson, Plowden & Robinson, P.A.
2103 Farlow Street, P. O. Box 3646
Myrtle Beach, SC 29578
(843) 443-3580 – voice
LThomas@RichardsonPlowden.com

December 9, 2022
Myrtle Beach, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was served on each party or counsel of record by electronic filing via the SCE-Filing system this 9th day of December, 2022, and is available for viewing and downloading. Notice of Electronic Filing has been sent automatically to all parties listed in the Service List in effect on the date of electronic filing, which constitutes service of same and satisfies the requirements of Rule 5, SCRCP.

s/ Lisa A. Thomas
Lisa A. Thomas, SC Bar #66458
Richardson Plowden & Robinson, P.A.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Ron Christmas,

Plaintiff,

vs.

County of Georgetown, City of Georgetown;
Green Wave Contracting, Inc.; South Carolina
Department of Transportation and John Doe 2-
10,

Defendants,

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2020-CP-22-00356

**ANSWER OF GEORGETOWN
COUNTY TO SECOND AMENDED
COMPLAINT**

TO PLAINTIFF AND HIS ATTORNEY:

Georgetown County ("Defendant"), by and through its undersigned counsel, hereby responds to Plaintiff's Amended Complaint and would show this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of this Defendant's Answer to the Amended Complaint not hereinafter expressly admitted is hereby denied.
2. Defendant is without sufficient information to confirm or deny the allegations in Paragraph 1 and 2.
3. In regard to Paragraph 3, no allegation appears to be made. Any other factual allegation which may be present against this Defendant is denied.
4. In regard to Paragraph 4, Defendant admits that it is a government entity and that this action is governed by the Tort Claims Act. All other allegations are denied.
5. Paragraphs 5 and 6 involve allegations not directed at this Defendant. Any allegation which may be directed at Defendant is denied.

6. Paragraph 7 is denied.
7. Defendant denies any allegation of road defects and Defendant is without sufficient information to confirm or deny the remaining allegations in Paragraphs 8 and 9.
8. Defendant does not have information sufficient to form a belief as to the allegations in Paragraphs 10-12 and therefore it denies the same.
9. The allegations in Paragraph 13 through 14 are denied and this Defendant requires strict proof thereof.
10. Answering the allegations in 15-17 this Defendant admits that venue is proper in Georgetown County, South Carolina and this Defendant leased East Bay Park. As to the remaining allegations this Defendant would refer to the lease agreement and deny any allegations inconsistent with the lease.

FOR A SECOND DEFENSE

11. Defendant realleges each and every defense above as if repeated here.
12. As to any portion of the Amended Complaint that may be interpreted as brought under the South Carolina Tort Claims Act of the South Carolina Code of Laws, Defendant pleads said Act and all pertinent provisions contained therein as a limitation or bar on the Plaintiff's claims.

AS A THIRD DEFENSE

13. Defendant reallege each and every defense above as if repeated here.
14. If there was any negligent, careless, reckless, willful, wanton, or grossly negligent, act or omission by this Defendant, which is expressly denied, any injuries or damages allegedly sustained by the Plaintiff, which are also denied, were due to and caused by the Plaintiff's own negligence, carelessness, recklessness, willfulness, wantonness, or gross negligence by failing to act as a reasonable person would under the same or similar circumstances. These acts or

omissions more proximately and directly caused any alleged injuries and damages to Plaintiff and Defendant pleads the Plaintiff's comparative negligence, carelessness, recklessness, willfulness, wantonness, and gross negligence as a complete bar or limit to Plaintiff's claim.

FOR A FOURTH DEFENSE

15. Defendant realleges each and every defense above as if repeated here.

16. Defendant alleges that if it was negligent in any particular which is denied, any injuries to the plaintiff were more proximately caused by the intervening negligence of some third party and this Defendant pleads such intervening negligence as a complete defense to Plaintiff's claims in the above captioned lawsuit.

FOR A FIFTH DEFENSE

17. Defendant realleges each and every defense above as if repeated here.

18. Defendant pleads the "Act of God" defense as a complete bar to Plaintiff's claims against this Defendant.

FOR A SIXTH DEFENSE

19. Defendant realleges each and every defense above as if repeated here.

20. Defendant plead the applicable statute of limitations defense as a complete bar to Plaintiff's claims against this Defendant.

FOR A SEVENTH DEFENSE

21. Defendant realleges each and every defense above as if repeated here.

22. Plaintiff's claims against this Defendant are barred by the defense of assumption of risk by the Plaintiff.

FOR AN EIGHTH DEFENSE

23. Defendant realleges each and every defense above as if repeated here.

24. Plaintiff does not have standing to assert claim for property he does not own or for damages to property he does not own.

FOR A NINTH DEFENSE

25. Defendant realleges each and every defense above as if repeated here.

26. Plaintiff's claims are barred by the equitable defenses of laches, waiver, estoppel and/or unclean hands.

FOR A TENTH DEFENSE

27. Defendant realleges each and every defense above as if repeated here.

28. Plaintiff's complaint fails to state a lawfully valid claim against Defendant.

WHEREFORE, having fully answered the Second Amended Complaint, Defendant Georgetown County prays that the same be dismissed, for costs, attorney's fees and for such other relief as may be just and proper.

s/Michael W Battle

Michael W. Battle, SC Bar #584
M. Kirk Battle; S.C Bar # 79699
BATTLE LAW FIRM, LLC
PO Box 530
1200 Main Street
Conway, SC 29528
(843) 248-4321 (tel)
(843) 248-4512 (fax)

December 12, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 Ron Christmas,	)	
	)	Civil Action No. 2020-CP-22-0356
Plaintiff,	)	
	)	
v.	)	
	)	ANSWER TO SECOND AMENDED
County of Georgetown, City of	)	COMPLAINT OF DEFENDANT
Georgetown, and South Carolina	)	CITY OF GEORGETOWN
Department of Transportation,	)	
	)	
Defendants.	)	
_____	)	

The Defendant City of Georgetown answers the Plaintiff's Second Amended Complaint (filed November 30, 2022) herein as follows:

FOR A FIRST DEFENSE

1. The Defendant City denies each and every allegation of the Plaintiff's Second Amended Complaint not hereinafter specifically admitted, qualified, or explained.

2. As to the allegations set forth in Paragraph 1 of the Plaintiff's Second Amended Complaint, the Defendant City admits only that the Plaintiff is one of the titled owners of the property located at 101 Greenwich Street, Georgetown, South Carolina.

3. The allegations set forth in Paragraph 2 of the Plaintiff's Second Amended Complaint are denied.

4. The allegations set forth in Paragraph 3 of the Plaintiff's Second Amended Complaint are merely a characterization or description of the lawsuit. To the extent a response is required, the Defendant City denies any assertions of liability as stated or suggested in Paragraph 3.

5. As to the allegations set forth in Paragraph 4 of the Plaintiff's Second Amended Complaint, the Defendant City admits that the Defendant Georgetown County is a governmental

entity and that the Defendant County has leased the property known as East Bay Park from the Defendant City. The remaining allegations set forth in Paragraph 4 are denied as stated.

6. As to the allegations set forth in Paragraph 5 of the Plaintiff's Second Amended Complaint, the Defendant City admits that the City of Georgetown is a governmental entity and is the owner of property known as East Bay Park. The remaining allegations set forth in Paragraph 5 are denied.

7. As to the allegations set forth in the first sentence of Paragraph 6 of the Plaintiff's Second Amended Complaint, the Defendant City admits that the Defendant South Carolina Department of Transportation is a state agency of the State of South Carolina. As to the allegations set forth in the second sentence of Paragraph 6, the Defendant City admits that the Front Street and Greenwich Drive at and near the intersection of the two streets are owned by the Defendant South Carolina Department of Transportation.

8. The allegations set forth in Paragraph 7 of the Plaintiff's Second Amended Complaint are denied as stated.

9. The allegations set forth in Paragraphs 8 and 9 of the Plaintiff's Second Amended Complaint are denied. Further answering, the Defendant City denies the existence of any road defects as claimed.

10. As to the allegations set forth in Paragraph 10 of the Plaintiff's Second Amended Complaint, the Defendant City admits that the Front Street and Greenwich Drive at and near the intersection of the two streets are owned by the Defendant South Carolina Department of Transportation and that the Department is responsible for the repair and maintenance of the stormwater drainage facilities located within the right-of-way of those streets.

11. The allegations set forth in Paragraphs 11 and 12 of the Plaintiff's Second Amended Complaint are denied.

12. As to the allegations set forth in Paragraph 13 of the Plaintiff's Second Amended Complaint, the Defendant City admits that only the Defendant Georgetown County is responsible for the maintenance and upkeep of East Bay Park per the Lease Agreement dated July 11, 2006.

13. The allegations set forth in Paragraph 14 of the Plaintiff's Second Amended Complaint are denied.

14. The allegations set forth in Paragraph 15 of the Plaintiff's Second Amended Complaint are jurisdictional in nature, to which no response is required.

15. The allegations set forth in Paragraph 16 of the Plaintiff's Second Amended Complaint are admitted. Further answering, the Defendant City craves reference to the Lease Agreement for the specific terms and provisions of that lease of the East Bay Park property.

16. As to the allegations set forth in Paragraph 17 of the Plaintiff's Second Amended Complaint, the Defendant City craves reference to the Lease Agreement for the specific terms and provisions of that lease of the East Bay Park property.

17. As to the allegations set forth in Paragraphs 18, 19, and 20 of the Plaintiff's Second Amended Complaint, the Defendant City admits that improvements have been made to the East Bay Park property in 2015 and 2016, including the replacement of the existing tennis courts which was undertaken by the Defendant County and improvements to other portions of East Bay Park for which the City craves reference to the plans and specifications for the work. The Defendant City, however, denies that "water management features" were removed from East Bay Park or any planned improvements.

18. The allegations set forth in Paragraphs 21 through 31 of the Plaintiff's Second Amended Complaint are denied.

19. As to the allegations set forth in Paragraph 32 of the Plaintiff's Second Amended Complaint, the Defendant City lacks sufficient information to admit or deny those allegations,

with the exception that the City denies any allegation that the City made any such “suggestion” to the Plaintiff.

20. The allegations set forth in Paragraphs 33 through 36 of the Plaintiff's Second Amended Complaint are denied.

21. The allegations set forth in Paragraphs 37 and 38 of the Plaintiff's Second Amended Complaint are not directed against the Defendant City, and therefore, do not require a response. However, to the extent these allegations attempt to establish liability or wrongdoing on the part of the Defendant City, those allegations are denied.

22. The allegations set forth in Paragraphs 39, 40, and 41 of the Plaintiff's Second Amended Complaint are denied.

23. As to the allegations set forth in Paragraph 42 of the Plaintiff's Second Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein.

24. The allegations set forth in Paragraphs 43, 44, and 45 of the Plaintiff's Second Amended Complaint are denied.

25. The allegations set forth in Paragraph 46 of the Plaintiff's Second Amended Complaint, including all subparts, are denied.

26. The allegations set forth in Paragraphs 47 and 48 of the Plaintiff's Second Amended Complaint are denied.

27. As to the allegations set forth in Paragraph 49 of the Plaintiff's Second Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

28. The allegations set forth in Paragraph 50 of the Plaintiff's Second Amended Complaint state a legal conclusion to which no response is required. Further answering, the Defendant City denies any taking of the Plaintiff's property for a public use.

29. The allegations set forth in Paragraphs 51, 52, and 53 of the Plaintiff's Second Amended Complaint are denied.

30. As to the allegations set forth in Paragraph 54 of the Plaintiff's Second Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

31. The allegations set forth in Paragraphs 55, 56, and 57 of the Plaintiff's Second Amended Complaint are denied.

32. As to the allegations set forth in Paragraph 58 of the Plaintiff's Second Amended Complaint, the Defendant City reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant City objects to the jumbling of causes of action.

33. The allegations set forth in Paragraph 59 of the Plaintiff's Second Amended Complaint are denied. Further answering, S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act and is also in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution

34. The allegations and relief sought in the Prayer for Relief are denied.

FOR A SECOND DEFENSE

35. The Plaintiff's Second Amended Complaint, in whole or in part, fails to state a cause of action upon which relief may be granted. The Defendant City reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCF, and/or Rule 12(c), SCRCF.

FOR A THIRD DEFENSE

36. The Plaintiff's claims are, in whole or in part, barred based upon operation of the common enemy rule.

FOR A FOURTH DEFENSE

37. The Plaintiff's claims are, in whole or in part, barred based upon the defense of laches.

FOR A FIFTH DEFENSE

38. The Plaintiff's claims are, in whole or in part, barred by the applicable statute of limitations and statute for repose.

