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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 IV OF VII**

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1 **THE COURT:** I believe they are. Am I correct in that?
2 Yes.

3 **MR. LINDEMANN:** They are. Okay. Thank you, Your Honor.
4 I appreciate that. Most of the time, I think, more than not.

5 **THE COURT:** Yeah. Good morning, Mr. Geiger.

6 **MR. GEIGER:** Good morning.

7 **STEPHEN J. GEIGER, HAVING BEEN DULY SWORN TESTIFIES AS**
8 **FOLLOWS:**

9 **THE CLERK:** Thank you. Please be seated and then state
10 and spell your name for the record, please.

11 **MR. GEIGER:** Yes, ma'am. My name is Stephen John Geiger.
12 S-t-e-p-h-e-n, middle name John, J-o-h-n, Geiger, G-e-i-g-e-r.

13 **THE COURT:** Thank you.

14 **DIRECT EXAMINATION OF MR. GEIGER BY MR. EVANS:**

15 Q: Good morning, sir.

16 A: Good morning, Justin.

17 Q: Let's go over a little bit of background and introduce
18 yourself to the jury. Tell us where you're from.

19 A: Originally, I grew up in Baltimore, Maryland. So I'm a
20 diehard Orioles fan. I'm very proud of their accomplishments
21 this year and then have transitioned south since that time.

22 Q: How long have you lived in the south?

23 A: I've lived in the south since 1984 when I was a freshman
24 at NC State. I've been in South Carolina primarily since that
25 time.

1 Q: Where do you live now?

2 A: I split time between Greenville, South Carolina and
3 Denver, North Carolina where we're renovating a lake house.

4 Q: And tell us about your education, please.

5 A: Yeah. I went to North Carolina State. I was there from
6 1984 to 1988. I have a bachelor's degree in civil engineering
7 with an emphasis on geotechnical engineering.

8 Q: Just for the jury's education, all of us for that matter,
9 tell us what geotechnical engineering means.

10 A: Geotechnical engineering for lack of a exhaustive answer
11 really is just the science of dirt and rocks. And it's really
12 that simple. So we get into the mechanical properties and
13 behaviors and characteristics of soil and rocks, and all those
14 interactions.

15 Q: When did you finish your bachelor's?

16 A: May of 1988.

17 Q: And do you have any licenses?

18 A: I am licensed in seventeen states and the United States
19 Virgin Islands, and that's as a professional engineer.

20 Q: One of those states in South Carolina, correct?

21 A: It is, yes.

22 Q: As part of the licensing requirements, do you have to
23 take continuing education courses?

24 A: We do and it varies from state to state. Some require
25 biannual, some require annual renewal. Some have technical

1 requirements, ethics requirements. So trying to juggle those
2 seventeen states plus the VI is a little chaotic, but it
3 averages about fifteen continuing education hours a year.

4 Q: And that's true for all licensed engineers?

5 A: Yes. That is a regulatory requirement, yes.

6 Q: Stated differently, your education didn't stop in '84,
7 '86, whatever that date was?

8 A: No, it didn't stop in '88. It's ever evolving for sure.

9 Q: Do you also speak at continuing ed or teach at continuing
10 ed courses?

11 A: I do. I get asked to speak a lot at professional society
12 meetings or conventions. We do internal training within our
13 company. I get asked to speak at local chapter events. I
14 speak for different charities to educate insurance companies.
15 That's something I really enjoy, get to kind of promote our
16 profession, but also speak to what a practitioner does.

17 Q: Do you -- are you a member or participate in any boards
18 or committees in the engineering field?

19 A: I do. I am one of the twelve voting members of the
20 committee that's writing the national standard for segmental
21 retaining wall design. Since there's nothing in the current
22 building codes that firmly addresses those, and there has been
23 an abundance of that used in today's construction, I was
24 invited to be a voting member of that committee. So that'll be
25 about a five to eight-year process to write the standard and

1 get it incorporated.

2 Q: And can you tell us about your employment after NC State?

3 A: Yeah. Right out of NC State, I moved to beautiful
4 Charleston, worked for a company called Soil & Material
5 Engineers. They are still around. They've gone through
6 different iterations of acquisition, but when I was there,
7 very good place to work. I loved living at the beach. I was
8 with them for about five years.

9 They were acquired by Westinghouse. Of all people,
10 you're thinking, what the heck is Westinghouse doing to
11 acquire a consulting firm. Westinghouse took that Charleston
12 office from about eighty-five people to twenty-five, and my
13 dad's advice was, don't be around for the next wave of chaos.
14 So I moved on from S&ME and went to work for a firm in
15 Raleigh, North Carolina, for a while to get back close to NC
16 State, and spent about four or five years there and then wound
17 up spending some time with another firm called A-Tech.

18 I was cursed. They were acquired and decided I'm not
19 going for another acquisition, and that's when I joined my
20 current company, which is ECS, or Engineering Consulting
21 Services, and that was in the spring of 1998. So I've been
22 with them now for over twenty-five years.

23 Q: Tell us a little bit about ECS. What are they? What do
24 they do?

25 A: Yeah. We are a national consulting firm. We have about

1 seventy-five offices, and we practice really in four primary
2 disciplines; geotechnical engineering, which is what I do,
3 testing and inspection of building materials. So if this
4 building's being built, we're on site verifying things are
5 being done for code and to the standard and to the contract
6 documents. So materials testing and inspection.

7 Environmental consulting, which is very broad. It can be
8 wetlands. It can be air quality. It can be mold or mildew
9 assessments. So that's another branch, and then the last
10 piece of our business is called facilities consulting. So, if
11 this building were to leak, if there were issues with, say, an
12 imbalanced HVAC system on roofing, our facilities group deals
13 with the built environment, per se. So those are the four key
14 disciplines of ECS.

15 Q: Have you worked on any sort of big or noteworthy projects
16 that we may recognize?

17 A: Yeah. I'd have to say I've worked on a few good ones. I
18 was an expert witness for a case that took almost seven years
19 to resolve up in Pawleys Island called Shipyard Village, where
20 we had some infighting between two homeowners associations and
21 an HOA board and in that matter, I was qualified enough for
22 expert testimony as far as how concrete behaves at the beach
23 and how it sometimes doesn't behave as it should.

24 I've done regular consulting at International Paper. I
25 did work at Georgetown Steel back in the day. I've worked on

1 Fort Charleston. I'm actually the County's expert on a matter
2 in which they are pursuing to recover monies from the design
3 team that actually designed this courthouse.

4 So you're sitting in a building that I've spent a good
5 bit of time in and have investigated the subsurface conditions
6 around it and below it.

7 Q: Let's move forward in time. Did you do some work at the
8 Christmas property?

9 A: Yes. Yes, I did.

10 Q: How many times have you been on site?

11 A: There was a cursory visit just to kind of get my feet
12 under me. I met with Robert Castles, who I believe is Mr.
13 Christmas's civil expert. He kind of explained to me the lay
14 of the land. Then I had an opportunity to spend some time
15 talking to Josh about, you know, what I thought was happening
16 and then what the next steps would be, and then revisited the
17 site several weeks later in early October of 2022 to plan our
18 scope of work.

19 Q: And did you review documents in this case?

20 A: I did, yes.

21 Q: What sorts of documents did you review?

22 A: Oh, geez. We had some civil drawings that were related
23 to the improvements on the tennis court property and the
24 adjacent walking trail, had some geotechnical data that was
25 collected for the tennis courts, had an old DOT civil drawing

1 that showed the alignment of Front Street and Greenwich and
2 some stormwater improvements, and then reviewed, you know, the
3 RFP for the tennis court project.

4 There was an as-built survey that was done that obviously
5 we reviewed and relied upon. So really that was the file we
6 were given was this culmination of things that had been
7 prepared since about 2017.

8 Q: When you came back in October of 2022 for your site
9 inspection, did you conduct tests?

10 A: We did. So tests being broad, we looked at things that
11 were going on, on the surface. So we took measurements, and
12 we looked at things that are going on below. So we wanted to
13 understand what are the soil conditions, or should I say
14 subsurface conditions, because we're interested not just in
15 the soil, but we also need to understand where groundwater is
16 since that is a very important part of geotechnical
17 engineering.

18 So we documented things on the surface and took
19 measurements, and then we drilled holes in the ground and
20 recovered soil samples by a couple different means.
21 Obviously, we had to core through and extract samples of the
22 driveway and the pavers and different elements of the property
23 to actually get to the soil.

24 So those were sort of the prongs. We visually assessed
25 and measured. We had to remove the surface materials and

1 document what was in place at that grade, so to speak, and
2 then the material for the soils below.

3 Q: Have you completed your tests?

4 A: We have, yes.

5 Q: Have you formed opinions to a reasonable degree of
6 engineering certainty?

7 A: Yes, I have.

8 **MR. EVANS:** Plaintiff would tender Mr. Geiger is an
9 expert in geotechnical engineering.

10 **THE COURT:** Any objections?

11 **MR. BATTLE:** No objection from the County.

12 **MR. LINDEMANN:** None from the City, Your Honor.

13 **THE COURT:** He'll be deemed an expert in geotechnical
14 engineering. You may proceed, Mr. Evans.

15 **MR. EVANS:** Thank you, Your Honor.

16 **BY MR. EVANS:**

17 Q: Mr. Geiger, did you memorialize your findings and
18 opinions in a report?

19 A: We did. We issued a formal report in November of 2022.

20 Q: Let's -- if you would, list your observations. What did
21 you find with the property -- do you have your report with you
22 today?

23 A: I brought it in my backpack. I didn't know if it was
24 part of this exhibit stack here or not.

25 **MR. LINDEMANN:** Your Honor, I don't know that it's

1 appropriate for him to read from his report. I think he ought
2 to be able to testify to his opinion without it.