FOR A SIXTH DEFENSE

39. The Plaintiff's claims are, in whole or in part, barred based upon the defense of Act of God.

FOR A SEVENTH DEFENSE

40. The Plaintiff's claims are barred by the defense of comparative negligence, including the Plaintiff's assumption of the risk and the Plaintiff's failure to exercise reasonable care for his own property. In the alternative, the Plaintiff's recovery should be reduced by the Plaintiff's proportion of fault.

FOR AN EIGHTH DEFENSE

41. The Defendant City asserts the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act, including but not limited to the definition of "loss" as set forth in S.C. Code Ann. § 15-78-30(f), the damages caps set forth in S.C. Code Ann. § 15-78-120 and the bar on the recovery of pre-judgment interest, punitive damages and attorney's fees.

FOR A NINTH DEFENSE

42. The Defendant City is absolutely immune from suit pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, specifically the immunities set forth in S.C. Code Ann. § 15-78-60(1), (2), (3), (4), (5), (7), (8), (9), (13), (16), and (20).

FOR A TENTH DEFENSE

43. The Defendant City is absolutely immune from the Plaintiff's tort claims pursuant to S.C. Code Ann. §§ 15-78-40 and/or 15-78-50(b) of the South Carolina Tort Claims Act.

FOR AN ELEVENTH DEFENSE

44. The Plaintiff's claims against the Defendant City are barred by operation of S.C. Code Ann. § 15-78-70(d) as a result of the settlement entered in this action between the Plaintiff and the co-Defendant Green Wave Contracting, Inc.

FOR A TWELFTH DEFENSE

45. The Defendant City alleges that any damages alleged to have been caused by any tortfeasors, which are specifically denied, must be apportioned between the Defendant City and all other tortfeasors, pursuant to S.C. Code Ann. § 15-78-100(c).

FOR A THIRTEENTH DEFENSE

46. The Defendant City asserts the defense of sovereign immunity as to all claims for money damages.

FOR A FOURTEENTH DEFENSE

47. The Defendant City is entitled to absolute immunity under *Long v. Seabrook* and its progeny.

FOR A FIFTEENTH DEFENSE

48. The Defendant City is immune from suit pursuant to the Stormwater Management and Sediment Reduction Act. In particular, S.C. Code Ann. § 48-14-160(1) provides in pertinent

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 SIXTEENTH DEFENSE

49. The Defendant City alleges that this action is barred, in whole or in part, by the defense of release or settlement.

FOR A SEVENTEENTH DEFENSE

50. The Plaintiff has failed to mitigate his damages, thereby barring his recovery in whole or in part.

FOR A EIGHTEENTH DEFENSE

51. The Plaintiff's claims are barred by the public duty rule.

FOR A NINETEENTH DEFENSE

52. The Plaintiff's claims are, in whole or in part, barred based upon the defense of ripeness and the Plaintiff's failure to exhaust available administrative remedies.

FOR A TWENTIETH DEFENSE

53. The Plaintiff has failed to join indispensable party under Rule 19, specifically the Plaintiff's spouse, Deborah S. Christmas, who has an ownership interest in the 101 Greenwich Street property. The Defendant City reserves its right to file a motion pursuant to Rule 12(b)(7), SCRCP.

FOR A TWENTY-FIRST DEFENSE

54. To the extent deemed an avoidance, the Defendant City pleads that S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act.

FOR A TWENTY-SECOND DEFENSE

55. The Plaintiff's Fourth Cause of Action for a violation of S.C. Code Ann. § 5-31-450 and that statute, on its face and as applied, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution.

FOR A TWENTY-THIRD DEFENSE

56. The Defendant City reserves its right to oppose the Plaintiff's request for a trial by jury.

WHEREFORE, the Defendant City of Georgetown prays that the Plaintiff's Second Amended Complaint be dismissed with prejudice; for the denial of all monetary and injunctive relief as sought by the Plaintiff; for a ruling that S.C. Code Ann. § 5-31-450 has been impliedly repealed by the enactment of the South Carolina Tort Claims Act; for a ruling that S.C. Code Ann. § 5-31-450, on its face and as applied, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the South Carolina Constitution; for the costs of this action; and for such other and further relief as the Court deems just and proper.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
 ANDREW F. LINDEMANN #13030
 5 Calendar Court, Suite 202
 Post Office Box 6923
 Columbia, South Carolina 29260
 (803) 881-8920
 Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

December 15, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 Ron Christmas,	)	
	)	Civil Action No. 2020-CP-22-0356
Plaintiff,	)	
	)	
v.	)	
	)	NOTICE OF MOTION AND
County of Georgetown, City of	)	MOTION FOR SUMMARY JUDGMENT
Georgetown, and South Carolina	)	
Department of Transportation,	)	
	)	
Defendants.	)	
_____	)	

TO: JUSTIN O. LUCEY AND JOSHUA F. EVANS, COUNSEL FOR PLAINTIFF

M. KIRK BATTLE AND MICHAEL W. BATTLE, COUNSEL FOR DEFENDANT
GEORGETOWN COUNTY

LISA A. THOMAS, COUNSEL FOR DEFENDANT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant City of Georgetown will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Georgetown Judicial Center, Georgetown, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCF, granting summary judgment to the Defendant City of Georgetown and dismissing the Plaintiff's Second Amended Complaint with prejudice.

The Defendant City's motion is based upon the following grounds:

1. The Plaintiff cannot prove each of the elements of his negligence/gross negligence cause of action, including a duty of care owed to the Plaintiff by the Defendant City,

a breach of any such duty of care by the Defendant City, the existence of proximate cause, and damages to the Plaintiff proximately caused by any breach.

2. The Plaintiff's tort causes of action are governed by the South Carolina Tort Claims Act. The Defendant City is entitled to absolute sovereign immunity pursuant to S.C. Code Ann. §§ 15-78-60(7), (8), (9), (16), and (20).

3. The Defendant City is also entitled to absolute sovereign immunity pursuant to S.C. Code Ann. §§ 15-78-40 and 15-78-50(b) for all allegations or claims for which there is no private analogue.

4. The Plaintiff's tort causes of action are barred by the applicable two-year statute of limitations under the South Carolina Tort Claims Act.

5. The Plaintiff's tort causes of action are barred by application of the common enemy rule.

6. The Plaintiff's tort causes of action are barred by the defense of Act of God.

7. As to the Plaintiff's Second Cause of Action for inverse condemnation, the Plaintiff cannot prove the elements of the claim including (1) affirmative conduct by the Defendant City, (2) that effected a taking, and (3) that the taking is for a public use. In other words, the Plaintiff cannot prove "an affirmative, aggressive, and positive act" by the Defendant City caused any recoverable damage to the Plaintiff's property. Moreover, in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals affirmed summary judgment for a municipality on an inverse condemnation claim arising out of allegations that the municipality failed to properly design and maintain its stormwater drainage system which resulted in flooding of the plaintiff's property. The Court of Appeals also held that "[a]llegations of mere failure to act are insufficient" to establish the requirement of an "affirmative, positive, aggressive act" by the municipality. 594 S.E.2d at 563.

8. The Plaintiff's Second Cause of Action for inverse condemnation is barred by the applicable statute of limitations.

9. The Plaintiff's Fourth Cause of Action for a violation of S.C. Code Ann. § 5-31-450 is barred because that Code section was impliedly repealed by the enactment of the South Carolina Tort Claims Act.

10. If the Court determines that S.C. Code Ann. § 5-31-450 has not been impliedly repealed, the Plaintiff cannot prove a claim under that Code section because he has not shown an overt act committed by the Defendant City that proximately caused the damages being claimed. In addition, the Plaintiff cannot establish each of the elements for such a cause of action. Finally, the Plaintiff's expert witness, Robert L. Castles, Jr. opined that "[m]ost of the water, in my opinion, that's flooding him is coming out of Winyah Bay," and when asked to quantify what he described as "most," the expert opined that 90 percent of the flooding to the Plaintiff's property is caused by tidal flooding rather than stormwater. *See*, Castles Depo., pp. 115-116. S.C. Code Ann. § 5-31-450 applies to stormwater and not to tidal flooding.

11. The Plaintiff's Fourth Cause of Action is barred by the applicable statute of limitations.

12. The Defendant City is immune from suit pursuant to the Stormwater Management and Sediment Reduction Act. In particular, S.C. Code Ann. § 48-14-160(1) provides in pertinent 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."

13. The Plaintiff's claim for a mandatory injunction fails because the Plaintiff cannot establish each of the elements of such a claim. In addition, the Defendant City does not own,

operate, or maintain the roadways at issue, nor does the City have any legal responsibility for the stormwater drainage facilities at issue, which are located with the South Carolina Department of Transportation right-of-way, and as a result, the Court cannot order the City to perform repairs to roads or drainage facilities it does not own and has no legal duty to maintain. The Plaintiff also lacks standing to seek or obtain an order directing governmental entities to perform repairs to public roadways or other public infrastructure.

14. The Plaintiff's claim for a mandatory injunction is barred by the doctrine of laches.

15. The Plaintiff's claims are barred by operation of the public duty rule.

16. The Plaintiff's claims against the Defendant City are barred by operation of S.C. Code Ann. § 15-78-70(d) as a result of the settlement entered in this action between the Plaintiff and the co-Defendant Green Wave Contracting, Inc.

17. The Plaintiff's Third Cause of Action for a writ of mandamus, to the extent it is pled as such, fails because the Plaintiff cannot demonstrate each of the elements required for the issuance of a writ of mandamus. "[T]o obtain a writ of mandamus requiring the performance of an act, the applicant must show (1) a duty of the opposing party to perform the act, (2) the ministerial nature of the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." *Charleston County School District v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567, 572 (1999). The Plaintiff has failed to plead facts supporting each of these four elements and can present no evidence to support each of these four elements.

The Defendant City's motion is based upon the pleadings filed in this case; a supporting memorandum as may be filed; the Deposition of Ronald Christmas (excerpts to be submitted); the Deposition of Robert L. Castles, Jr. (excerpts to be submitted); the Rule 30(b)(6) Deposition of the South Carolina Department of Transportation (excerpts to be submitted); the Settlement Agreement

between Plaintiff and the Defendant Green Wave Contracting, Inc. (because the Settlement Agreement has a confidentiality clause, the Defendant City will make a copy available to the Court at the time of the hearing); the rules of court; and such other matters as may be presented to the Court at or before the time of the hearing.

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

July 30, 2023

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 Ron Christmas,	)	
	)	Civil Action No. 2020-CP-22-0356
Plaintiff,	)	
	)	
v.	)	
	)	PRE-TRIAL BRIEF
County of Georgetown; City of	)	OF DEFENDANT
Georgetown; and South Carolina	)	CITY OF GEORGETOWN
Department of Transportation,	)	
	)	
Defendants.	)	
_____	)	

The Defendant City of Georgetown hereby submits this Pre-Trial Brief in accordance with Rule 16(c), SCRCP.

1. A concise, non-argumentative statement of the facts of the case.

The Plaintiff Ron Christmas is an owner of a residence located at 101 Greenwich Drive, Georgetown, South Carolina. The subject property is located at the intersection of Greenwich Drive and Front Street, which is waterfront property directly on Winyah Bay. The house itself is built on supports because the area is routinely subject to flooding from high tides and king tides from Winyah Bay. The property is, in fact, located in a FEMA flood zone. In response to interrogatories, the Plaintiff has acknowledged prior flood insurance claims. This waterfront area is subject to flooding, as acknowledged by Plaintiff's expert, Robert Castles.

The City of Georgetown owns the property across Front Street from the Plaintiff's property. The City's property has been developed and used as East Bay Park. While the City owns the park, it has leased the park to Georgetown County. In the 2016-2017 timeframe, the City undertook various improvements to East Bay Park, including removal of the athletic fields,

the addition of a walking path, improvements to the boat ramp area including the addition of a parking area and bathroom. In addition, the tennis courts were redone by the County. East Bay Park is encircled by Greenwich Drive, Front Street, and East Bay Street, all of which are SCDOT roads. Timothy Britt, the representative for SCDOT, testified that the roadways encircling the part are all SCDOT-owned roads and that the drainage facilities within the SCDOT right-of-way are SCDOT's responsibility to maintain.