3 **THE COURT:** I think the question was, do you have it.

4 **MR. EVANS:** Right.

5 **BY MR. EVANS:**

6 Q: And, as we sit here today, you issued that report in
7 November of 2022?

8 A: Yes. Yes, sir.

9 Q: So, I don't know, nine months ago?

10 A: Nine, ten months ago, yes, sir.

11 Q: Okay. Would it help you to have your report in front of
12 you to refer to to tell us about your findings?

13 A: Yes, that is, and that's fairly customary for me to have
14 that in front of me.

15 Q: Is this you?

16 A: That's me.

17 **MR. LINDEMANN:** It may -- he may think it's customary,
18 Your Honor, but you're not supposed to use that unless --

19 **THE COURT:** I'm going to let him continue --

20 **MR. LINDEMANN:** -- it's necessary to refresh his memory
21 on a specific question.

22 **BY MR. EVANS:**

23 Q: If we get somewhere and you can't answer my question --

24 A: Yeah, then I'll refer to it. How about that? I don't
25 think I'll need it but just in case. That was our report.

1 Yay thick.

2 Q: About a half inch, three quarters?

3 A: About three quarters, yeah. Yeah, about three quarters.

4 Q: Tell us about your observations of the physical
5 conditions first. I want to talk about what you saw just
6 visually before you tell us about results of testing and that
7 sort of thing.

8 A: Absolutely. So, when we visited the property, we
9 basically tried to break things down into what we call
10 hardscapes, which are like the driveways and the pavers and
11 the walkways, and then structural elements like walls and the
12 house and columns and things like that, and because the
13 property sort of had two distinct areas, we had the driveways,
14 which surrounded the south and north and the east, and then we
15 had the pool. So that was all brick pavers and that was to
16 the west.

17 So we sort of segregated our observations that way. And
18 broadly, what we saw, obviously there are conditions, and
19 whether it's concrete or brick, they sort of replicate
20 themselves throughout both. We have cracking. We have
21 vertical separations across those cracks, so one side of a
22 crack may be higher than the other. Some cracks are wider
23 than others horizontally. We have width beneath certain
24 hardscapes, meaning concrete drive and brick pavers, meaning
25 there's open space, that the soil was not directly supporting

1 that.

2 We identified, particularly within the brickwork, the
3 pavers and the walkways and pool deck. There's mortar between
4 those bricks that kind of hold everything together and make it
5 aesthetically pleasing. There's joint separations and
6 cracking and loss of mortar from between the bricks.

7 There's architectural columns that actually are supported
8 on these hardscapes that have rotated and moved outward
9 relative to their original positions. So sort of the property
10 proper; those were the types of things we saw. We saw
11 inconsistencies in the surface elevation. We saw the
12 cracking. We saw the elevation changes. We saw the voids.
13 We saw different elevations between the pavers and the coping
14 of the pool.

15 So those were very typical of the areas surrounding the
16 house. And then with that, we looked at the adjoining
17 streets. We looked at Greenwich and we looked at Front
18 Street. And what you see there is we saw, obviously, when we
19 were there on October 4th and 5th, and then when we're
20 analyzing the report, we have standing water at various
21 locations, not only along the street, but also encroaching
22 onto Mr. Christmas's property.

23 We were able to make observations of four drop inlets
24 that are offsite technically. You know, they're off the
25 property but adjoin the property, and some of those inlets,

1 obviously, are recessed well below grade. There's washouts
2 and voids around one of those inlets. There was debris
3 accumulated. So, as you look down into the grate, you can see
4 leaves and sticks and different debris that had accumulated
5 within the inlets.

6 And then in certain areas, particularly the inlet at the
7 corner of Greenwich and Front, there had been so much ground
8 loss there that there's a decorative brick wall that's been
9 undermined that borders the perimeter of the Christmas
10 property.

11 So, in a sense, those are the physical symptoms. Those
12 are the observations we saw when looking at those surfaces at
13 grade. And then, obviously, Greenwich and Front Street being
14 asphalt pavements, their weather, what we call weathering --
15 you know, the asphalt is not beautiful and smooth and black
16 anymore. It's rough, and you can see the aggregate. It has
17 what we call alligator cracking, and then that's actually a
18 term we see in a lot of parking lots, a lot of roadways, and
19 that's when the materials recede and they began to fail.

20 We saw what's called shoulder drop-offs. So, on the edge
21 of the road where erosion and loss of ground, softening of
22 ground has occurred, there's a recessed edge off the edge of
23 the pavement. You know, so we saw that.

24 And then where those edges have dropped and have
25 softened, we have what's called edge cracking. So, as the

1 wheel goes along the edge of the pavement and there's no
2 support, you have cracking along the edges of the pavement.

3 So that was sort of the off-site observation as it
4 related to the streets.

5 Q: I don't think the jury's heard the term "inlets" before.

6 A: Oh, okay.

7 Q: But that's the same thing as a catch basin, correct?

8 A: Yeah, catch basin, inlet, drop structure. Yes, sir.

9 Q: You mentioned with your hands, you were talking about the
10 difference between one material and another material -- each
11 other doing this, one dropping relative to the other.

12 A: Yes, sir.

13 Q: What causes that in your experience?

14 A: It's basically ground loss, and that could be a
15 combination of material migrating from beneath the surface.
16 More typically, the soil is all settled. So the soils below
17 those hardscapes, in this case, have settled, and then
18 stresses develop within the hardscape, and the only way for
19 the stresses to relieve themselves and get back to the state
20 of neutrality is, you know, the hardscape will crack and then
21 one side moves down relative to the other, consistent with the
22 compression or the settlement of the ground.

23 Q: You described finding voids under some of these hard
24 surfaces as well. How do the voids fit in with what you've
25 just described?

1 A: Right. Obviously, when you construct something that's
2 intended to be supported, aggregated -- what we call
3 aggregated on soil, the soil is what provides the support. So
4 the objective, obviously, is to have the hardscape or whatever
5 that surface is in intimate contact with the soil.

6 So, if you think about it, if now all of a sudden the
7 soil is down here and we have this void, it's sort of like
8 pushing on a spaghetti noodle. So, if you have the noodle and
9 it's sitting on the table, it doesn't deflate. If you hold
10 the spaghetti between your fingers and push down, it gets
11 this. It can be displaced. And that's what happens when
12 there's voids. It allows those brittle, hard materials, they
13 don't span that open space, and they have to crack. You know,
14 it's kind of reoriented in this new state of equilibrium.

15 Q: Did you take measurements of the locations where the two
16 materials, one dropped relative to the other?

17 A: We did. There was seventeen locations that we measured
18 all around the house, so the pool deck, the concrete
19 driveways, the brick bands, the sidewalks. So there's
20 seventeen locations where we took physical measurements,
21 accurate to millimeters instead of inches. That's the type of
22 resolution sometimes we need. So we have seventeen locations.

23 Q: Do you recall what the range was?

24 A: Yeah. The differential -- or the transition across those
25 separations range from anywhere from about one-third of an

1 | inch to about two-and-three-quarters inches. So about ten
2 | millimeters to about seventy millimeters as we reported them
3 | in the report. So a third of an inch to two-and-three-
4 | quarters inches.

5 | Q: Any other visual observations you made before getting
6 | into the testing of the low ground soil?

7 | A: Yeah. I think that really is the high spot. Like I
8 | said, anything that was at grade, I've kind of characterized
9 | those, that conditions weren't significantly different,
10 | whether it was brick or concrete, you know, my observations of
11 | the standing water and the inlet conditions and things.

12 | You know, probably one thing that is pretty important
13 | that I did not bring out, if you've seen pictures of the
14 | residence, there's two large brick staircases, one to the east
15 | and one to the west. Those staircases have actually pulled
16 | away from the residence, so those staircases sit atop the
17 | concrete driveway. The concrete driveway has settled, and as
18 | a result of that, the staircases have moved outward away from
19 | the porch on the first floor. So that's the main egress to
20 | that first floor, and the staircases have actually rotated
21 | away from the house.

22 | Q: At the top where --

23 | A: At the top, yes. So the separation is tight at the
24 | bottom, and then it's like a V. If you were to look at my
25 | photographs or visit the property, so if you look, you would

1 see the light come through the separation, wider at the top
2 and narrower at the bottom.

3 Q: How much has it separated at the top?

4 A: I think the western staircase is on the order of about an
5 inch and a half, plus or minus, and then the eastern staircase
6 is about three-quarters of an inch to an inch, based on the
7 measurements we took.

8 Q: Did you then do some -- I guess for lack of a better
9 word, below-ground testing?

10 A: We did. We did two types of borings. We did one that's
11 advanced mechanically with a big piece of drilling equipment.
12 So it's got a diesel engine, and it can drill very deep in the
13 ground. So we did what's called regular standard penetration
14 testing with that big drill rig, and then we did some borings
15 by hand with what we call a bucket auger. So it's just we
16 have to have somebody manually turn the auger into the ground,
17 and then we recover the soils out of the auger, whereas in the
18 soil boring, we actually drive samplers in there, and we can
19 retrieve samples of the earth.

20 Q: These are typical geotechnical tests that you and folks
21 in your industry do all the time, correct?

22 A: Yeah, these are very typical. This is sort of the
23 industry standard in terms of the way we would, you know,
24 approach a project like this.

25 Q: What did the tests tell you? What did you learn?

1 A: Yeah. What we basically were able to identify is below
2 those hardscapes, the brick and the concrete, things like
3 that, there's a layer of what we call fill material, and fill
4 is stuff that's not natural. It didn't just wash up there
5 from Winyah Bay or the river.

6 As you know, much of Georgetown, the grades have been
7 raised historically with material that was brought in and
8 placed mechanically, and that's what we found, somewhere
9 around two to maybe four feet of materials that are visually
10 characterized as fill, and so that's not unusual to see, and
11 they were readily distinguishable from the materials below.

12 And then below the fill, we identified natural soils,
13 things that had been in place, what we call coastal plain
14 soils that had been deposited sometime within about the last
15 ten to 15,000 years. So they're really what we call
16 geologically young deposits, and those consisted of really,
17 really soft, compressible organic silt. So think of what you
18 guys have heard as pluff mud. That's a local term, Charleston
19 or at least Georgetown, really soft, sticky, squishy, gray
20 clay. And then below that, we got into some sand, which used
21 to be the beach millions of years ago. And then below that
22 sand layer, we got into limestone, which underlies a good bit
23 of downtown Georgetown, so cemented shells and sand, and
24 that's just a native limestone material.

25 Q: Did you do any other testing or make any other

1 observations while you were out there?

2 A: We did. So, within the actual deep borings, the standard
3 penetration test, we drive a sampler into the ground and we
4 record the number of blows it takes to drive that sampler a
5 certain distance. So that's called a standard penetration
6 test.

7 Generally, the number of blows required to drive the
8 sampler gives us an idea of how stiff or how dense or how
9 loose or how soft the soil is. So that was done in the deep
10 borings. And then in the shallow and other borings, we did
11 what's called a portable penetrometer, a dynamic cone
12 penetrometer, same principle. You drop the weight, it drives
13 a calibrated cone into the ground and you record how many
14 blows it takes to drive a certain distance, and it tells us
15 the same thing, how stiff, how dense, how loose, how soft. So
16 those were the in-situ tests that we did within each of those
17 -- each of those boring types.

18 Q: Okay. After conducting your visual inspections as well
19 as your subgrade, your below-ground testing, did you form any
20 opinions?

21 A: Well, we did some laboratory testing after --

22 Q: Right.

23 A: -- we did --

24 Q: Tell us about it.

25 A: So, after we collect the samples, we have to classify

1 | them visually, and that's what I do, is we look at them and we
2 | kind of understand the characteristics. And then we want to
3 | verify those characteristics, so we do testing in our
4 | laboratory. Is it a silt, is it a clay, does it have
5 | organics, is it sand, how wet is it.

6 | So we did a series of laboratory tests to help us
7 | understand those characteristics. So we determined moisture
8 | content, how wet are these soils. We did some organic content
9 | testing. We wanted to know how much organic material was in
10 | that clay layer, because we all know organic stuff is squishy
11 | and soft.

12 | We did what's called Atterberg limits. And for you guys,
13 | that just tells us how sticky it is. We get three parameters,
14 | and it gives us an idea of how sticky and how plastic the soil
15 | is, and then we did what we call grain size. We want to know
16 | how much is sand, how much is silt, how much is clay. So sand
17 | is the coarsest, silt is the next coarsest, and clay is the
18 | finest.

19 | So we want to know what percentage of each of those
20 | constituents is in the tested sample. And then we attempted
21 | what we call a consolidation test, but there's so much organic
22 | material within this clay strata, we physically could not
23 | perform the test. The sample was corrupted because of all the
24 | old decaying organic matter that was in that sample.

25 | Q: Did I miss any other testing before I --

1 A: Nope, you got it.

2 Q: All right.

3 A: We got it.

4 Q: Based on all these site inspections and testing, did you
5 come to opinions? Did you form opinions about the property,
6 about Mr. Christmas's property?

7 A: We did, yes. So, based on all of the work we did and the
8 things we saw and documented, we did some settlement
9 calculations to basically understand how should the site
10 behave, and what would we be expecting, and are we seeing
11 things that might be reasonable.

12 So we did what we call time-rate settlement calculations.
13 So we used the lab data, and then we interpret it and we can
14 estimate how much settlement is going to occur within a given
15 strata and how fast it's going to occur. So those are two
16 important things. It's not just how much, but we want to know
17 how fast it happens.

18 So we ran those calculations for both borings. So we
19 were able to identify and estimate the settlement
20 characteristics of the clay layer in the boring, what we call
21 B2, which would be on the south side of the residence. That's
22 where the clay strata, that's really soft, squishy clay; it's
23 thinner and it's deeper, so it's further away from the
24 surface.

25 And then over in boring B1, the clay strata is really

1 thick and it's really close to the surface. So we came up
2 with those estimates, predictions, and we basically were able
3 to provide and generate graphs.

4 So, for a certain amount of load that's applied, we
5 should get a certain amount of silt, assuming the soils behave
6 as we expect, and there's no reason they wouldn't. It's
7 elastic theory, so it's like we know the properties. We know
8 if we squeeze them like this, this is how they should behave.
9 So we were able to generate settlement predictions for both of
10 those scenarios.

11 Q: Let me stop you for a second. These predictions, do they
12 include or assume the introduction of flood waters? Does that
13 have any bearing on the predictions?

14 A: They do. If you think about what is a load, anything
15 that sits on the surface of that ground or that driveway or
16 that brick paver is an external load. It's just like you
17 walking on it. So, yeah, so if there's a foot or two foot or
18 three foot of water, that simulates an external load, and
19 that's what's being applied and that's what's trying to
20 compress and squeeze.

21 Q: So, after conducting your lab analysis and performing
22 these settlement calculations, what did you learn?

23 A: What we learned is for the stress regime that occurs at
24 the Christmas property, the settlement estimates generally are
25 in the range of about a quarter of an inch to about two and a

1 half plus or minus inches for a stress regime that's somewhere
2 between a standing water depth of about a foot up to about two
3 and a half feet, which is what we understand the depths of
4 water have historically been.

5 So those estimates or those calculations demonstrate
6 predictions that are very consistent with what we measured at
7 those seventeen locations across the property.

8 Q: What did you learn about the -- you told us that you sort
9 of learned two things with these calculations, one being the
10 amount of settlement and the other being time, correct?

11 A: Correct.

12 Q: So tell us about the time component.

13 A: Correct. So essentially the way clay soils or sticky
14 soils, cohesive soils behave is they generally take a very
15 long time to settle and the way settlement occurs is soil is
16 made up of solid particles and it's made up of void space.
17 Air and some of those air voids are filled with water.

18 So the way a soil settles is when you push on it, the
19 water gets squeezed out and it compresses. Think of your dish
20 sponge. That's a good analogy. You can compress it; once all
21 the water is squeezed out, it's thinner, and that's exactly
22 how these marine clays behave. We have to squeeze the water
23 out.

24 So these soils have very, very high moisture contents,
25 over a hundred percent, meaning there's more water in the soil

1 | than there is physical particles. So, as we apply load, that
2 | soil wants all that water to leave, and when that water
3 | leaves, it just (snapping fingers) -- and it just takes a
4 | very, very long time.

5 | And what we understand is that Mr. Christmas built his
6 | house back in 2005 and it was put into service. Just a
7 | nominal amount of grading was done. So whatever was
8 | happening, we understood really all of the things that had
9 | been developing had been developing since the time of the
10 | tennis court, this repeated inundation. So what we were able
11 | to see is that we're about roughly, you know, 2005 he finished
12 | and here we are seventeen years later and we're way out in
13 | this time history. We're finally beginning to see as a result
14 | of this repeated inundation, this rapid regular application of
15 | new vertical stress because of the water, it's continuing to
16 | squeeze that soil out way out here toward the very end of
17 | that, that -- what we call the consolidation or primary
18 | consolidation period.

19 | So what we're seeing today is not settlement that's
20 | resulting from the construction. What we're seeing today is
21 | settlement that's resulting from this repeated inundation. So
22 | we're way out there in that time history. We're squeezing
23 | more and more water out as we go.

24 | Q: Does that mean Mr. Christmas's damage is directly related
25 | to the regularity and length of the property's exposure to the

1 soil saturation?

2 A: Yes.

3 Q: If adjacent infrastructure maintenance, you know, the
4 road, the drainage system, the tidal gate, had materially
5 reduced the regularity or lengthened the exposure, is it more
6 likely than not the resulting property damage to Mr.

7 Christmas's home would have been proportionally less?

8 A: Yeah. I think that's --

9 **MR. LINDEMANN:** Your Honor, objection to leading.

10 **BY MR. EVANS:**

11 A: Yeah. Obviously, what we offered and opined and what we
12 obviously believe to be the case is the rapid and regular
13 inundation of the property. If that were not occurring, then
14 what we're seeing today out there would not be as severe.

15 **MR. LINDEMANN:** And, I'm sorry, Your Honor, I didn't hear
16 a ruling -- he started answering before you ruled.

17 **THE COURT:** Well, he didn't exactly answer the question
18 as it -- he answered separately from what the leading was. He
19 was looking for a yes or a no, and he actually answered the --
20 a question. He proposed a question with an answer at the end
21 of it. He actually answered the question differently than
22 what he proposed was his answer.

23 **MR. LINDEMANN:** I would just ask for a record if we could
24 get a ruling before the witness --

25 **THE COURT:** I'll sustain your --

1 **MR. LINDEMANN:** -- ignores Your Honor

2 **THE COURT:** -- objection.

3 **MR. LINDEMANN:** -- starts answering.

4 **THE COURT:** Yes.

5 **BY MR. EVANS:**

6 Q: Based on what you've seen, is there a reason to think
7 that the condition of the soils under the road are any
8 different than the soils on the Christmas property?

9 A: No, they're not going to be materially different.

10 **MR. EVANS:** Nothing further, Mr. Geiger. Thank you.

11 **MR. GEIGER:** Thank you.

12 **FOREMAN:** Your Honor, can we take a break?