As mentioned, in 2006, the City and Georgetown County entered into a 20-year lease for East Bay Park. That lease agreement includes a maintenance provision stating: County shall be responsible for all maintenance and upkeep of Property. Property excludes all roads surrounding Property.” Thus, the maintenance responsibilities for the park itself fall on the County, and the maintenance responsibilities for the roadways and the drainage facilities within the SCDOT right-of-way are SCDOT's responsibility. Although the roads are SCDOT-owned, the Stormwater Department for the City has on occasion responded to citizen complaints and performed cleaning activities of the catch basins and lines to address those complaints.

2. An objective statement of the facts in controversy.

The Defendant City is not aware of any genuine issue of material fact in controversy. Accordingly, the City does have a Motion for Summary Judgment pending.

3. The legal issues involved. This includes the law applicable to the cause of action and the defense.

The Plaintiff brought this lawsuit in April 2020, alleging claims against the City of Georgetown, Georgetown County, and Green Wave Contracting, Inc., the latter being the contractor who performed the re-build of the tennis courts. The causes of action against the City are negligence and inverse condemnation. The Plaintiff then filed an Amended Complaint that added the South Carolina Department of Transportation (“SCDOT”) as a party. In addition, the

Plaintiff amended the original Complaint to add a cause of action pursuant to Section 5-31-450. The Plaintiff has also sued for mandamus relief and a permanent injunction.

The Plaintiff's First Cause of Action is for negligence/gross negligence. The Plaintiff's tort causes of action are governed by the South Carolina Tort Claims Act. The Defendant City is entitled to absolute sovereign immunity pursuant to S.C. Code Ann. §§ 15-78-60(7), (8), (9), (16), and (20). The Defendant City is also entitled to absolute sovereign immunity pursuant to S.C. Code Ann. §§ 15-78-40 and 15-78-50(b) for all allegations or claims for which there is no private analogue. Moreover, the Plaintiff's tort causes of action are barred by the applicable two-year statute of limitations under the Tort Claims Act. Those claims are also barred by application of the common enemy rule. Finally, the Plaintiff's claims are barred by the defense of Act of God.

Additionally, the Plaintiff's claims under the Tort Claims Act are barred by operation of S.C. Code Ann. § 15-78-70(d) as a result of the settlement entered in this action between the Plaintiff and the co-Defendant Green Wave Contracting, Inc.

As to the Plaintiff's Second Cause of Action for inverse condemnation, the Plaintiff cannot prove the elements of the claim including (1) affirmative conduct by the Defendant City, (2) that effected a taking, and (3) that the taking is for a public use. In other words, the Plaintiff cannot prove "an affirmative, aggressive, and positive act" by the Defendant City caused any recoverable damage to the Plaintiff's property. Moreover, in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals affirmed summary judgment for a municipality on an inverse condemnation claim arising out of allegations that the municipality failed to properly design and maintain its stormwater drainage system which resulted in flooding of the plaintiff's property. The Court of Appeals also held that "[a]llegations of mere failure to act are insufficient" to establish the requirement of an "affirmative, positive, aggressive act" by

the municipality. 594 S.E.2d at 563. The inverse condemnation claim is also barred by the applicable statute of limitations.

Moreover, the Defendant City is immune from suit pursuant to the Stormwater Management and Sediment Reduction Act. In particular, S.C. Code Ann. § 48-14-160(1) provides in pertinent 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."

The Plaintiff's Third Cause of Action for a writ of mandamus, to the extent it is pled as such, fails because the Plaintiff cannot demonstrate each of the elements required for the issuance of a writ of mandamus. "[T]o obtain a writ of mandamus requiring the performance of an act, the applicant must show (1) a duty of the opposing party to perform the act, (2) the ministerial nature of the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." *Charleston County School District v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567, 572 (1999). The Plaintiff has failed to plead facts supporting each of these four elements and can present no evidence to support each of these four elements.

Likewise, the Plaintiff's claim for a mandatory injunction fails because the Plaintiff cannot establish each of the elements of such a claim. As indicated, the Defendant City does not own, operate, or maintain the roadways at issue, nor does the City have any legal responsibility for the stormwater drainage facilities at issue, which are located with the SCDOT right-of-way, and as a result, the Court cannot order the City to perform repairs to roads or drainage facilities it does not own and has no legal duty to maintain. The Plaintiff also lacks standing to seek or obtain an order directing governmental entities to perform repairs to public roadways or other

public infrastructure. Further, the Plaintiff's claim for a mandatory injunction is barred by the doctrine of laches.

The Plaintiff's Fourth Cause of Action for a violation of S.C. Code Ann. § 5-31-450. S.C. Code Ann. § 5-31-450 is a statute that pre-dates the Tort Claims Act and the waiver of sovereign immunity. The case law generally holds that S.C. Code Ann. §5-31-450 requires "positive action" or an "overt act" by a municipality to render it liable for damages under the statute. It has been held that "[t]he statute does not make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover." As a result, the plaintiff must plead and prove an overt act against the municipality proximately causing the damages complained of in order to state a claim for a violation of S.C. Code Ann. § 5-31-450. The City also contends that the claim pursuant to S.C. Code Ann. § 5-31-450 is barred because that Code section was impliedly repealed by the enactment of the Tort Claims Act. If the Court determines that S.C. Code Ann. § 5-31-450 has not been impliedly repealed, the Plaintiff cannot prove a claim under that Code section because he has not shown an overt act committed by the Defendant City that proximately caused the damages being claimed. In addition, the Plaintiff cannot establish each of the elements for such a cause of action. Finally, the Plaintiff's expert witness, Robert L. Castles, Jr. opined that "[m]ost of the water, in my opinion, that's flooding him is coming out of Winyah Bay," and when asked to quantify what he described as "most," the expert opined that 90 percent of the flooding to the Plaintiff's property is caused by tidal flooding rather than stormwater. *See*, Castles Depo., pp. 115-116. S.C. Code Ann. § 5-31-450 does not address tidal flooding. Finally, the Plaintiff's Fourth Cause of Action is barred by the applicable statute of limitations.

4. A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

The Defendant City is still in the process of finalizing an exhibit list which will be provided separately but will include photographs of East Bay Park, photographs of tidal flooding taken by Freddie Darby, photographs of the Plaintiff's property, property records for the subject property, flood insurance claims by the Plaintiff, the East Bay Park lease, and portions of the City's Drainage System Inspection and Maintenance Log.

Witnesses are as follows:

- (a) Orlando Arteaga (City Engineer)
- (b) Freddie Darby (Stormwater Manager)
- (c) Ronald Christmas
- (d) Thomas Britt of SCDOT
- (e) Dr. Till Hanebuth
- (f) Beth Goodale

5. Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.

The Defendant City anticipates that there will be expert witness issues under a *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) analysis.

6. Any unusual question or matter which should be brought to the attention of the court.

The Defendant City anticipates that there will be bifurcation issues with the inverse condemnation and mandamus/injunctive relief claims.

The Defendant City will be requesting a special verdict form that includes apportionment under S.C. Code Ann. § 15-78-100(c). The City further anticipates a likely need for special interrogatories as part of the verdict form.

7. A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

The parties proceeded through mediation which was unsuccessful.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

August 11, 2023

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Ron Christmas,

Plaintiff,

vs.

County of Georgetown, City of Georgetown;
Green Wave Contracting, Inc.; South Carolina
Department of Transportation; and John Doe
1-10,

Defendants,

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2020-CP-22-00356

**RULE 16 SCRPC PRE-TRIAL
BRIEF**

Defendant County of Georgetown submits the following brief:

FACTS

1. NON-CONTROVERTED STATEMENT OF FACTS.

Plaintiff's property borders on Winyah Bay. Plaintiff purchased his property at 101 Greenwich Drive around 2002. The property is located in the City of Georgetown next to the intersection of Greenwich Drive and Front Street. South of his property is East Bay Park. East Bay Park is leased by Georgetown County and owned by the City of Georgetown. The lease agreement began in 2006. Under the lease the County is responsible for maintaining certain aspects of the park. Its duties primarily involve mowing the grass and maintaining the tennis courts. The lease excludes from the County any duties to maintain the roads or drainage.

Beginning in 2016, the County replaced 3 tennis courts and added 3 new tennis courts which are located approximately 200 yards across open grass fields south of Plaintiff's property. The tennis court area is approximately 1/3 an acre. The tennis court area had been elevated prior to 2016 and it was further elevated in 2016. The total current elevation above sea level is

approximately four feet. The tennis court area is about the same size as the lot on which Plaintiff constructed his house and on which Plaintiff constructed cemented parking areas and driveways which cover most of Plaintiff's property.

COUNTY FACTS IN CONTROVERSY.

- a. Whether Plaintiff's property flooded before County constructed tennis courts.
- b. Whether the County's acts caused flooding on Plaintiff's property.
- c. Whether the County's acts caused any of Plaintiff's alleged damages.
- d. Whether Plaintiff's property has been lowered by the County's acts.
- e. Whether Front Street and Greenwich Drive have been lowered by the County's acts.
- f. Whether Plaintiff is the author of his own misfortune by his site selection, his building choices, and his maintenance actions.

COUNTY'S LEGAL THEORIES.

1. Plaintiff's claims against the County are for negligence, violation of SC Code Ann. §5-31-450, and inverse condemnation. Plaintiff's evidence is insufficient to establish any of his claims.
2. Plaintiff's claims are an attempt to modify the common enemy rule in a manner that has been rejected by S.C. courts.
3. Plaintiff's claims for negligence are barred by the SC Tort Claims Act including but not limited to a) two year statute of limitations; b) limitation of liability from non-employee acts; and c) discretionary acts.
4. Plaintiff's claims for negligence are barred by Plaintiff's comparative negligence.
5. Plaintiff's claims for negligence are barred by third party intervening negligence.
6. Plaintiff's claims are barred by "Act of God" defense.

7. Plaintiff's claims for negligence are barred by Plaintiff's assumption of risk for site selection and construction choices in a flood zone.
8. Plaintiff's claims for equitable relief are barred by the defenses unclean hands, equitable estoppel, waiver, and/or laches.
9. Plaintiff's claims for violation of SC Code Ann. §5-31-450 are barred because the statute only imposes a duty on municipalities and it does not impose a duty on the County.
10. Plaintiff's claims for inverse condemnation are barred because Plaintiff cannot establish the County performed any act which constituted a taking of Plaintiff's private property.

DEFENDANT'S EXHIBITS.

1. **10.25.2021 Preliminary Estimate for Christmas site work with wetlands.**
2. **10.25.2021 Preliminary Estimate for Christmas site work with wetlands.**
3. **2021.10.20 Near Map Area Calculation**
4. **ABS Preliminary Estimate for pavers on Christmas property**
5. **10.27.2021 ABS-Preliminary Report and estimates**
6. **2021 CISA and SC Sea Grant Salinity SARP report**
7. **Building Permit-Christmas**
8. **Check Valve Map**
9. **Christmas King Tides and Precipitation**
10. **Christmas-000030 Carolina Paver**
11. **Christmas-000062 Photo Oct. 01, 10 25 03 am**
12. **Christmas -000073 Photo Oct. 01, 10 39 23 am**
13. **Christmas-000074 Photo Oct. 01, 10 40 04 am**
14. **Christmas-000075 Photo Oct. 01, 10 40 08 am**
15. **Christmas-000079 Photo Oct. 01. 10 44 50 am**
16. **Christmas-000164 Photos**
17. **Christmas-000197 Christmas Damage Disclosure updated 10.26.21**
18. **Christmas-City-000001-Check Valve Map**
19. **Corrosion of Concrete-Corrosion of Concrete**
20. **County Lease**
21. **Custom Soil Resource Report for Georgetown County, South Carolina**
22. **DHEC APPROVAL**
23. **GeoTech Report**
24. **Geotechnical Report**
25. **Green Wave Contracting 16-077, Construction Contract**
26. **Hurricane Florence Flooding in Georgetown**
27. **Property Sale Paperwork**
28. **Tennis Court Plans**

29. Tide Chart Ron Christmas
30. USDA Soil- Christmas property
31. Site photos taken during Hanebuth investigation of roads, site & water

All exhibits listed by other parties.

DEFENDANT'S POTENTIAL WITNESSES.

- 1) Beth Goodale, Director of Parks and Reaction for Georgetown County.
- 2) Steve Moore, P.E. as the engineering expert.
- 3) Greg Cunningham, Parker Land Surveying representative.
- 4) Jenny Horne, Senior Landscape Architect Stantec.
- 5) Josh Lilly, P.E., Civil Engineer Stantec.
- 6) Joshua D. Jordan, P.E., Construction Services Group Leader, S&ME.
- 7) Ricky Rowe, Park Supervisor.
- 8) Dane Hanebuth, PhD. Expert Geologist
- 9) Blake Harwell, witness from Greenwave Construction

All witnesses named by the other parties.