13 **THE COURT:** Yes, we can. Let's -- I'll tell you what,
14 it's 12:30. Well, it's almost 12:30. That -- now looks like
15 a pretty good time to break for lunch. Why don't we try to be
16 back at 1:45? That gives you an hour and fifteen. Okay?

17 **FOREMAN:** Thank you.

18 **THE COURT:** Thank you. Thank you. And again, I'm just
19 going to remind you not to speak about anything that's
20 happened with this case with anyone else, including your
21 fellow jurors. All right. We'll be at recess until 1:45.

22 **REPORTER'S NOTE:** (Jury exits the courtroom at 12:22p.m.)

23 **THE COURT:** Mr. Geiger, you are also not allowed to speak
24 with the counsel or anyone else.

25 **MR. GEIGER:** Yes, sir. Yes, sir.

1 (COURT IS IN RECESS)

2 (Proceedings resume at 1:50 p.m.)

3 **THE COURT:** -- in no way do I mean to make you drop
4 witnesses. That was not --

5 **MR. LUCEY:** We want to finish this, this week, too, sir.

6 **THE COURT:** Gotcha. Gotcha. Well, we'll -- as soon as
7 our jury gets here, we'll move forward. Is there anything
8 else we need to take up before the jury is brought out?

9 **MR. LUCEY:** Just a question that came up at sidebar while
10 I wasn't present, Your Honor, this morning on the issue of
11 equitable estoppel. Every case I've ever tried, the statute
12 of limitations defense has gone to the jury. And typically,
13 my judges have sent the equitable estoppel to the jury with
14 it.

15 We -- plaintiff recognizes that in the first instance,
16 equitable estoppel is an equitable decision that can be for
17 the Court. A lot of times the Court has chosen to keep those
18 two issues together. I'm fine either way. I just assumed in
19 this case that it would be -- it would all just go to the jury
20 with a special -- around the statute of limitations.

21 If, in fact, the Court is going to maintain that the
22 ruling applied to the last witness on the next witness, then
23 we would need to do it proper outside of the hearing of the
24 jury as to the equitable estoppel testimony after the other
25 evidence is presented to the jury.

1 **THE COURT:** Mr. Lindemann?

2 **MR. LINDEMANN:** Your Honor, I'm sure Your Honor is aware
3 of this because I mentioned it at the bench, but during the
4 sidebar, the Gaymon v. Rich Memorial Hospital case is directly
5 on point for the South Carolina Supreme Court (1997). Point
6 blank overturned previous cases that had allowed equitable
7 estoppel as a defense to the statute of limitations defense to
8 be a jury question. And the court said -- in fact, if I can
9 read it, it says:

10 "These cases" -- after citing several that had held that
11 it was a jury question, they said, "These cases are not
12 dispositive since they involve no issue whether equitable
13 estoppel should be tried by a jury or by the Court in equity.
14 While these cases are correctly cited for the proposition that
15 equitable estoppel may involve a question of fact, for the
16 fact finder it is mere dictum that such a question of fact is
17 for the jury to the contrary. We specifically hold the
18 defense of equitable estoppel interposed in a law case should
19 be tried by the Court as an equitable issue."

20 **THE COURT:** Well, and I tend to agree with you, but I'll
21 tell you what, can you tell me that case again? You cited it
22 real quickly. I just wanted to write it down so I could take
23 a look at it.

24 **MR. LINDEMANN:** I brought an extra copy.

25 **THE COURT:** Okay. Thank you.

1 **MR. LINDEMANN:** I figured that might be an issue.

2 **THE COURT:** Counsel, have you had a chance to look at
3 this?

4 **MR. LUCEY:** No, sir. If we could have the cite, we'll --

5 **THE COURT:** 327 S.C. 66.

6 **MR. LUCEY:** Okay. Thank you, sir.

7 **MR. LINDEMANN:** And I have another case, Your Honor, a
8 subsequent case -- well, it came out the same day, actually,
9 Black v. Lexington County School District in a Tort Claims Act
10 case, where they applied the same -- the same ruling. And
11 actually, that case has a lot more of the black letter law on
12 equitable estoppel that we'll be arguing at the directed
13 verdict stage. And I'm happy to hand that up as well. I have
14 -- for the record, it's 488 SE 2nd 327.

15 **THE COURT:** Thank you, sir.

16 **MR. LINDEMANN:** And again, just the argument, obviously,
17 if it was picked up on sidebar by the court reporter, that's
18 great, but the argument is, obviously, any testimony as to
19 any, quote, "promises made by the mayor" --

20 **THE COURT:** Right.

21 **MR. LINDEMANN:** -- "or individuals" don't go to any cause
22 of action. There's no misrepresentation or fraud claim. So
23 it would be purely on the equitable estoppel argument.

24 **THE COURT:** And that was my ruling at sidebar, was that
25 that was correct.

1 **MR. LINDEMANN:** That's correct. Thank you, Your Honor.
2 I think it's great when sidebars are picked up by the court
3 reporter, but that doesn't happen very often --

4 **THE COURT:** I think they're asking all court reporters
5 now to do that. She's taking it down.

6 **THE COURT REPORTER:** I have that for that. And then if
7 there's something that you don't want on there, just let me
8 know.

9 **THE COURT:** Got you.

10 **THE COURT:** Everyone is here now?

11 **THE CLERK:** Yes, sir.

12 **THE COURT:** Okay. Mr. Lucey, I don't know where Mr.
13 Evans went. Did he step out?

14 **MR. LUCEY:** He might be just checking to see if a witness
15 is here, Your Honor.

16 **THE COURT:** Okay. I didn't want to begin without him.

17 **MR. LUCEY:** Yes, sir. Here we go.

18 **THE COURT:** Anything else before we bring the jury back
19 in?

20 **MR. LUCEY:** Nothing from the plaintiff, Your Honor.

21 **MR. LINDEMANN:** Nothing, Your Honor.

22 **THE COURT:** All right. Please bring the jury in.

23 **REPORTER'S NOTE:** (Jury enters courtroom at 1:57p.m.)

24 **THE COURT:** Thank you, Mr. Foreman. Thank you, ladies
25 and gentlemen. You may have a seat.

1 All right. I believe we ended with -- Mr. Evans, I think
2 you had finished with your witness. Is that correct?

3 **MR. EVANS:** That's correct, Your Honor.

4 **THE COURT:** At least for direct.

5 Mr. Battle?

6 **MR. BATTLE:** I'm going to be first, Your Honor.

7 **THE COURT:** Yes, sir.

8 **CROSS-EXAMINATION OF MR. GEIGER BY MR. BATTLE:**

9 Q: Mr. Geiger, my name is Mike Battle. I represent Horry
10 County in -- Georgetown. I'm sorry. Did you recognize the
11 United States Department of Agriculture, their web soil
12 surveys as reliable information?

13 A: From a geotechnical engineering standpoint?

14 Q: Yes, sir.

15 A: Typically, no. I would not rely on those from a
16 geotechnical perspective.

17 Q: Do you rely on their descriptions of the soils?

18 A: They are purely from an agricultural land use perspective
19 and not an engineering perspective.

20 Q: Let me show you this particular map. It shows what the
21 soils are in a particular area. Do you find that to be
22 reliable?

23 A: Yeah. These are mapped. Like I said, that's how the
24 USDA maps. They don't characterize from an engineering
25 perspective.

1 Q: I know, but they are reliable information.

2 A: Yes, textural classification. Yes, sir.

3 Q: And let's go ahead and throw that --

4 **MR. BATTLE:** I'd like to introduce the USDA soil survey
5 map -- webbed soil survey map.

6 **THE COURT:** Mr. Lucey, have you -- Mr. Evans, have y'all
7 seen this?

8 **MR. LUCEY:** No objection, Your Honor.

9 **MR. BATTLE:** And the description of the soil -- and it's
10 Defendant's Exhibit Number 2.

11 **THE COURT:** It'll be introduced as Defendant's Exhibit
12 Number 2.

13 **(DEFENDANT'S EXHIBIT NUMBER 2**

14 **IS ADMITTED INTO EVIDENCE)**

15 **MR. BATTLE:** All right. If you would, first of all, put
16 up Exhibit Number 15, Page 15 of that.

17 **MR. GEIGER:** I'm going to get my readers.

18 **MR. BATTLE:** I'm sorry, what?

19 **MR. GEIGER:** I'm going to get my readers.

20 **MR. BATTLE:** You know what, I'll have to put mine on so
21 I'll match you.

22 **MR. GEIGER:** All right.

23 **BY MR. BATTLE:**

24 Q: So basically, what this is showing is the USDA's
25 description of the soils on the lot across the street from Mr.

1 Christmas's property and basically almost half of his other
2 property. Does that appear to be correct? Is it on the TV
3 screen?

4 A: Yeah. The description is, the map is not.

5 **MR. BATTLE:** I want the map.

6 **MR. KIRK BATTLE:** That's 16.

7 **MR. BATTLE:** All right. Put 16 up.

8 **MR. GEIGER:** It's available now.

9 **MR. BATTLE:** Okay. Thank you.

10 **MR. GEIGER:** Thank you.

11 **MR. BATTLE:** I apologize.

12 **BY MR. BATTLE:**

13 Q: So the -- half of the map is nineteen.

14 A: Correct.

15 Q: And that is basically pluff mud. Is that correct?

16 A: Well, I don't know if it's pluff mud or not. I mean,
17 the US --

18 Q: Let me read to you --

19 **MR. LUCEY:** Objection, Your Honor. The witness was still
20 answering the question --

21 **THE COURT:** Just let him finish his answer.

22 **BY MR. BATTLE:**

23 Q: Go ahead.

24 A: I don't know if it's pluff mud or not. It's
25 characterized as clay loam.

1 Q: I thought you had mentioned earlier it was pluff mud. I
2 apologize.

3 Let me read to you the description of the -- what's
4 called "levy silty clay loam." And I want to just hit on some
5 of the properties and characteristics of this.

6 A: Okay.

7 Q: The drainage class is very poorly drained. Do you agree
8 with that?

9 A: That's what it says. Yes, sir.

10 Q: Okay. The water table is about zero inches. That means
11 the water table is almost up to the surface. It says that,
12 doesn't it?

13 A: That's what it says. Yes, sir.

14 Q: And then it says frequency of flooding; very frequent.
15 Doesn't it say that?

16 A: It does. Yes.

17 Q: And I believe you testified that you found -- when you
18 did soil borings, in that particular piece of property,
19 organic matter.

20 A: We did. That does. Not at shallow depths. If you look
21 at our report, I think we encountered in B1, and we began to
22 encounter the organic silts at about six feet, and then in the
23 other boring, I think it was around ten to twelve feet...

24 Q: And this particular house was put on stilts. It went
25 down to what would be local limestone. Is that correct? Which

1 is sort of like --

2 A: Well, not stilts. It was --

3 Q: Pilings.

4 A: -- on driven piles. That's my understanding.

5 Q: That's when you take a big old heavy piece of equipment
6 and beat the --

7 A: I assume they were driven piles. That's my
8 understanding. Yes, sir.

9 Q: And that puts a lot of soil and -- a lot of stress on the
10 soil, doesn't it?

11 A: Not really. I mean, driving piles in granular soils can
12 be problematic but in cohesive clay soils, typically not.

13 Q: But the upper part of the house is on -- loamy. And
14 that's like upland, isn't it?

15 A: Well, relatively speaking.

16 Q: Okay. So there's a difference if it's on the clay and if
17 it's on the -- what I call pluff mud, but the loamy, silty
18 loamy, organic soil, as opposed to the upland. And you're
19 saying upland, if you do pile driving on that, then that could
20 have some effect on it, but not on the loamy soil.

21 A: Well, again, these are general textural classifications.
22 There's no substitute for the physical study that we did and -
23 -

24 Q: I understand. But it's what USDA has, isn't it?

25 A: I understand. And I respect what they characterize these

1 | soils as texturally. They are not characterizing them from an
2 | engineering perspective. That's why they accept it.

3 | Q: Engineers rely on them.

4 | A: They may.

5 | Q: All right. Now, with regard to subsidence, are you an
6 | expert in subsidence?

7 | A: On substance or subsidence?

8 | Q: Subsidence.

9 | A: Yes, settlement. Yes, sir.

10 | Q: That's the sinking of the soil.

11 | A: Compression of the soil. Yes, sir.

12 | Q: Compression of the soil. And so your testimony is that
13 | the soil on Mr. Christmas's property has subsided some.

14 | A: Yes, sir.

15 | Q: Okay. What is the length of time for subsidence on the
16 | silty, loamy stuff on the front part of his house?

17 | A: It's significant. It depends on a number of factors. It
18 | depends on the thickness of the strata. It depends on if
19 | drainage can occur within that strata directionally or
20 | bidirectionally, one direction or two directions.

21 | Q: Didn't you find -- your report indicated it was a
22 | sixteen-year average?

23 | A: No. What I -- if you look at the time rate
24 | characteristics, boring B1, where the strata is thicker, the
25 | time to reach ninety percent or so of that predicted

1 settlement could be in the range of thirteen to fifteen to
2 seventeen years. And then where the strata is much thinner,
3 seven feet versus twelve to fifteen feet, the time to reach
4 that is only a few years, a couple years.

5 Q: And then the upper -- upland soils are one year?

6 A: Those are -- yeah, sands are what we call elastic
7 settlements. They settle essentially immediately upon load
8 application. And that's assuming nothing changes other --

9 Q: Right.

10 A: -- than load application.

11 Q: Understood. Now, with regard to some of the structure,
12 did you notice whether those steps at the front of the house
13 were on any pilings?

14 A: The steps are supported at grade.

15 Q: But they're not on pilings. So they're basically
16 supported by that silty long soil.

17 A: They're supported. The stairs are constructed on top of
18 a concrete slab.

19 Q: Yeah. And --

20 A: And then the slab is supported on about three to five
21 feet of fill ,and then the fill overlies on the east side of
22 the house. The clays are generally right below the fill. And
23 over on the south side of the house, there's a sand strata
24 that's about five feet thick. And then we get to the clay.

25 Q: So, are you saying Mr. Christmas came in and elevated the

1 whole lot?

2 A: Well, I don't know when the fill was placed. I'm just
3 saying that we know much of Georgetown is the upper profile,
4 or the upper few feet, are man-placed fills so --

5 Q: Let's just assume for the sake of argument that he did
6 fill it in; would he have to take heavy trucks with dirt in
7 there?

8 A: If he did.

9 MR. BATTLE: That's all the questions I have.

10 **CROSS-EXAMINATION OF MR. GEIGER BY MR. LINDEMANN:**

11 Q: As I understand, Mr. -- is it Geiger or Geiger? I'm
12 sorry.

13 A: Geiger.

14 Q: Geiger. As I understand it, you did a site visit on
15 October 4, 2022?

16 A: Right. That's when we actually selected the boring
17 locations and did our field measurements and all the related
18 testing.

19 Q: Okay. But that was the only site visit you did?

20 A: No, I made a visit before that with Mr. Castles just to
21 kind of get my bearings on the project, get some understanding
22 of what may be going on, you know, talking through some of the
23 approaches that might be practical to take to investigate the
24 site.

25 Q: The photographs that are taken that are part of your

1 | report, they were taken at the site visit on October 4, 2022?

2 | A: Yes, sir. That's correct.

3 | Q: Did you -- you testified about some standing water in the

4 | road? Is that correct?

5 | A: Yeah, along -- if you look at the photographs in the

6 | report, standing water sort of along the interfaces, kind of

7 | where the asphalt meets, those neighboring grass buffers,

8 | that's generally where the water had ponded at the time of my

9 | visits.

10 | Q: Is that reflected on -- in Photographs 47 and 48 of your

11 | report?

12 | A: Can I open my report? Is that okay?

13 | Q: You can.

14 | A: Okay. 47 and 48, sir? Is that -- yes, sir. Standing

15 | water 47, and 48, 50, 51, 54, 55 --

16 | Q: Well, I'm asking around the house.

17 | A: Yes, sir.

18 | Q: Okay. One second. The photographs you just cited, they

19 | are multiple photographs of the same locations, correct?

20 | A: Well, they vary because they're taken from different

21 | orientations.

22 | Q: The standing water was -- that you photographed was at

23 | the end of this driveway, correct?

24 | A: Well, there's the drive that fronts Front Street, and

25 | then there's the drive that empties onto Greenwich.

1 Q: All right. The driveway on the Front, you're absolutely
2 right. There are multiple drives into this property.

3 A: Right. 47 and 48 are the southern side of the property,
4 so it would be along Front Street.

5 Q: And so -- and those reflect the standing water that you
6 identified at the end of the driveway on Front Street?

7 A: Yes, sir. Along the southern boundary. Yes, sir.

8 Q: And do those two photographs, 47 and 48, do they portray
9 the standing water that you testified to earlier?

10 A: Well, this is what was there the day I saw it.

11 Q: That's what I'm asking.

12 A: Right.

13 Q: You testified to this jury there was standing water that
14 day. I want to make certain --

15 A: That is.

16 Q: -- the jury knows what you saw that day --

17 A: That is.

18 Q: -- that you characterized as standing water.

19 A: Yes, sir.

20 **MR. LINDEMANN:** All right. And, Your Honor, I would ask
21 -- I don't certainly want to put it in the entire report, but
22 those two photographs, and we can pull them out of the report
23 and mark them if we can. Let me show them to counsel.

24 **MR. EVANS:** I've marked as Plaintiff's 176 all of his
25 photos from October 4th that include photos 1 through 57.

1 **MR. LINDEMANN:** Your Honor, I'm not asking to put it in
2 their exhibit. I'm asking to put it in my exhibit. So it's
3 47 and 48 of his photographs.

4 **MR. EVANS:** No objection.

5 **MR. LINDEMANN:** All right.

6 **THE COURT:** It will be Defense Exhibit --

7 **MR. LINDEMANN:** I think Number 3.

8 **THE COURT:** Yes. It is admitted.

9 **(DEFENDANT'S EXHIBIT NUMBER 3**
10 **IS ADMITTED INTO EVIDENCE)**

11 **BY MR. LINDEMANN:**

12 Q: Mr. Geiger, did you see any type of standing water in the
13 rear yard of the property?

14 A: When you say rear --

15 Q: The backyard.

16 A: Meaning where the pool deck is?

17 Q: Where the pool deck is, basically from the house to the
18 property line on Front Street.

19 A: Well, it's represented in this photo, so where the
20 driveway abuts Front Street.

21 Q: All right. Let me be more specific. Within the fenced-
22 in area of the backyard --

23 A: Okay.

24 Q: -- did you see any standing water, any water whatsoever?

25 A: No, not on the floor. Just what was in the pool.

1 Q: Has anybody ever -- have you been provided any
2 photographs that show that?

3 A: No.

4 Q: As part of your work as a geotechnical engineer looking
5 at this particular residence, did you obtain any records
6 regarding the construction of the home?

7 A: I don't have any design or construction documents. I
8 understand that they were -- or that the home was supported on
9 timber piles and is a wood-frame building. That was my
10 understanding of the residence.