1. UNUSUAL QUESTIONS OR MATTERS WHICH SHOULD BE BROUGHT TO THE ATTENTION OF THE COURT.

A special verdict form required by the S.C. Tort Claims Act will be requested by one or more of the Defendants.

Plaintiff's claims are an attempt to modify the common enemy rule in a manner that has been rejected by S.C. courts.

2. SETTLEMENT NEGOTIATIONS.

Settlement negotiations were attempted through mediation but the parties were not able to resolve their differences.

S/ Michael W. Battle S.C. Bar #584
Michael W. Battle
M. Kirk Battle
BATTLE LAW FIRM, L.L.C.

PO Box 530
Conway, SC 29528
(843)248-4321
kbattle@battlelawsc.com

August 11, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00356
Ron Christmas,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
County of Georgetown; City of Georgetown;	)	
and South Carolina Department of	)	
Transportation.	)	
	)	
Defendants.	)	

The Plaintiff, by and through his undersigned counsel, hereby submits the following pre-trial brief to the Court in accordance with Rule 16(c), SCRCP.

I. STATEMENT OF THE FACTS

A.) The Subject Property and Responsible Parties

This case stems from a confluence of three factors causing flooding and property damage at Plaintiff's property located at the intersection of Front Street and Greenwich Drive ("the Intersection"). The City of Georgetown ("City") and County of Georgetown ("County") made a series of improvements to East Bay Park in Georgetown, South Carolina, which had the effect of redirecting surface water towards Plaintiff's property and causing subsidence at the Intersection. South Carolina Department of Transportation's ("SCDOT") and City's failure to maintain the storm drainage infrastructure at the Intersection; and the City's failure to maintain the tidal gate at the Intersection, have combined with the County's development to expose the roadbed (and adjacent properties, including Plaintiff's) to regular wet/dry cycles and heavy usage, causing road subsidence and increased flooding of, and damage to, Plaintiff's access and property.

What was once a rare hurricane or king tide event several decades ago has become a regular event for portions of the year. The two largest causes are the failed stormwater system that facilitates regular saturation on the landward side of the road, and the two depressed damage areas on Greenwich Drive which facilitate frequent overtopping and inhibit vehicular and pedestrian access to Plaintiff's residence.

Plaintiff purchased the residential lot at 101 Greenwich Drive in Georgetown, South Carolina, in 2003 and thereafter constructed a home in 2005 (hereinafter referred to as the "Subject Property"). The Subject Property located across the street from Winyah Bay to the East and the East Bay Park to the South has been inundated with flooding as a result of the foregoing factors. The City owns East Bay Park and the County operates East Bay Park pursuant to a long-term lease; SCDOT owns the right-of-ways and roads at the Intersection; the City owns the tidal flap valve adjacent to the Intersection; and the City and SCDOT share maintenance of the storm water system under and adjacent to The Intersection.

The roads at the Intersection are owned by SCDOT and SCDOT is responsible for the repair and maintenance of the roads, adjacent right-of-ways, and the stormwater pipes under the State-owned roads. The City owns and maintains the stormwater management systems, ditches, and drainpipes that are not under the State-owned roads, and shares in the maintenance of storm pipes under the roads. The City has installed flap valves at one or more of the stormwater outfalls along Greenwich Drive and East Bay, to prevent tidal waters from backflowing into the drainage systems from the river. The County built the elevated tennis courts in East Bay Park and has assumed the maintenance of the open stormwater ditches in and at the perimeter of East Bay Park that feed into the drainage at or near the Intersection. The evidence reflects that the City and the

County have shared the maintenance of the wetlands water retention area at the north end of East Bay Park.

B.) Flooding Caused by Project and SCDOT'S Failure to Maintain Drainage Structures and Wetlands

On or around July 11, 2006, the County leased the East Bay Park property from the City for a term of twenty (20) years and subject to renewal thereafter on an annual basis. The lease agreement included "land, facilities, recreational equipment, and *improvements* located within the confines of East Bay Park and circled by Greenwich Drive, Front Street, and East Bay Street in the City of Georgetown" (emphasis added).

The City began instituting incremental changes in East Bay Park one decade ago. In 2012, the City improved a portion of the Park and added frisbee golf facilities. In 2015, the City facilitated the addition of concrete pad mounted workout stations by a third-party benefactor. In approximately 2016, the City adopted a master plan for the further improvement of East Bay Park (hereinafter, "The Project,"). Pursuant thereto, the City and the County acted in concert in the replacement of the existing flood prone tennis courts with twice as many elevated tennis courts in the middle of the improvements. The Project included mucking, filling, raising, improving, and reconstructing various parts of East Bay Park, including the tennis court project spearheaded by the County. The City planned and handled other improvements to East Bay Park, including converting additional pervious surfaces to impervious surfaces. Notwithstanding the publicly announced goal of improving drainage during the design and work on the Project, the City failed to plan or implement material drainage improvements and removed various water management features from the plans. Construction of the tennis portion of the Project began in 2017; and the County constructed six new, raised tennis courts and accessories; and the City thereafter

constructed the new, slightly raised, paved walking path, ball fields, boat ramp parking, and accessories.

The Project included hauling in hundreds of truckloads of dirt for the different improvements. The dirt was used in part to raise the elevation of the Park, thus creating a low spot at Plaintiff's property. The relative elevation of Plaintiff's property compared to the Park was made worse by damage inflicted to the roads by hauling in the hundreds of truckloads of dirt (and the use of the park as a staging area for heavy equipment for other City capital projects). Under the weight of these heavy truckloads of dirt, the road subsided. Now, because of the raised elevation of the Park and the subsided roads in front of Plaintiff's property, 101 Greenwich Drive is the lowest point in the immediate area. Thus, all surface water collects and intrudes upon Plaintiff's property, damaging his property, and making it inaccessible at times.

Defendants County and City raised the Project above the previous existing grade and raised the tennis courts substantially above the existing grade, thereby removing previous receptors for the surface water in the area. This had the effect of causing additional surface waters to flow towards and into the Intersection and onto Plaintiff's property. The Project has altered the course of, and increased the amount of, surface water flooding onto Plaintiff's property. The Project has altered the natural flow of waters, causing increased flooding onto Plaintiff's property and adjacent to the Intersection. Concurrently therewith, the Defendants' collective failure to maintain the drainage infrastructure (including tidal flaps), roads, and wetlands at and near the Intersection has also caused increased flooding at the Intersection. The increased flooding has caused the soils under Greenwich Drive to saturate and consolidate which has caused Greenwich drive to further subside at the Intersection, causing additional flooding.

The surface water drainage system(s) and components at the Northeast Corner of the Park and at the Intersection have not been maintained by the Defendants. As a result, the drainage pipes back-up, back fill, and fail to manage the waters that are damaging Greenwich Drive, the Intersection, and Plaintiff's property. As of recently, the drainage system facilitates the intrusion of river waters more often than it facilitates the discharge of stormwaters.

SCDOT has failed to maintain the roads at and adjacent to the Intersection, which have subsided and are now permitting increased tidal flooding. The cumulative and combined effect of the foregoing is an ever-worsening flooding condition at and near the intersection of Greenwich Drive and Front Street, and further deterioration, including subsidence caused by wet/dry cycles, to nearby properties. The excessive flooding has severely damaged Plaintiff's hardscape, pool, and home, adversely affected the property value, and prevents Plaintiff from reasonably accessing his property on the adjacent roads.

A new tidal gate was installed in the Spring of 2017 which presumably performed its intended function for a period of time. However, some of the Park improvements were performed thereafter and completed in 2018 which is believed to have contributed to the changed water flows and increased depression in the roads which led to the modern-day frequent flooding and damage.

C.) Litigation History and Current Status

Prior to filing this claim on April 3, 2020, Plaintiff brought the occasional flooding issues to the Defendants' attention. Defendants again received notice of these problems by the service of this suit and the depositions of Plaintiff, witnesses, and expert witnesses. Plaintiff additionally filed repair requests with SCDOT (local and central) nearly a year ago. All to no avail.

Defendants' agents have testified that they have been aware of the problems at the Intersection and have allegedly taken steps to assuage Plaintiff's concerns. Defendants owed

Plaintiff statutory and common law duties not to increase the discharge of surface water onto Plaintiff's property, to maintain the drainage systems, to maintain the roads, and for the other matters set forth in the Second Amended Complaint.

Plaintiff's operative Second Amended Complaint filed on November 30, 2022, claims the following failure of duties against each of the Defendants:

a) Defendant City undertook a duty to manage the surface waters at and feeding to the Intersection and installed and maintained a drainage system (which it mostly owns), and therefore had a duty to exercise due care in the maintenance of that system.

b) Defendant County undertook a duty to maintain the drainage ditches swales, and other features in and around East Bay Park, including those discharging into and under the Intersection, and therefore had a duty to use due care in the maintenance of those features.

c) Defendant SCDOT undertook a duty to install and maintain the roads in and adjacent to the Intersection, and to maintain the drainage pipes under the roads, and therefore had a duty to use due care in the maintenance of those features.

d) Defendants City and County undertook a duty not to direct their storm and surface water onto Plaintiff's property when renovating East Bay Park.

e) Additionally, in undertaking the installation and maintenance of roads and surface water control systems, Defendants owed a special duty to immediate adjoining property owners not to damage their property or their access to their property.

f) Additionally, SCDOT had a duty to maintain the roads such that they did not deprive Plaintiff of reasonable access to his property; and SCDOT additionally voluntarily undertook to repair the roads to prevent the foregoing deprivation.

Plaintiff claims that each of the foregoing duties has been breached by these Defendants and as a direct and proximate result of Defendants' acts and omissions, Plaintiff is being harmed by the excessive flooding onto his property, and a lack of road access to his property.

Plaintiff estimates the repairs needed to his home and surrounding hardscape, pool, outdoor kitchen, AC stand and doors, and fence exceed eight hundred thousand dollars. Additionally, he has suffered loss of use and carrying costs exceeding five hundred thousand dollars while being unable to fully use and enjoy the property. He has spent in excess of eighty-five thousand dollars on engineering experts to investigate, diagnose, and propose repairs.

II. FACTS IN CONTROVERSY

Defendants' responsibilities for the claimed causation factors are disputed. Defendants have based their defenses around the South Carolina Tort Claims Act. Defendants also allege that sea level rise is the cause of the flooding. While Plaintiff does not dispute some sea level rise, Plaintiff will show the majority of the flooding and damage is caused by the Defendants' acts and omissions.

III. LEGAL ISSUES

Plaintiff alleges the following Causes of Action:

1. Negligence/Gross Negligence (all Defendants);
2. Inverse Condemnation (all Defendants);
3. Injunction/Mandamus (all Defendants); and,
4. Violation of South Carolina Code § 5-31-450 (City and County).

Robert Castles, P.E., has provided Plaintiff with an expert report in this matter. His opinions include:

- County and City knew flooding was an issue at the Park;
- County and City raised the elevation of the Park;
- Wetlands within the Park have been compromised;
- The foregoing has forced additional surface drainage toward Plaintiff's home;

- Greenwich Drive has settled as a result of the weakening from saturation cycles and trucks hauling dirt;
- The drainage under and around Greenwich and Front streets has been damaged and has not been maintained; and
- The flooding and drainage have damaged Plaintiff's property.

Stephen Geiger, P.E., a geotechnical engineer, has reviewed Castles' findings and conducted additional inspections and analyses. Geiger has opined that the regular flooding and saturation of the sub-soils resulting from the re-direction of storm and surface waters have caused the subsidence that has damaged Plaintiff's property. As the soils get saturated, they get heavier and compress. The soils then consolidate or firm up as they dry. When they get wet again, the process starts over.

The legal principles controlling this matter are being addressed in Plaintiff's opposition to Summary Judgment, supplemented by Plaintiff's proposed jury charges.

IV. WITNESSES & EXHIBITS

A. EXHIBITS

Exhibit List attached hereto. Plaintiff attempted to conduct an exhibit conference, but one or more Defendants did/could not make time for one.

B. WITNESSES

Witness List attached hereto.

V. ANY UNUSUAL PROBLEMS RELATING TO EVIDENCE TO BE INTRODUCED

Plaintiff does not anticipate any unusual problems related to the evidence to be introduced at trial. Plaintiff's experts have prepared reports to support their findings and damages. These reports will be submitted as Exhibits to the Court. Additionally, per SCRCP Rule 1006, a summary of these reports may be used to present the information in Court. One defense expert has taken the unique position that the sea level rise at Plaintiff's property has occurred at five times the globally

recognized rate due to the sinking of Coastal Georgetown. Any other anticipated issues will be highlighted in a motion *in limine*.