11 Q: All right. Was there a geotechnical study done as part
12 of the construction of the home?

13 A: I would hope so. Since they drove piles, typically that
14 would be procured to know how deep to drive the piles.

15 Q: But that's not something you inquired about?

16 A: I did. I asked to have available information. Yes, sir.

17 Q: All right. And were you provided a copy of any
18 geotechnical report that was done during the construction of
19 the home?

20 A: I was not.

21 Q: Did you attempt to find out who the geotechnical
22 engineer, if there was one, may have been?

23 A: Yeah. I mean, I'm always curious as to previous
24 engagements or involvement by our peers. I always want to
25 know if there's available information. Yes, sir.

1 Q: And so my question is, did you find out the name of the
2 geotechnical --

3 A: No. I was not given the name of any previous
4 geotechnical consultant that had worked on the property.

5 Q: To your knowledge, was there a geotechnical engineer that
6 was engaged?

7 A: Not as I sit here today. I'm not aware of one.

8 Q: Okay. And how about any type of construction record,
9 such as the amount of fill that was put into this particular
10 property?

11 A: I don't have any documentation on the actual construction
12 of the residence.

13 Q: But you've already testified that you found three to five
14 feet of fill based on your investigation.

15 A: Yeah, we physically classified the material visually.
16 There's a process that we go through, ASTM standard for visual
17 and physical manual classification of soils.

18 Q: Now, when fill is brought into a property as part of a
19 construction project, like the construction of Mr. Christmas's
20 home, there's a need to go through a process of compaction.
21 Isn't that correct?

22 A: Yes, typically that is.

23 Q: Did you do any type of investigation to determine whether
24 any compaction was done during the construction of the home?

25 A: Again, I don't know if fill was placed, and I don't know

1 | what the means and methods would have been if it was done.

2 | Q: All right. And so, obviously, if the soils hadn't been
3 | properly compacted in 2005, that could result in settlement,
4 | shrinkage, cracking, could it not?

5 | A: Well, certainly they could settle under applied load.

6 | Q: And, if something isn't compacted properly, typically you
7 | would get those type of damages, would you not?

8 | A: Well, if the loads are -- if the applied stresses are
9 | high enough.

10 | Q: You wouldn't disagree with me that compaction of fill is
11 | an important component of properly grading and managing a site
12 | before you build a home, correct?

13 | A: It is. Yes, sir.

14 | Q: All right.

15 | A: I would agree with you.

16 | Q: In addition to finding evidence that the home was built
17 | on a lot where three to five feet of fill was brought in, did
18 | you also not find in your soil borings organic materials?

19 | A: Well, we didn't say three to five feet of fill was
20 | brought in. We said there's three to five feet of fill at
21 | these test locations. And then the organic materials were
22 | primarily encountered within the marine clay, the organic
23 | silts is what they actually classify it as; they're organic
24 | silts.

25 | Q: All right. Well, just to clarify, you said three to five

1 feet of fill. You don't know whether it was brought in for
2 part of construction or prior to construction, but you agree
3 with me there's three to five feet of fill that you found in
4 your investigation?

5 A: Correct. We did identify it.

6 Q: All right. And you also -- as I indicated, you also
7 found in your soil borings the presence of organics, correct?

8 A: Primarily in the native organic silt strata. Yes, sir.

9 Q: And, by organics, I'm referring to pieces of wood, roots,
10 things that decay, correct?

11 A: Yeah. Organics decay if there's a change in the
12 environment. If they stay fully saturated and they don't
13 undergo what's called anaerobic decay where oxygen is
14 introduced, they won't decay.

15 Q: Okay.

16 A: If oxygen is introduced and the water exits, then the
17 condition can develop and you get what's called anaerobic
18 decay. There has to be water leaves and then the environment
19 becomes open to the air.

20 Q: And, ultimately, you did your soil borings seventeen
21 years after that house was built, correct?

22 A: Approximately, yes, sir.

23 Q: Okay. So you have no way of knowing whether there was
24 more organic material that was part of either the fill or, as
25 you indicated, the areas where you found it that subsequently

1 | decayed over those seventeen years, correct?

2 | A: That would be kind of hard with the groundwater table
3 | being essentially at elevation zero. So our borings confirm,
4 | if you look at the data, that we basically encountered the
5 | groundwater at the interface of the fill and the native soils,
6 | which is typical on the coast.

7 | Q: So the groundwater is at zero?

8 | A: About elevation zero.

9 | Q: Okay.

10 | A: Yes, sir.

11 | Q: The front of the house is -- the front yard is primarily
12 | poured concrete, correct?

13 | A: And you're speaking about between the house and
14 | Greenwich? Is that --

15 | Q: Yes.

16 | A: Yes, sir. It's primarily concrete with some brick and
17 | lay pavers.

18 | Q: All right. And the pavers in the backyard, they actually
19 | are on top of a bed of concrete, correct?

20 | A: There's a bed of mortar. So that's sand and cement, and
21 | then below that there seems to be a thin slab of some sort.
22 | Concrete slab.

23 | Q: Well, in -- you found that the concrete that you
24 | encountered in your hand-auger borings varied from three
25 | inches thick to actually almost six inches thick, five and

1 three-quarters inches, correct?

2 A: That's correct. Yes, sir.

3 Q: All right. And you consider that a thin layer of
4 concrete?

5 A: Well, under the pavers, yes. I mean, relatively
6 speaking, three inches of concrete is not a lot.

7 Q: Well, it's up to almost six inches of concrete --

8 A: Right. In the driveway areas, yeah, you would expect --

9 Q: Well, I'm not asking you about driveways. It looks like
10 the driveways are actually thinner than the backyard. I mean,
11 if you need to look at your report, I welcome you to Table --

12 A: I mean, I know there's a table --

13 Q: -- Table 2 on Page 7.

14 A: Correct.

15 Q: Just looking at boring -- the boring that is marked as
16 HA1 --

17 A: Yes, sir.

18 Q: -- you list that as the location as the pool deck,
19 correct?

20 A: Yes, sir.

21 Q: And that's where you've got a three-inch thick concrete,
22 correct?

23 A: Correct. Yes, sir.

24 Q: And then HA3, you also have that listed as the pool deck
25 --

1 A: Correct.

2 Q: -- correct?

3 A: Uh-huh.

4 Q: Which is in the backyard, correct?

5 A: Correct --

6 Q: And that is a concrete thickness of five and three-
7 quarter inches, correct?

8 A: Correct. Yes, sir.

9 **MR. LINDEMANN:** All right. I don't have any further
10 questions.

11 **MR. GEIGER:** Thank you.

12 **THE COURT:** Thank you.

13 Ms. Thomas?

14 **MS. THOMAS:** No questions, Your Honor.

15 **THE COURT:** All right. Mr. Evans, any redirect?

16 **MR. EVANS:** Yes, Your Honor.

17 **REDIRECT EXAMINATION OF MR. GEIGER BY MR. EVANS:**

18 Q: Mr. Geiger, you were asked about your knowledge of fill
19 property. Do you recall that?

20 A: Yes, sir.

21 Q: Do you know if that fill predates or postdates the
22 construction of the road in 1955, '56?

23 A: Yeah. I don't know the origins of fill. I mean, we know
24 from aerial photographs that Front Street has existed to the
25 old ferry dock for a long time, and we know Greenwich existed

1 in a previous life under another name.

2 Q: You were asked some questions about compaction, whether
3 compaction occurred, what type of compaction, during original
4 construction. Do you recall that?

5 A: Yes, sir.

6 Q: If there was inadequate compaction of the soils under the
7 house, at the property, when would settlement occur?

8 A: It would have been very shortly after construction. It
9 would have occurred -- like we say, sands undergo what we call
10 elastic compression or immediate settlement. So it would have
11 revealed itself very rapidly.

12 Q: Meaning what? Six months, a year?

13 A: Yeah, probably within the first year. Yes, sir. That's
14 typically what we see, and sometimes sooner.

15 Q: If the steps were going to settle, the brick steps in
16 front of the house, because of the construction of the steps
17 and the fill themselves, unrelated to any introduction of
18 water, when would that occur?

19 A: Essentially, as the steps were being built. So, as the
20 steps got taller and taller and taller, the settlement would
21 have occurred as the steps were going vertical, and then just
22 a very short period of time thereafter.

23 So the loads get higher as the steps go vertical, and
24 then plateau out, and then that final stress state is in
25 place, and by that point, nearly all of the elastic settlement

1 would have occurred.

2 **MR. LINDEMANN:** Your Honor, I -- well, I'll let you
3 introduce what they are but there's an objection, Your Honor,
4 that I think it's beyond the scope.

5 **BY MR. EVANS:**

6 Q: Mr. Geiger, I'm going to hand you this remark for
7 identification purposes only as Plaintiffs' Exhibit 176. Can
8 you tell us what those are?

9 A: These are the fifty-seven photographs that were included
10 in our November 17th, 2022 engineering report.

11 Q: A couple of those photos were just shown to you;
12 specifically, Photos 47 and 48 on Page 29 of 34. You just
13 discussed those with counsel for the City, correct?

14 A: I did.

15 Q: Specifically, Photo 48, what's going on there?

16 A: In 48, well, we see distress with the roadway, and I
17 talked about what we call alligator and edge cracking and
18 shoulder drop-offs. So we see that, and then we see obviously
19 where the water is standing. There has to be a depression or
20 a low area. So we see that. And that's looking west up Front
21 Street.

22 Q: What causes alligatoring?

23 A: Generally, it's material fatigue and a loss of subgrade
24 support.

25 Q: These photos represent your observations on October 4th,

1 2022, correct?

2 A: They do.

3 **MR. EVANS:** Plaintiffs would move the entirety of 176
4 into evidence.

5 **MR. LINDEMANN:** Your Honor, I believe that's way beyond
6 the scope. I just used the photographs to show where his
7 testimony earlier, that he saw standing water just so the jury
8 would be able to see the extent of it and the location of it.
9 That was the whole point of cross, not putting in dozens of
10 photographs that they didn't go into in direct.

11 **THE COURT:** Mr. Evans, the photo that you just questioned
12 him on that I think was questions about what Mr. Lindemann
13 discussed earlier, is that the photo that was just up?

14 **MR. EVANS:** That was the photo that was just up.

15 **THE COURT:** All right. I'll allow you to introduce that
16 photo.

17 **MR. EVANS:** And, just for the record, Your Honor, not the
18 rest of 176?

19 **THE COURT:** That's correct.

20 **BY MR. EVANS:**

21 Q: You were asked, Mr. Geiger, your questions regarding
22 whether or not you saw any signs of -- or excuse me, if you
23 saw any water in the backyard. Do you recall that?

24 A: I do. Yes, sir.

25 Q: Turn still in Plaintiffs' Exhibit 176, marked for

1 identification purposes only, to Photos 22 and 23 on Page 13,
2 as well as Photos 24 and 25.

3 A: Yes, sir.

4 Q: What do you observe in these photographs?

5 A: Well, what I see is a lot of sediment that has washed
6 over the brick pavers. So that's the gray material that
7 overlies the red brick.

8 Q: How does sediment get there?

9 A: It's transported by water.

10 **MR. EVANS:** Plaintiffs would move Photos 22, 23, 24, and
11 25 into evidence.

12 **THE COURT:** Mr. Lindemann?

13 **MR. LINDEMANN:** No objection, Your Honor.

14 **THE COURT:** They're deemed admitted.

15 **(PLAINTIFF'S EXHIBIT NUMBER 176**

16 **IS ADMITTED INTO EVIDENCE)**

17 **MR. EVANS:** With the Court's indulgence, one second, Your
18 Honor. Thank you, Mr. Geiger.

19 **MR. GEIGER:** Thank you.

20 **THE COURT:** Mr. Evans, the photos that you just said, the
21 numbers, will you give those to the court reporter again, and
22 would you like for us to put those as one exhibit or a
23 separate number for each?

24 **MR. EVANS:** One exhibit. We'll mark them as 176, and
25 we'll cull out my original to get it down to the photo numbers

1 that we just pulled.

2 **THE COURT:** Okay.

3 **MR. EVANS:** And --

4 **THE COURT:** For the record, will you state those numbers
5 again?

6 **MR. EVANS:** Yes, that's what I'm --

7 **THE COURT:** Thank you.

8 **MR. EVANS:** Just checking, Your Honor. It's Photos 22,
9 23, 24, 25, as well as Photos 47 and 48.

10 **THE COURT:** Is that your --

11 **MR. LINDEMANN:** One quick question on recross, Your
12 Honor?

13 **THE COURT:** Yes. Let me get this first for the court
14 reporter.

15 **MR. LINDEMANN:** Okay.

16 **THE COURT:** Did you get that? All right. Thank you, Mr.
17 Evans.

18 Yes, Mr. Lindemann.

19 **RECROSS-EXAMINATION OF MR. GEIGER BY MR. LINDEMANN:**

20 Q: Mr. Geiger, the photographs that were just put into
21 evidence, 22 through 24 -- through 25, excuse me, those are
22 all photographs of the brick pavers, the pool deck, correct?

23 A: Yeah. The pool deck, yes, sir.

24 Q: All right. And those brick pavers are impervious,
25 correct?

1 A: Well, the brick is porous, the mortar is porous, the
2 concrete is porous to a certain extent. There's some amount
3 of air within the system but for -- they're large-scale. Yes,
4 sir.

5 Q: Right. Obviously, they're subject to rainwater, correct?

6 A: Yeah. They can rain on them, yeah.

7 Q: They can rain on them, and the water is going to run off,
8 correct?

9 A: Well, it should if it's normal rainfall, correct.

10 **MR. LINDEMANN:** All right. Thank you.

11 **THE COURT:** Can Mr. Geiger be excused?

12 **MR. LINDEMANN:** Yes, Your Honor.

13 **THE COURT:** Counselor?

14 **MR. EVANS:** Yes, Your Honor.

15 **THE COURT:** Thank you, Mr. Geiger.

16 **MR. GEIGER:** Thank you, sir.

17 **THE COURT:** Mr. Evans, Mr. Lucey, y'all can call your
18 next witness.

19 **MR. LUCEY:** Yes, sir.

20 **MR. EVANS:** Plaintiffs calls Ronald Christmas.

21 **REPORTER'S NOTE:** (Court and court reporter confer.)

22 **THE COURT:** I'm sorry, let's let her swear in the witness
23 first, and then we'll -

24 **CHARLIE RONALD CHRISTMAS, HAVING BEEN DULY SWORN**

25 **TESTIFIES AS FOLLOWS:**

1 **THE CLERK:** Thank you. Please be seated and then state
2 and spell your name for the record, please.

3 **THE COURT:** Mr. Christmas, just one second before you
4 state your name. We're going -- you can sit down. I just
5 meant we were trying to do some housekeeping up here to get
6 our evidence list done.

7 (Court, counsel, and court reporter confer.)

8 **THE COURT:** All right. Mr. Christmas, you can state your
9 name now. Thank you.

10 **MR. CHRISTMAS:** My name is Charlie Ronald Christmas. I
11 go by Ron. Christmas is like the holiday.

12 **THE COURT:** Thank you, sir.

13 **DIRECT EXAMINATION OF MR. CHRISTMAS BY MR. EVANS:**

14 Q: Mr. Christmas, let's go over a little bit of background.
15 When were you born?

16 A: I was born in 1946 in Baptist Hospital in Columbia, South
17 Carolina.

18 Q: And I think you're seventy-seven?

19 A: Seventy-seven.

20 Q: Where did you go to high school?

21 A: Went to high school at A.C. Flora High School in
22 Columbia, South Carolina.

23 Q: What did you do after high school?

24 A: Excuse me?

25 Q: What did you do after high school?

1 A: I went to college.

2 Q: Where did you go?

3 A: University of South Carolina.

4 Q: And when did you graduate?

5 A: In 1967 from undergraduate school; 1970 from law school.

6 Q: What did you do professionally?

7 A: I was a banker all of my career.

8 Q: Did you ever practice law?

9 A: No.

10 Q: Tell us about banking.

11 A: I started out with Branch Banking & Trust Company or CNS
12 Bank; headed the South Carolina Trust Division for First
13 Citizens Bank & Trust. Then I went to Kentucky with the Third
14 National Bank, which became part of First Kentucky National
15 Corporation, which was bought by Nat City. And then I went
16 with some other directors, and we bought a bank in Eastern
17 Kentucky and operated it for thirteen years.

18 And then I came back to South Carolina and started
19 Palmetto Heritage Bank that was in Murrells Inlet and Pawleys
20 Island.

21 Q: Did you eventually retire?

22 A: I retired.

23 Q: When did you retire?

24 A: Oh, in 2018, October 31st.

25 Q: Let's talk about your personal life. Married?

1 A: Yes.

2 Q: And your wife's name?

3 A: Deborah, Debbie.

4 Q: And do y'all have kids?

5 A: Yes.

6 Q: How many kids do you have?

7 A: Six children.

8 Q: And are they -- do you have grandchildren as well?

9 A: Twelve grandchildren and one great-grandchild.

10 Q: How long have you lived in Georgetown County?

11 A: We bought our first place in Georgetown County at the end
12 of 1999, and my wife moved down there and I told the board of
13 the bank that I worked for that I was going to leave because
14 my wife's family, her brother and father had gotten older and
15 had some health conditions and we were moving back to South
16 Carolina.

17 Q: Been in South Carolina ever since '99?

18 A: No, my wife has. I've been since 2000 -- end of really
19 2003, but I commuted every weekend until the time we sold the
20 bank. So, I worked out a contract that I had to work it out.

21 Q: Let's talk about the house, 101, Greenwich Drive.

22 A: Yes, sir.

23 Q: When did you buy?

24 A: I bought the lot at the end of 2001 or 2002, or I paid
25 for it; they had some issues that they had to clear up legally

1 in giving me title. And I think the title was like maybe 2000
2 -- first of 2003, somewhere in there getting put on the
3 record.

4 Q: And why did you buy?

5 A: Because we love the little town of Georgetown, and we
6 love the view across there of Winyah Bay over toward Hobcaw
7 because there was nothing but nature there.

8 Q: What's your understanding of how your wife felt about the
9 property?

10 A: My wife loved the property.

11 Q: When did you build it?

12 A: I think we started building in 2004 and completed it in
13 2005.

14 Q: Had to get a building permit to do it?

15 A: Had to get a building permit to do it.

16 Q: And had to then build the house and get a certificate of
17 occupancy?

18 A: Yes.

19 Q: When you got that building permit, eventually the
20 certificate of occupancy, were you aware of any objection from
21 the City as to the amount of hardscape you were putting in on
22 your property?

23 A: No, I think everything had to be approved. We had to
24 have an architect. I think the engineer and the builder got -
25 - did the forage and stuff to make sure the soil was

1 (inaudible). I think the City required all that.

2 Q: And no objection from them, what you did?

3 A: No, no objection from the city. No. Very good people to
4 work with.

5 Q: Let's move forward a little bit. Now you're in the
6 house. Talk to us from '05 until 2013 or so. Tell us about
7 any flooding you experienced first, just in the road.

8 A: The road would get some water where it would come up from
9 the ditch and over into the property and you could actually
10 hear water running in those pipes even on a sunny, dry day
11 when we'd have several days with no rain.