VI. ANY UNUSUAL QUESTION OR MATTER WHICH SHOULD BE BROUGHT TO THE ATTENTION OF THE COURT

Plaintiff learned this weekend that, due to a late conflict, Plaintiff's expert Geiger is unavailable to testify until Wednesday morning. Geiger was recently notified of the designated date and time for his daughter to move into her dorm at Illinois Institute of Technology in Chicago. Geiger issued his report late last fall, but Defendants chose not to depose him.

On Monday, August 7, 2023, Plaintiff notified Defendants of his intent to perpetuate Geiger's testimony on August 10, 2023, because of the conflict. Defendants objected and refused to cooperate in the perpetuation of the testimony. Defense counsel further refused to indicate any other time they would make themselves available for a *de benne esse* deposition of Geiger. Presently, Geiger is flying in Tuesday night to be present at trial on Wednesday morning.

VII. A STATEMENT THAT SETTLEMENT NEGOTIATIONS WERE ATTEMPTED BEFORE THE DATE OF THE PRE-TRIAL HEARING, AND THE STATUS OF SETTLEMENT NEGOTIATIONS

The initial and amended complaints included claims against Georgetown County, City of Georgetown, and contractor Green Wave Contracting. Mediation commenced between the parties on November 21, 2021, with Mediator, Attorney Robert Calamari. Green Wave settled with Plaintiff and was subsequently dismissed with prejudice from the case. Post mediation, Defendants County and City took the position that Plaintiff's claims cannot be properly addressed without the involvement and cooperation of SCDOT; therefore, SCDOT was added to this suit as a Defendant in December of 2021. Plaintiff attempted negotiations with SCDOT to no avail. There have been no further discussions in the last ten months.

Respectfully submitted,

By: /s/Justin Lucey
Justin Lucey
Joshua F. Evans
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400 Phone
jlucey@lucey-law.com
jevans@lucey-law.com
Attorneys for Plaintiffs

August 11, 2023
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) **IN THE COURT OF COMMON PLEAS**

Ron Christmas,)
Plaintiff,) Civil Action No. 2020-CP-22-0356
v.)
County of Georgetown, City of) **NOTICE OF MOTION AND**
Georgetown, and South Carolina) **MOTION TO BIFURCATE**
Department of Transportation,)
Defendants.)

TO: JUSTIN O. LUCEY AND JOSHUA F. EVANS, COUNSEL FOR PLAINTIFF

M. KIRK BATTLE AND MICHAEL W. BATTLE, COUNSEL FOR DEFENDANT
GEORGETOWN COUNTY

LISA A. THOMAS, COUNSEL FOR DEFENDANT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant City of Georgetown will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Georgetown Judicial Center, Georgetown, South Carolina, at the call of the case, for an Order bifurcating the takings phase and the compensation phase of the Plaintiff's inverse condemnation claim as directed by the South Carolina Supreme Court in *Cobb v. South Carolina Dept. of Transportation*, 365 S.C. 360, 618 S.E.2d 299, 301 (2005). The Defendant City's motion is also supported by the Court of Appeals' decision in *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269 (Ct. App. 2013), where the Court, citing *Cobb*, explained: "In an inverse condemnation case, the trial court will first determine whether a claim has been established. Then, the issue of compensation may be submitted to a jury at either

party's request." 752 S.E.2d at 274.

In addition, the Defendant City will move for the bifurcation of the Plaintiff legal claims and his equitable claim for a permanent injunction. Under South Carolina law, it is well settled that "[w]hether an action is legal or equitable is primarily determined by the allegations in the complaint. Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court." *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386, 389 (Ct. App. 2004). (Citation omitted).

Finally, the Defendant City will move for the trial court to adjudicate the Plaintiff's request for a writ of mandamus which is a matter for the trial court, not a jury, to determine. As the Supreme Court explained, "[m]andamus is somewhat of a hybrid proceeding. It is not a suit in tort, nor is it a suit in contract; it is not strictly a law case, nor is it one in equity. It is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. Whether to issue a writ of mandamus lies within the sound discretion of the trial court." *Charleston County School District v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567, 570 (1999). (Citation omitted).

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
 ANDREW F. LINDEMANN #13030
 5 Calendar Court, Suite 202
 Post Office Box 6923
 Columbia, South Carolina 29260
 (803) 881-8920
 Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

August 12, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) **IN THE COURT OF COMMON PLEAS**

Ron Christmas,)
Plaintiff,) Civil Action No. 2020-CP-22-0356
v.)
County of Georgetown, City of) **NOTICE OF MOTION AND**
Georgetown, and South Carolina) **MOTION IN LIMINE**
Department of Transportation,)
Defendants.)

TO: JUSTIN O. LUCEY AND JOSHUA F. EVANS, COUNSEL FOR PLAINTIFF

M. KIRK BATTLE AND MICHAEL W. BATTLE, COUNSEL FOR DEFENDANT
GEORGETOWN COUNTY

LISA A. THOMAS, COUNSEL FOR DEFENDANT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant City of Georgetown will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Georgetown Judicial Center, Georgetown, South Carolina, at the call of the case, for an order in limine as described below.

1. The Defendant City requests an order in limine excluding the damages evidence to be elicited from Roger England including specifically Plaintiff's Exhibit 171. That document titled "Estimate Cost Water Damage" was never produced during discovery and was not received until an email with the Plaintiff's proposed trial exhibits was received on Thursday evening, August 10, 2023, at 7:50 p.m. In addition, the Plaintiff never produced any documents from this witness that form the basis for his damages opinions. The Plaintiff never supplemented the Defendant City's

interrogatories as to the opinions to be provided by expert witnesses and the bases for those opinion nor the City's requests for production seeking documents prepared by expert witnesses and "any documents, including but not limited to estimates, proposals, invoices, and bills, relating in any respect to the damages claimed by the Plaintiff against any of the Defendants." The Plaintiff has still not produced any invoices or other documents as referenced in or serve as the underlying support for Plaintiff's Exhibit 171, including information from third-party contractors. The Court is requested to exclude Plaintiff's Exhibit 171 and limit the introduction of damages information to that which was timely produced during discovery.

2. The Defendant City requests an order in limine excluding any arguments or evidence that the City is liable for damage to the SCDOT-owned Greenwich Drive due to the travel of dump trucks along the road as part of the renovations to East Bay Park. The City's position is two-fold.

First, under South Carolina law, "[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). In evaluating the reliability of scientific expert testimony, the Court considers factors which include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, 517 (1999). The Plaintiff is relying on the opinions of Robert L. Castles, Jr. to claim that trucks used as part of the East Bay Park renovation project resulted in the subsidence of Greenwich Drive. Those opinions have not been shown to be reliable under a *State v. Council* analysis.

In addition, the opinions by Castles are not relevant to any issue or claim on which the

Plaintiff may proceed. The work that is challenged, including the use of dump trucks to carry fill dirt along Greenwich Drive, was work performed by contractors for the City and County. The City cannot be held liable for the acts or omissions of contractors under Section 15-78-60(20) of the Tort Claims Act. Further, even if there was damage to Greenwich Drive, that is an SCDOT-owned road, and the Plaintiff cannot make a claim for the alleged damage to a third-party's property.

3. The Defendant City requests an order in limine excluding evidence of the engineering and/or design work that was performed by Mead & Hunt and other engineering contractors of the Defendant City on the East Bay Park renovation project. The City cannot be held liable for the acts or omissions of contractors under Section 15-78-60(20) of the Tort Claims Act. In addition, the Plaintiff's expert, Robert Castles, Jr. testified that he did not have any criticisms of the design work performed by the City's engineering contractor with respect to the drainage plans for the East Bay Park project and would not offer opinions that Kevin Barnes of Mead & Hunt violated the standard of care with respect to any drainage plans. *See*, Castles Depo., pp. 108-110.

4. The Defendant City requests an order in limine excluding any evidence as to potential repairs or changes that can be made to the stormwater drainage system, to the roadways, and/or to East Bay Park so that such evidence is not admitted before the jury but rather may be submitted only for the trial court's consideration as part of the bifurcation of the case. The Plaintiff's claims for a writ of mandamus and permanent injunctive relief are not claims for the jury to decide. Such evidence, if even admissible and relevant, would be relevant only to the Plaintiff's claims for a writ of mandamus and permanent injunctive relief and is not relevant or material to any claims or issues to be decided by the jury.

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann

ANDREW F. LINDEMANN #13030

5 Calendar Court, Suite 202

Post Office Box 6923

Columbia, South Carolina 29260

(803) 881-8920

Email: andrew@ldlawsc.com

Counsel for Defendant City of Georgetown

August 13, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL
COUNTY OF GEORGETOWN	)	CIRCUIT CASE NO. 2020-CP-22-00356
Ron Christmas,	)	
	)	
Plaintiff,	)	PLAINTIFF’S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT CITY
vs.	)	OF GEORGETOWN’S MOTION FOR
	)	SUMMARY JUDGMENT
County of Georgetown; City of Georgetown; and	)	
South Carolina Department of Transportation,	)	
	)	
Defendants.	)	

Plaintiff Ron Christmas (hereinafter “Plaintiff”), by and through his undersigned counsel, respectfully submits this Memorandum in Opposition to Defendant City of Georgetown (“City”)’s Notice of Motion and Motion for Summary Judgment (“Motion”) as follows:

SUMMARY OF ARGUMENT

City’s Motion for Summary Judgment should be denied. Plaintiff has established the elements of negligence; City cannot escape liability through sovereign immunity, the common enemy rule, Act of God defense, or public duty rule; Plaintiff brought his claims timely; City can proffer no evidence that S.C. Code Ann. § 5-31-450 (the South Carolina Stormwater Statute) was “impliedly repealed” by the South Carolina Tort Claims Act; Plaintiff has demonstrated the “overt act” necessary for both the Stormwater Statute and Inverse Condemnation;¹ Defendant Green Wave Contracting, Inc.’s settlement with Plaintiff does not absolve City of liability; and Plaintiff has properly pled and established the elements for an injunction and writ of mandamus.

FACTUAL BACKGROUND

¹ City also alleges it is immune from liability from the Stormwater Management and Sediment Reduction Act, S.C. Code Ann. § 48-14-160. As Plaintiff has not brought such a claim, Plaintiff will not address the merits of the defense.

This case concerns flooding damages to Plaintiff's property resulting from a series of improvements made in recent years to East Bay Park and adjacent areas, and the additional adjacent failures to maintain 1) the surrounding roadways, and 2) the drainage systems in the area, resulting in the Plaintiff's loss of access to his property.²

Plaintiff purchased the property at 101 Greenwich Drive in 2002 and thereafter constructed a residence in 2005. The home is north of East Bay Park, at the corner of Greenwich and Front streets, and faces Winyah Bay.³ The East Bay Park real estate is owned by the City of Georgetown, but the Park is operated by the County of Georgetown ("County") pursuant to a 2006 twenty (20) year lease.

In approximately 2016, the City and County planned the park improvements in part because the Park was regularly flooding. Construction of the improvements began in 2017. The County demolished three (3) tennis courts that were essentially at grade. Because of known flooding problems at the Park, the County constructed six (6) new tennis courts approximately three (3) feet higher than the prior courts. The City constructed the new raised, paved walking path, boat ramp parking, and other improvements.⁴ The construction work necessitated hundreds of heavy trucks loaded with dirt, as well as other heavy equipment, traversing Greenwich and Front streets. Additionally, the City was concurrently using an area within the Park as a laydown area to

² The area in question primarily consists of the intersection of Front Street and Greenwich Drive and within three hundred feet thereof in either direction ("the Intersection").

³ Plaintiff also owns the land across the street between Greenwich Drive and the Bay.

⁴ The Park improvements began in approximately 2012 with the addition of the frisbee golf course, continued in 2015 with the installation of the concrete workout station pads, followed thereafter by the improvement of the boat ramp and boat parking and ball fields, followed by the renovation of and elevation of the tennis courts and the improvement of the tennis parking, which was followed by the installation of the paved walking path. More recently, a dog park and bathrooms have been added and a protective picnic area/pavilion has been in process.

store heavy equipment and dumpster loads of dirt/sand brought in by truck from elsewhere in town.⁵

Around the same time, the County abandoned the Bobby Alford Recreational Center that had operated in the park for decades due to the on-going flooding the Park experienced. In total, Defendants raised the grade materially above the previous existing grade, added more impervious surfaces than were previously present, and contributed to flooding at the Intersection and onto Plaintiff's property. They didn't stop the East Bay Park flooding from occurring, they simply directed some of it off the Park, into The Intersection, and onto Plaintiff's property.

As the owner of East Bay Park, the City, through its engineer, Orlando Arteaga, was involved in reviewing and approving the plans for all sections of the Park improvements.

The Defendants then compounded the problem. One or more Defendants started mowing the wetlands at the north end of the Park, adjacent to Plaintiff's property. As a result, the soil in the wetlands became matted and no longer drained. Additionally, the two (2) operative catch basins (concrete drain boxes with drainage pipes intended to evacuate the water) became inoperable. Additionally, The piped drainage system in the wetlands, under the roads, and ultimately draining into the Bay, was not maintained. The catch basin in the wetlands at the corner of Front and Greenwich has subsided. Other catch basins and pipes in the area are likewise in disrepair and blocked with debris.

The Defendants compounded the problem with other acts and omissions. Defendants have permitted tidal waters to regularly pass under the road and saturate it from both sides. Greenwich

⁵ See, e.g., R. Rowe Dep. Tr. 56:24 – 57:14 (testifying the City stored dirt and equipment behind the Alford Center for a water main project around 2017 or so); *id.* at 78:6 – 80:8 (identifying Pl. Ex. 48 photos of laydown area in Park); *see also* Pl. Ex. 48 at pp. 178 & 180-81 (photos of dirt, trailers in the laydown area for water main project).

Drive has been documented to have subsided. Water is entering the base course and causing the soils to consolidate. These saturated soils compress under their own weight and subsided further under the weight of the Park construction traffic. The lowered road elevation has allowed water from Winyah Bay to overtop the road. The weight of the water on the road has caused further consolidation of the soils under the road, likely damaged the piped drainage system under the road, and caused damage to Plaintiff's property.

Now, the Park has been elevated above the Plaintiff's property; there is more impervious area in the park than was there previously, allowing for less natural drainage into the soil; the wetlands can no longer drain the Park because of the failure to maintain the wetlands; the piped drainage system has failed due to a lack of maintenance; and, finally, Greenwich Drive has subsided and now allows water from Winyah Bay to overtop it and travel under it.

This damaged condition has created a never-ending cyclical train of cause and effect damage to themselves (the road and drainage), and Plaintiff. In addition to the physical damage caused to Plaintiff's property, he is also regularly unable to access his property, due to the flooding on the adjacent roads.

LEGAL STANDARD

Summary judgment is a "drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Wallace v. Day*, 390 S.C. 69, 73, 700 S.E.2d 446, 448–49 (Ct. App. 2010) (citing *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321–22, 548 S.E.2d 854, 857 (2001)). Summary judgment is inappropriate where, like here, material facts are in dispute and further inquiry into the facts is necessary to clarify the application of the law. Rule 56(c), SCRCP ("[s]ummary judgment may only be granted where "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 any party is entitled to a judgment as a matter of law.”) (emphasis added); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000) (summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts).

Summary judgment is also inappropriate “where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005). This is because a court considering summary judgment neither makes factual determinations nor considers the merits of conflicting evidence with respect to a disputed fact. *S.C. Prop & Cas. Guar. Ass’n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001); see also *Anderson v. Liber Lobby, Inc.*, 477 U.S. 242, 249 (1986) (In deciding summary judgment, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”). Rather, the court must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999); see also *Anderson*, 477 U.S. at 248 (“A disputed fact presents a genuine issue if the evidence is such that a reasonable jury could return a verdict for the non-moving party.”).

Moreover, a heightened standard for summary judgment is required when evidentiary standards are implicated. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003). In cases applying the preponderance of the evidence standard, “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). This standard requires only “the slightest amount of relevant evidence on an issue to warrant denial

of summary judgment.” *Harris Teeter, Inc. v. Moore & Van Allen PLLC*, 390 S.C. 275, 294, 701 S.E.2d 742, 752 (2010) (internal quotations omitted).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991); *see also Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990).

ARGUMENT

I. Defendant City owed a duty to Plaintiff and breached that duty in multiple ways.

The City asserts in its Motion that Plaintiff cannot prove the elements of negligence and thus it is entitled to judgment as a matter of law. (*See* Mot. at 1-2). This is incorrect. There are multiple authorities that create a duty for a municipality to maintain its roads, right of ways, and drainage systems. Further, there is substantial evidence that the City has breached its duty and proximately caused the injuries and damages incurred by Plaintiff.

The City has a statutory duty to keep roads in good repair:

[t]he city or town council of any city or town of over one thousand inhabitants **shall keep in good repair all the streets, ways and bridges within the limits of the city or town . . .**

S.C. Code Ann. § 5-27-120 (emphasis added).

Furthermore, ownership and maintenance of a street by another entity does not prevent a town or municipality from also maintaining or controlling the same street. *See Vaughan v. Town of Lyman*, 370 S.C. 436, 444, 635 S.E.2d 631, 636 (2006) (finding even though there was evidence tending to show ownership of the sidewalk belonged to county, deposition testimony showed the town assumed general maintenance of the streets and sidewalks by removing trees and filling potholes, the town exercised control over the streets by fielding citizen complaints about the streets

and sidewalks, and town minutes referenced affirmative actions by it to correct problems related to the town's sidewalks); *see also* S.C. Code Ann. § 57-5-140 (2005) (providing that ownership of a highway by the state "shall not prevent a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the department is able to undertake"). In this way, a municipality's exercise of control over its streets and ways may give rise to a common law duty for it to maintain its streets and ways that are within its control. *Vaughan*, 370 S.C. at 446, 635 S.E.2d at 637 (finding summary judgment improper on common law duty of town to maintain sidewalk where evidence indicated the town fielded complaints and undertook control of maintaining the sidewalk).

Similarly, a duty of due care may arise when a municipality voluntarily undertakes to repair, control, or maintain the streets and sidewalks within it. *Vaughan*, 370 S.C. 436, 446-47, 635 S.E.2d 631, 637 (2006) (finding a genuine issue of fact regarding whether town undertook the duty of maintaining city streets, even though not all city streets owned by town, noting evidence of sidewalk maintenance in town minutes, ordinances regulating sidewalks, and previous complaints from town residents about sidewalks handled by town); *see also Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken."); *Miller v. City of Camden*, 329 S.C. 310, 314-15, 494 S.E.2d 813, 815 (1997) ("The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.").

In addition to keeping the roads in good repair, the City also has a statutory duty to keep drainage systems in good repair:

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, **such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains**, except when the formation of the street renders it impracticable, **along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property**. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

S.C. Code Ann. § 5-31-450 (emphasis added).

The evidence adduced to date demonstrates that the City has not maintained the drainage in the vicinity of the Intersection. Specifically, the Daily Maintenance Logs maintained by City employee, Freddie Darby, document that the catch basins have been cleaned infrequently and the pipes have never been inspected with a camera. *Compare* Pl. Ex. 169 (City’s Drainage System Inspection and Maintenance Log) *with* Pl. Ex. 170 (Excerpts of City’s Log, showing Front and Greenwich Street entries). Additionally, the tidal gate at the end of Front Street, designed to keep flood waters from backing up into the drain pipes, has not been inspected since April 9, 2012; all of this despite having been on notice of Plaintiff’s claims since 2006. *See* Pl. Ex. 170 (2012 inspection date of tidal gate); *see also* R. Pope Dep. Tr. 13:12-23, May 26, 2023 (former South Carolina Department of Transportation (“SCDOT”) employee testifying had conversations with Plaintiff about surface water and drainage issues in 2006, and from that time on).⁶

⁶ On a related aside, in 2006, SCDOT leveled The Intersection, and in about 2008 or 2009, did a total resurfacing of Greenwich, both in an effort to keep the water out. *See* R. Pope Dep. Tr. 18:20-22:23 & 44:24-45:6.

Plaintiff's expert engineer Robert Castles has testified that the recreational trail, built by the City at the perimeter of the Park, contributes to the flooding to Plaintiff's property. R. Castles, Dep. Tr. 48:18 – 49:5. He further opined that the drainage system itself and drainage pipes sit over one foot below grass grade, having subsided, and noted the system and pipes stay full of water all of the time. *Id.* at 24:12 – 25:20.

In addition, the evidence shows that the City voluntarily undertook road maintenance responsibilities. *See, e.g.*, Pl. Exs. 36 & 38 (City assumed the duty from the SCDOT to clean out the pipes); Pl. Ex. 85 (City assumed the duty at East Bay Park); Pl. Ex. 190 (City assumed the duty to check valve); Pope Dep. Tr. pp. 15 & 23 (City would go in and clean out the pipes); Darby Dep. Tr. p. 22 (We [City] maintain the pipe); Darby Dep. Tr. pp. 23-25 (City maintains the tidal gate in the pipe); Darby Dep. Tr. pp. 44-45 (City removed old tidal gate and put new on in in 2017); Darby Dep. Tr. pp. 46 (We [City] do not check tidal gate because cannot get to it); *see also* R. Christmas Dep. Tr. pp. 54-56, 63, 76, & 150 (City assured Plaintiff that it would handle drainage problems directing water to his property).

The City also argues that Plaintiff cannot show that its failures proximately caused the damages to Plaintiff's property. (Mot. at 2). The testimony adduced points to the opposite conclusion. *See, e.g.*, R. Castles Dep. Tr. 157:21 – 158:8 (opining the City caused the flooding to Plaintiff's property by failing to upkeep the flap valve drainage pipe and running truckloads of fill dirt down Greenwich Drive while saturated); *see also id.* at 203:13 – 206:15 (Plaintiff expert engineer stating it is his understanding that the Park project intentionally raised the elevations of the Park property; opining that by filling in low areas in the Park, the City took away areas where water was previously stored, generating more surface drainage that flowing to Plaintiff's property). Further, whether the City's acts, *e.g.*, raising the grade of the Park and adjacent areas, reducing the

total pervious areas around Plaintiff's property, damaging the roads, etc. proximately caused the damages to Plaintiff here is a jury question. *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Proximate cause is normally a question of fact for determination by the jury . . . Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law.").

II. The City is not immune to liability under South Carolina Tort Claims Act exemptions.

The City asserts five (5) exemptions contained within the South Carolina Tort Claims Act to avoid liability for its actions. (*See* Mot. at 2). However, at least two (2) of the exemptions cited are of no moment and immaterial to this case.

a. Nuisance exemption

The City asserts the Nuisance exemption even though Plaintiff 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.

Likewise, the City asserts the Snow or Ice exemption, the Authorized Entry exemption, and the Acts of a Third-Party exemption, none of which are relevant.

b. Snow or Ice exemption

Assuming for argument's sake that the Snow or Ice exemption is potentially triggered even though no claims related to snow or ice have been raised, the City fails to recognize the latter half of the statute. The City is not liable for:

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). This exemption specifically states that the natural conditions cannot be "affirmatively caused by a negligent act of the employee." Plaintiff has alleged that the resulting damages were caused by, *e.g.*, the redirecting of the Park's stormwater

onto Plaintiff's property. Further, Plaintiff has alleged that the mowing of the wetlands and failure to maintain the catch basin therein has caused damage to Plaintiff's property. The wetlands are owned by the City. At the very least, there is a genuine issue of material fact for the jury as to Plaintiff's negligence claim.

c. Authorized Entry exemption

As to the Authorized Entry exemption, the lawfulness of the City's entry upon Plaintiff's property is not at issue. "S.C. Code Ann. § 15-78-60(9) (concerning "entry upon any property where the entry is expressly or impliedly authorized by law[.]"). Thus, the City is not immune from liability under this exemption.

d. Maintenance exemption

The City next relies on the Maintenance exemption. However, the City again fails to give due regard for the entirety of the statute.

A governmental entity is not liable for a loss resulting from "maintenance...of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, *unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance...within a reasonable time after actual notice of the defect or condition*[.]

S.C. Code Ann. § 15-78-60(16) (emphasis added).

The City was aware of the flooding problem and told the Plaintiff they were working on it. *See, e.g.*, Pl.'s Ex. 3 at p. 5 (The City's May 6, 2016 Request for Proposal stated "East Bay Park suffers from continuous exposure to high-tide flooding and poor drainage conditions particularly at the south end of the park..."). In fact, the primary purpose of the Park improvements was the very flooding that City, and others, addressed in part by shifting from the City's property to the Plaintiff's. *See, e.g., id.* ("The City is currently soliciting consultants to provide civil engineering and landscape design services....The first priority will be design and construction of...drainage,

recreational walking trail, and ground improvements during the 2016-2017 fiscal year...”). Because the City did not correct these issues at all, let alone within a reasonable time, the use of this exemption by the City is unavailing.

e. Third-Party exemption

Finally, the City seeks to avail itself of the Third-Party exemption:

an act or omission of a person other than an employee including but not limited to the criminal actions of third persons[.]

S.C. Code Ann. § 15-78-60(20).

Plaintiff does not allege that the City is liable for any negligence on the part of Defendants County of Georgetown or SCDOT, but rather that it is liable for its own negligence in failing to maintain its roads, drainage systems, and wetlands, and for the increased impervious area in the Park (*e.g.*, walking trail) that it created with mitigating storm water controls.

III. The City is not immune to liability under sections 15-78-40 and 15-78-50(b) of the Tort Claims Act.

The City attempts to argue that S.C. Code Ann. §§ 15-78-40 and 15-78-50(b) protect it from liability because not “all allegations or claims” in this case have a “private analogue.” (Mot. at 2). The inverse is true. The City, just like a private individual, is liable for the resulting damages to Plaintiff’s property because the City took steps to direct its stormwater to Plaintiff, and failed to maintain the storm water systems which the City was responsible for.

South Carolina follows the “Virginia Rule,” which provides that an upper riparian landowner is liable to the lower riparian if the presence of an artificial drainage system causes an increase in surface water drainage. *Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 225, 341 S.E.2d 783, 785 n.2 (1986). Here, the City’s redirection of the stormwater away from the Park and on to Plaintiff’s property, and the failure to maintain the roads, drainage, and wetlands has caused an

increase in surface water, making the City liable under South Carolina law just as an individual would be.

IV. Plaintiff's claims are not barred by the Common Enemy Rule because the rule does not apply where surface water has been cast onto another's property in concentrated form.

South Carolina follows the common enemy rule which allows a landowner to treat surface water as a common enemy and dispose of it as he sees fit. *Glenn v. Sch. Dist. No. Five of Anderson County*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988); see *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). While a landowner has a right to redirect the surface water, they must do so with due care or they may face liability for negligence. *Home & Indus. Mech. Supplies, Inc. v. CSX Transportation, Inc.*, No. 4:19-CV-00931-RBH, 2019 WL 3288618, at *4 (D.S.C. July 22, 2019); see also *Johnson v. Charleston & W. Carolina Ry.*, 50 S.E. 775, 776 (S.C. 1905) (stating that a plaintiff may seek damages for negligent construction of an embankment).

In *Johnson v. Phillips*, the court held that granting of a directed verdict based on defendant's right to discharge surface water under the common enemy rule was improper because there was evidence that created a reasonable inference that the water was cast in a concentrated form by means of drainage structures, making it a question for the jury. 315 S.C. 407, 413-14, 433 S.E.2d 895, 899 (Ct. App. 1993), *aff'd in part, rev'd in part sub nom. Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995).

The recognized exceptions to this rule further support Plaintiff's argument. There are two recognized exceptions to this rule. *CSX Transportation*, 2019 WL 3288618, at *4 (“[A] landowner may not use his land in a manner to create a nuisance,” and “he may not discharge water in concentrated form upon his neighbor's land.”) (quoting *Glenn v. Sch. Dist. No. Five of Anderson*

Cty. 366 S.E. 2d 47, 49 (S.C. Ct. App. 1988). As mentioned previously, there is no nuisance claim against the City in this case, thus the first exception is irrelevant. However, the City's redirection of water away from the Park, failure to maintain drainage pipes and construction of the raised walking paths has diverted excessive, concentrated surface water on to Plaintiff's property. Thus, the common enemy rule does not bar Plaintiff's claims. Moreover, it is uncontroverted that the surface waters are damaging Plaintiff in a way and to an extent not being experienced by any other resident in the area. *See* O'Donnell Dep. Tr. 14:14-15:2 (flooding to Plaintiff's property is worse than others).

V. The act of God defense does not apply because the City cannot show an act of God was the sole cause of Plaintiff's injuries.

"[O]ne is not liable for damages caused by the act of God or the public enemy, if such act be the direct or proximate cause of the injury. It is the settled rule of the law in this jurisdiction that the jury is the sole judge of the facts of the case, and, if there be relevant and competent testimony on the issues, they must be submitted to the jury for determination." *Correll v. City of Spartanburg*, 169 S.C. 403, 169 S.E. 84, 86. "An 'act of God' is a valid defense only when it is the sole cause of the injury." *Morgan v. Greenville Cnty.*, 189 S.C. 368, 1 S.E.2d 144, 146 (1939) (quoting *Montgomery v. National Convoy and Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938)).

Here it is not simply the rain from the heavens, or the ebb and flow of the tides causing damage. Rather, it is the overt redirection of the stormwater away from the Park and on to Plaintiff's property, and the failure to maintain the roads, drainage, and wetlands that have caused the damage to Plaintiff's property. Those are the City's acts, not God's. But for these acts and omissions, the damage to Plaintiff's property and access would not have occurred.

VI. Plaintiff's claims are not barred by the Public Duty Rule because a special duty exists.

A plaintiff may prevail against a public duty rule defense if the statute concerns the duties of a public office and has the essential purpose of protecting identifiable individuals from a particular kind of harm. *Arthurs v. Aiken County*, 338 S.C. 253, 265, 525 S.E.2d 542, 547-48 (Ct. App. 1999). In such cases, the statute creates a special duty which may give rise to a negligence suit against an officer for failure to perform his duties properly. *Id.*

Here, Plaintiff is not asserting a claim in an attempt to protect the community at large. Rather, Plaintiff is seeking redress for damages to his property. In fact, the Stormwater Statute identifies a particular kind of harm to identifiable individuals: the harm contemplated is surface water from any street or public thoroughfare that travels over private property, and the individuals impacted are private property owners who demand that the municipality provide sufficient drainage to prevent passage of such water over his property. *See* S.C. Code Ann. § 5-31-450. Mr. Christmas is such plaintiff. The public duty rule is inapplicable in this case.

VII. Plaintiff timely brought his claim.

The City asserts Plaintiff's claim is barred by several statutes of limitation: the two-year statute of limitation under the South Carolina Tort Claims Act, the applicable statute of limitation for inverse condemnation causes of action, and the statute of limitation applicable to the Stormwater Statute, at S.C. Code Ann. § 5-31-450. (*See* Mot. at 2, 3, 11). This is incorrect. Plaintiff's claim was timely and is not barred under any of these conclusory averments by the City.

In South Carolina, the statute of limitation (SOL) begins to run from the date the claimant knew or should have known that a cause of action exists. The clock starts ticking when "the injured party knows, or should have known by the exercise of reasonable diligence that **a cause of action arises from the wrongful conduct.**" *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004) (emphasis added). The standard as to when the limitations

period begins to run is an objective one rather than a subjective one and should be considered on a case-by-case basis. *Walbeck v. I'On Co., LLC*, --- S.E.2d ---, 2023 WL 1809318, *5 (2023) (“Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question”).

Plaintiff timely brought his case against the City on April 3, 2020. *See* Pl.'s Original Summ. and Compl. Between 2010 and 2017, Plaintiff brought the occasional flooding issues existing on Greenwich and Front streets, but not Plaintiff's residential lot, to the City's attention. *See, e.g.,* R. Christmas Dep. Tr. 114:17 – 115:7 & 116:11-20 (Plaintiff notified City that after City began filling in the perimeter around the Park, the ditch began to widen, back end eroding and pushing water down at the intersection of Front and Greenwich). The City assured Plaintiff that there was no cause for concern, and that the City would take steps to mitigate the flooding. *See, e.g.,* R. Christmas Dep. Tr. 119:9 – 120:5. Assuaged by the City's (and SCDOT's) apparent understanding, Plaintiff trusted that his city (and state) would protect his property. R. Christmas Dep. Tr. 110:7-20 (Plaintiff trusted that “when the mayor told me they would take care of it, they might need permits, it might take some time, that that's what they would do.”) In response to the flooding concerns, a tidal gate was installed on the drain pipe at the end of Front Street. *See* Pl. Ex. 170; Darby Dep. Tr. pp. 44-45 (installed new tidal gate in Spring of 2017); Ortega Dep. P. 96, 190 (tidal gate replaced as a result of a meeting with Christmas). Additionally, the City and County's 2016-2018 Park project professed a goal of addressing drainage at and around the Park. *See* Pl. Ex. 3 at p. 5. It wasn't until the Park project was substantially complete in 2018 that it was clear that the flooding was not addressed, was made worse, and now affected Plaintiff's property.

Even if this Court were to find that Plaintiff should have known before 2018 that drainage and flooding defects existed at the Intersection and/or Park, equitable estoppel applies to prevent

the City from asserting the SOL as a defense because there is evidence that the City's own conduct induced Plaintiff into believing that 1) the issues would be corrected by the City's drainage and Park improvements and 2) his property would be safe from flooding damages. *See* R. Christmas Dep. Tr. citation, *infra*. *See also* *Dillon*, 286 S.C. at 219-20, 332 S.E.2d at 561 ("A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct.") (internal citations omitted).⁷

Equitable tolling also serves to preserve Plaintiff's claims here. Whether a "defendant's conduct lulled a plaintiff into a false sense of security" is ordinarily one of fact. *Lovell v. C.A. Timbes, Inc.*, 263 S.C. 483, 210 S.E.2d 610 (1974). Inducement on the part of the defendant may consist "of an express representation that the claim will be settled without litigation or conduct

⁷ The doctrine of equitable estoppel as it relates to the SOL was analyzed by the South Carolina Court of Appeals in the construction context in *Magnolia North*:

[a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct. The doctrine is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's intentional misrepresentation; **but deceit is not an essential element of estoppel. It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.**

The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue. Some courts hold that repairs by a defendant may toll the statute of limitations. **One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.**

See Magnolia N. Prop. Owners' Ass'n v. Heritage Cmties., Inc., 397 S.C. 348, 372-73, 725 S.E.2d 112, 125 (Ct. App. 2012) (emphasis added).

that suggests a lawsuit is not necessary.” *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997).

Plaintiff has testified at length not only as to the Defendants’ assurances, but also as to the Defendant’s efforts to fulfill their assurances, both of which operate to toll any claim. *See, e.g.*, R. Christmas Dep. Tr. 53:7 – 54:24 (Plaintiff talked with the City and they promised to resolve the water drainage problem that began on his property during the City’s Park project; Plaintiff spoke with the acting city manager, people from stormwater, the mayor, and when he did, they talked of putting in a backflow apparatus or a retention pond, promising him “they would find a solution”); *see also id.* at 55:10 – 56:4 (City assured Plaintiff each time “we will get it worked out”). Besides promising Plaintiff that they would handle the problem, Defendants actually installed a new tidal flap in 2017. Before and after, their assurances were accompanied by explanations as to the delay, that they would have to get any further fix “permitted.” *See, e.g.*, R. Christmas Dep. Tr. 80:8-17 (City told Plaintiff they “would do what they need to do [to correct drainage being directed onto Plaintiff’s property] ... but they might require permits, so it might take some time to get this project done”).

Plaintiff relied on these, and other, examples of conduct and representations of the City. It is precisely this circumstance when a Court, sitting in equity, should apply estoppel. *See, e.g.*, *Centex Homes v. S.C. State Plastering, LLC*, No. 4:08-CV-2495-TLW, 2010 WL 2998519, at *6 (D.S.C. July 28, 2010) (“The Court concludes, even if the alleged defects challenged in this case can be traced to the original construction completed in 2001, that the subsequent 2002 repairs create an issue of fact as to whether Carolina Drywall is estopped from asserting a statute of limitations defense based on its attempt to correct the alleged defects in lieu of suit.”); *see also Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 219, 332 S.E.2d

555, 561 (Ct. App. 1985), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (“One’s assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that ‘may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.’”) (emphasis added).⁸

Additionally, it is a jury question as to when the flooding became so intrusive so as to put the Plaintiff on notice of a claim. *Turner v. Milliman*, 381 S.C. 101, 111–12, 671 S.E.2d 636, 641–42 (Ct. App. 2009), aff’d in part, rev’d in part, 392 S.C. 116, 708 S.E.2d 766 (2011) (“while Respondents allege only one reasonable inference can be drawn from the evidence, based on the varying amounts of the premium increases and the timing of those premium increases, we believe reasonable minds could differ on this issue.”)

VIII. The doctrine of laches does not apply.

The City argues Plaintiff’s mandatory injunction claim is barred by the doctrine of laches. (Mot. at 4). “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expense or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights, especially if an injunction is asked.” *Mack v. Edens*, 306 S.C. 433, 435–36, 412 S.E.2d 431, 433 (Ct. App. 1991). “Whether the plaintiff is barred from relief is to be determined on the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.” *Id.* (finding the Master erred in applying doctrine of laches to bar

⁸ See also *Pilz v. FDIC*, 1997 117 F.3d 1414, 1997 WL 360639, *4 (4th Cir. July 1, 1997) (denying summary judgment on the notice issue, explaining “[e]ven when Plaintiff have some reason to suspect they may have a claim, Maryland courts have been unwilling to resolve the notice issue as a matter of law, especially when a plaintiff has relied on the defendant’s or some other skilled person’s assurances that there was no problem”) (emphasis added).

relief because plaintiff “was not guilty of unreasonable delay in asserting his rights and [defendant] Edens did not suffer any detrimental change of position attributable to Mack”).

The City has not pointed to any evidence showing unreasonable delay by Plaintiff or any detrimental change of position by the City, because there is none. To the contrary, the evidence against the application of the statute of limitations to Plaintiff’s claim, described above, applies equally in opposition to the application of the doctrine of laches. The City’s motion on laches therefore fails.

IX. The South Carolina Stormwater Statute, at S.C. Code Ann. § 5-31-450, has not been “impliedly repealed.”

Defendant argues that Plaintiff’s Stormwater Statute claim is barred because the Statute was “impliedly repealed by the enactment of the South Carolina Tort Claims Act.” (Mot. p. 3). This argument fails for several reasons. No legal precedent supports the City’s argument that the legislature intended to repeal the stormwater statute. In fact, repeal by implication is disfavored and is found only when two statutes are incapable of any reasonable reconciliation. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). A later statute on a given subject, not repealing an earlier one in terms, is *not* to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. *State v. Hood*, 181 S.C. 488, 188 S.E. 134, 136 (1936) (emphasis added). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. *City of Rock Hill v. South Carolina DHEC*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. *Wilder v. South Carolina Hwy. Dep’t*, 228 S.C. 448, 90 S.E.2d 635 (1955).

The General Assembly has clearly found that “while total immunity from liability on the part of the government is *not* desirable . . . neither should the government be subject to unlimited nor unqualified liability for its actions.” S.C. Code Ann. § 15-78-20(a) (emphasis added). Here, the South Carolina Tort Claims Act (“SCTCA or the “Act”) is not repugnant to the stormwater statute, it does not fully embrace the whole subject matter, and as a result, the two statutes can co-exist. While the SCTCA sets forth waivers and limitations on governmental immunity, it does not “fully embrace” damages, among other matters. Specifically, the stormwater statute first dictates specific performance of management of the stormwater; and, if specific performance is not possible or refused, the stormwater statute permits and enables an award of damages. The SCTCA does not provide a specific performance remedy. Plaintiff wants a remedy, not solely monetary damages.

This Court previously considered and rejected the City’s “impliedly repealed” argument in this case. In a March 2022 Order, the Court correctly recognized that the City lacked legal precedent that the legislature intended to repeal the Stormwater Statute; that the SCTCA is not repugnant to the Stormwater Statute and does not fully embrace the whole subject matter; and refused to find the Stormwater Statute was impliedly repealed. Though superseded by a June 2022 Order which was silent on the issue, the Court’s reasoned rejection of the City’s impliedly repealed argument in the March 2022 Order should be reinstated. *Compare* March 22, 2022 Order, attached at Exhibit “A,” *with* June 7, 2022 Superseding Order, attached at Exhibit “B.”

X. Plaintiff has established the elements under the Stormwater Statute and for Inverse Condemnation, including the affirmative act required.

South Carolina courts have held that liability obtains under Section 5-31-450 when there is some affirmative act by the municipality which alters the course or increases the amount of stormwater runoff onto private property. *See Brown v. Sch. Dist. Of Greenville County*, 251 S.C.

220, 225, 161 S.E.2d 815, 817 (1968) (holding that if the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is a cause of action under this statute). Further, “the statute does not purport to make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality’s works that he may recover. By the same token, a municipality may not absolve itself from liability by diverting the surface water from its streets into a natural watercourse too small to carry it off.” *Hall v. City of Greenville*, 227 S.C. 375, 386, 88 S.E.2d 246, 251 (1955).

Under this statute, proof of negligence in the design or construction of the drainage facilities installed by a municipality for the purpose of carrying off surface water along a street or other public thoroughfare is not an essential ingredient of the cause of action in favor of an adjacent landowner whose property has been damaged by surface water cast upon it as the result of such construction. *Id.* at 386, 88 S.E.2d at 251. This section contemplates positive action by a municipality to render it liable for damages. *Brown*, 251 S.C. at 225, 161 S.E.2d at 817.

Here, the testimony adduced supports Plaintiff’s allegations that the City, who is responsible for the drainage, (a) failed to provide sufficient drainage and (b) engaged in affirmative acts which altered the course and/or increased the amount of stormwater runoff onto Plaintiff’s private property. For example, Mr. Castles testified that the drainage plan that was designed and constructed as part of the improvements to the Park did not provide any retention of water to collect off the hard surfaces, *e.g.*, the tennis courts. R. Castles Dep. Tr. 105:21 – 106:6. He opined the drainage system carries the surface water to the streets and ditches, adding to the water at the corner of Front Street and Greenwich Street. *Id.* at 106:16 – 107:1. Mr. Castles testified that this is a design defect that “create[es] water by having an impervious area” rather than draining it into

a pond or similar basin that captures the water first and then lets it flow out at its natural rate. *Id.* at 107:2-10.

The City's attempt to evade liability by characterizing its wrongdoing as "maintenance" rather than affirmative acts is misplaced. The South Carolina Tort Claims Act provides an exception to the maintenance exemption for precisely this circumstance, as discussed above. Once a municipality is on notice of an issue and fails to act, the exemption no longer immunizes it from liability. The City was on notice of the drainage problems and damages to Plaintiff's property, represented to Plaintiff that it was taking action to correct the problems, and then failed to clean the pipes (*see* Pl. Ex. 170). Later, on September 1, 2016, the City cleaned the pipes and then not again until January 3, 2020, and not since.⁹

The City quotes testimony concerning the percentage of tidal flooding versus stormwater flooding of Plaintiffs' property. (Mot. at 3). In doing so, the City appears to *concede the existence of expert testimony* that stormwater flooding *is* causing damage to Plaintiffs' property. However, Defendants failed to question Plaintiff's expert Castles regarding the effect of the City's elevated walking path, the abused wetlands, the improperly maintained drainage ditches and culverts at the Park, or the combination of any of the foregoing. The extent of the damage and cause of the flooding damage are both jury questions.

Similarly, Plaintiff has satisfied the requirements for inverse condemnation. "Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006). "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

⁹ And SCDOT failed to raise the road.

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 v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (citing Rule 56(c), SCRCPP).

Plaintiff has established that the City 1) inhibited the wetlands drainage; 2) failed to maintain the catch basins in the wetlands; 3) failed to maintain the tidal gate at the end of Front Street; 4) allowed the catch basins, drain pipes, and tidal gate to become damaged and ineffective; 5) raised and permitted parts of the Park to be raised, and 6) increased the impervious area within the Park. The aforementioned aggressive acts have directed water to Plaintiff’s property. *See, e.g.*, F. Darby Dep. Tr. 19:20 – 20:14 (City maintains the channel/marsh in front of Greenwich and Front, however “we don’t deal with the marsh... we deal with the drainage only”); F. Darby Dep. Tr. 75:2 – 76:1 (catch basins going away from Bay were holding water, City Stormwater Supervisor did not know whether water was trapped at outfall by vegetation and mud blockage because the outfall was full of water); F. Darby Dep. Tr. at 47:19 – 48:18 (cannot see tide gate at end of Front Street because remains under “standing water” even at low tide; cannot check it); R. Rowe Dep. Tr. 48:9-25 (County employee had never seen anyone maintain three ditches in the middle of the wetlands [in the Park] leading to a catch basin); O. Arteaga Dep. Tr. 116:14 – 117:8 (City owns the marsh across from Front Street, Morgan Park, and all of the land east of Greenwich that is not part of the DOT right-of-way all the way around East Bay Park); O. Arteaga 143:21 – 144:9 (City noticed wetlands and wetlands vegetation being mowed and cut down as part of County “grass” maintenance in the Park).¹⁰ Moreover, the City 1) knew of the problem at the Park;

¹⁰ Along this same vein, Georgetown County employee Ricky Rowe testified that the wetlands in the Park have been mowed and cut back since 2015:

2) “fixed” the Park at the expense of the Plaintiff; and 3) chose to ignore the problem after telling Plaintiff they would fix the drainage. Additionally, the testimony is that if the problem is being caused by a state road, that the City would notify DOT to come fix their road (Arteaga Dep. p. 18), the City has been aware of the Greenwich Drive problem, and has failed to request or require that DOT fix it.

XI. Defendant Green Wave’s settlement with Plaintiff does not absolve the City of liability under Section 15-78-70(d).

The City points to the Tort Claims Act to attempt to absolve itself of liability again, this time arguing the following provision bars Plaintiff from pursuing a claim against the City after Plaintiff settled with a separate, non-government entity previously named in this suit:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d). 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 can’t

-
- Q. Did there come a time more recently when somebody's mowed into the wetlands?
- A. Yes.
- Q. Tell me about that, please.
- A. Maybe about once a year --
- Q. Right.
- A. -- we'd go in, cut it down. And the owners complain about mosquitos and -- because they couldn't see across the park or the bay or whatever. And we'd go in, cut it maybe once a year, possible twice, but most of the time it was once.
- Q. About what year did that start?
- A. Maybe seven years ago.
- Q. And so that would be roughly 2015?
- A. Yes.

R. Rowe 44:16-34:6.

thereafter sue an employee of the government body for the same claim. It has no applicability to the Green Wave settlement.

Moreover, Plaintiff'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). Additionally, Plaintiff's Stormwater Statute claim could not be settled against Green Wave, as the Statute only applies to municipalities, not private entrepreneurs, like Green Wave. Lastly, and perhaps most importantly, the plain language of subsection -70(d) does not support the interpretation the City advances. The provision prohibits "further action... against an employee or governmental entity." There is no "further action." This suit is litigating Plaintiff's original claims against the respective municipalities (the Defendant City, Defendant County, etc.), none of which have settled.

XII. Plaintiff has established the elements required for an injunction and a writ of mandamus.

An injunctive order to a government entity is often referred to as a mandamus. "To obtain a writ of mandamus requiring the performance of an act, the petitioner must show (1) a duty of respondent to perform the act, (2) the ministerial nature of the act, (3) the petitioner's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." *Porter v. Jedziniak*, 334 S.C. 16, 18, 512 S.E.2d 497, 498 (1999).

The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial). The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. In contrast, a quasi-judicial duty

requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.

Redmond v. Lexington Cnty. Sch. Dist. No. Four, 314 S.C. 431, 437–38, 445 S.E.2d 441, 445 (1994) (court held mandamus was not appropriate where duties were ministerial even though the statute in question required the performance of those duties). *Mayrant v. City of Columbia*, 77 S.C. 281, 57 S.E. 857, 858 (1907) (“When, however, the city authorities have consulted and adopted a certain plan of drainage, in other words, have exercised their legislative and judicial functions with regard thereto, the carrying out of this plan becomes merely a ministerial duty, and for negligence in the execution of it the town or city is liable.”).

The City can be compelled to act by the Court. The City has a duty to ensure that its roads, walkways, and drainage do not re-direct surface water onto another’s property. *See also* R. Castles Dep. Tr. 52:8 – 25. The Plaintiff has properly pled and demonstrated that the City’s Park improvement project and actions (increasing impervious surface area, raising the grade of the Park, hauling in truckloads of dirt on saturated Greenwich Drive ensuring Plaintiff’s lot was the lowest point, etc.) have re-directed the water away from its natural course (prior pervious areas/wetlands which were reduced or damaged), away from the artificial drainage system (which remains full in its current condition - unmaintained) onto Plaintiff’s property.

CONCLUSION

Plaintiff respectfully requests this Court deny Defendant City of Georgetown’s Motion for Summary Judgment.

-SIGNATURES ON FOLLOWING PAGE-

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin O. Lucey

Justin O. Lucey

Joshua F. Evans

Mt. Pleasant, SC 29465

(843) 849-8400

jlucey@lucey-law.com

jevans@lucey-law.com

Attorneys for Plaintiff

August 14, 2023
Charleston, South Carolina