12 Q: Did you have -- at that point in time, again, '05 until
13 about 2013, did you have any flooding on your house property?

14 A: No, we got water in 2000 -- I'm trying to think about
15 Matthew. In Matthew, when the water came down on the hundred-
16 year flood, but they receded, you know, pretty quickly. The
17 hundred-year flood went a little bit longer than the others
18 but by the next day, we were able to get in there but the
19 water stayed on Front Street.

20 Q: And the hundred-year flood, does 2015 sound right for
21 that?

22 A: I think it was the year after Matthew was -- it was '15
23 or '16 or vice versa.

24 Q: I get confused, too. It was '15 or '16 and Matthew was
25 one and the hundred-year flood --

1 A: One or the other. Yes, sir.

2 Q: -- was the other, right?

3 A: Yes.

4 Q: Other than the hundred-year flood and Hurricane Matthew,
5 are you aware of having any water on your property, and I mean
6 the house property, up until now we're into 2016?

7 A: Not really. We -- sometimes we'd get a little bit of
8 water that would come down and it might come right into the
9 edge of my fence there, across there, but not anything major
10 there at all, no.

11 Q: When you had water in the road at this point in time, not
12 on your property but up in the road, did you ask anyone -- did
13 you talk to anybody, City, County, DOT?

14 A: I talked several times, had representatives of the City
15 and the State come down. It was my understanding that the
16 County, when I had asked, that the County didn't have anything
17 to do with it, that the City owned the park or across there,
18 whatever -- across there.

19 Q: What do you mean it's your understanding that the County
20 didn't have anything to do with it?

21 A: That one of them leased it to the other and they were not
22 -- it was a city park.

23 Q: And after -- why did you have folks from the City and DOT
24 come talk to you?

25 A: All right. In around 2013, '14, whatever in there, they

1 filled in on the water side of the park, put a lot of dirt on
2 that side of the road, which caused more water to come down
3 and sediment to start coming into the ditch, which was on a
4 City or State right-of-way, I'm not sure which. And we
5 started getting silt and stuff, and we started getting that
6 stuff coming up under the road and onto the road.

7 Q: After you talked to folks, did you have an understanding
8 that there were going to be some next steps?

9 **MR. LINDEMANN:** Your Honor, objection. This is what we
10 took up prior to his testimony. It's an issue for Your Honor
11 to decide.

12 **THE COURT:** Let's let the jury step out for just a few
13 minutes.

14 **REPORTER'S NOTE:** (Jury exits courtroom at 2:38p.m.)

15 **THE COURT:** Counsel, I'm thinking if this is going to be
16 proffered now is the best time to do it.

17 **MR. LINDEMANN:** And that's fine, Your Honor, but I have
18 an issue with lawyers who don't follow judges' rulings.

19 **THE COURT:** Well, understood.

20 **MR. LINDEMANN:** To that jury, I'm the one who just made
21 them leave.

22 **THE COURT:** Well --

23 **MR. LINDEMANN:** So I would ask the Court to give them an
24 instruction afterwards that you had to take up some testimony
25 outside -- again, it's just a not proper way of lawyering, and

1 I want to make an objection to it and note it for the record
2 because you just made that ruling, and they just ignored it.

3 **THE COURT:** Mr. Lucey?

4 **MR. LUCEY:** We have refrained from responding to a lot of
5 the accusations from that side of the room that have been made
6 in front of the jury, and we're going to continue to refrain
7 from it. We have --

8 **THE COURT:** Yeah. From -- as far as that goes, let's
9 just -- if you've got an objection to make, stand up, say I
10 have a matter to take up outside of the jury's presence. I'll
11 send them out. Yeah, I don't like the slinging of accusations
12 but -- and, as far as that goes, I do think this is the proper
13 time to take proper testimony in regards to what he was told.

14 So, Mr. Evans, I'm going to allow you to continue your
15 examination of Mr. Christmas in my presence.

16 **MR. EVANS:** Thank you, Your Honor.

17 **DIRECT EXAMINATION OF MR. CHRISTMAS BY MR. EVANS (PROFFER):**

18 Q: Mr. Christmas, you were telling us about water backing up
19 on the road in the 2000 -- you said 2013, 2014 time frame. Is
20 that right?

21 A: Right. It was coming up over the road and coming up
22 under, and it was coming up out of the grates under the road.

23 Q: Okay. And --

24 A: And I felt that it was caused by the filling in of the
25 perimeter of the park, because some of what I recall were

1 wetlands, but I don't -- again, I'm not -- I don't know and
2 I'm not qualified to say but I had the mayor down. I had
3 people from the State, and I had people from Water and Sewer
4 down and I talked to them, and what my understanding is was
5 they were trying to find a solution to it, and would do so.

6 And I had meetings with them on several different
7 occasions. And I went through this in my deposition. So I'm
8 sure that the attorneys for the City and County and State know
9 that. And I went through who was there that I knew, and I
10 said representatives were there from the -- Water and Sewer
11 also, and the -- a city manager one time, and an acting city
12 manager one time.

13 Q: After you had conversations with the City and the State
14 employees, did you have any understanding as to what was going
15 to happen?

16 A: They were going to find a solution, but they did put a
17 back-flow valve on.

18 Q: So you saw activity after --

19 A: I saw activity on that. And then they did come do some
20 cleaning out of the drains and stuff across at the pilings. I
21 do know they did that.

22 Q: Catch basins and the pipes?

23 A: Catch basins. But other than that, we kept going through
24 what needed to be done. Then the water kept coming. I didn't
25 have water coming on a regular basis on my lot. People parked

1 on it. I had a picture from a book from maybe Folly or
2 something that showed where the ferry went across, and that
3 you had cars on that parking lot and stuff back in those days,
4 solid ground. I had people -- we had a Christmas party every
5 year from about 2007 maybe to 2013. We had people park on
6 that lot.

7 Q: When you talked to folks from the City, who did you talk
8 to?

9 A: I talked to the mayor. They had the guy in charge of
10 Water and Sewer.

11 Q: I realize it's been --

12 A: A long time.

13 Q: -- maybe fifteen-ish years if my math is right.

14 A: Yes.

15 Q: Ten years? Ten and a half?

16 A: And I don't remember the name. They had, again, a city
17 manager one time, and that -- they had the mayor. Mayor
18 Scoville came down.

19 Q: Besides seeing activity, seeing the tidal gate, what did
20 the city representatives tell you?

21 A: They told me that they would find -- look to find
22 solutions. We only got worse. It did get worse from there.
23 I had them back down on site. We met on site, I think, on
24 three different occasions.

25 Q: Did they tell you that it might take a while?

1 A: Yes. They said they might have to get permitting because
2 they -- you know, they gave you about four or five things that
3 were looked at, and --

4 Q: What were those four or five things?

5 A: Okay. They talked about maybe putting a bigger pipe --
6 this is just a small plastic pipe they have coming out of this
7 thing for all the drainage that comes down from all the roads
8 onto that property. And they talked about putting a bigger
9 pipe, putting on back-flow valves to make sure no water can't
10 get across there. Then they talked about -- Mr. Pope from the
11 State, talked about putting in a trap, which I think was some
12 type of concrete box and maybe running some pipe to hold
13 water. The water was coming out, coming onto the road, and it
14 was -- and I was afraid it would get on my lot, and well,
15 later times, it started getting on my lot. It washed away
16 where it could get over -- maps showing the bay, you'll notice
17 they used to have a little piece that stuck out. It washed
18 away. And, you know, any time you put dirt and you move water
19 down to an another spot, I mean, if you have a neighbor who
20 built something, built it up, it's going to push water right
21 down on you. That's where that water was coming from, in my
22 opinion.

23 After the park was done, I met with Mayor Barber and
24 people from the Water and Sewer. I'm not sure if it was
25 somebody from the State. I thought they were getting somebody

1 to come from the State, but I don't know. There were about
2 five or six people that came.

3 And, after they did the park, the park looked like --
4 even where the wetlands were on the corner, looked like a
5 regular yard because the Phragmites disappeared. They weren't
6 getting any water over there, and we were getting water that
7 was coming in and we were getting water twice a day sometimes
8 for two hours where it did not subside.

9 We had water that came across from the side, pushed
10 across, got around my pool. My neighbors next door and the
11 next neighbor had water that went all the way through -- all
12 the way through his backyard to the next property. I mean,
13 all I'm going through and trying to do is go through what
14 happened and I mean, my answer -- I have requested it be
15 fixed. I thought they were taking steps, and they were doing
16 the park. They said they were going to do water diversion.

17 I know that the Clemson study said that they might build
18 a retention pond. They talked about that at one time. I
19 mean, we had a number of things that they talked about across
20 there and trying to fix it and I just assumed they would. And
21 I assumed that they had a budget.

22 When we met with Mayor Barber, he was telling us that
23 they had gotten like 4.1 or \$4.2 million that Representative
24 Rice had gotten for us and that they were going to have money
25 to fix some of the problems. They asked us to find out what

1 we thought would solve the problem. And Robbie O'Donnell and
2 I have been down there and met with them on a couple of
3 occasions.

4 And we went through -- you know, they said -- we talked
5 to the engineer. But nobody was going to tell us because they
6 were afraid they would be assuming liability if they told us
7 what was solved if the City did that and it didn't solve it.

8 Q: Let me slow you down here. We started to bleed over from
9 sort of pre-park to post-park.

10 A: Yes, sir.

11 Q: Let me return to the pre-park time frame. Okay? I think
12 you told us you talked to the city water manager and the
13 mayor, right?

14 A: And the city manager and the Water and Sewer guy, in
15 charge of Water and Sewer.

16 Q: And Mr. Pope?

17 A: Mr. Pope.

18 Q: And it was your understanding after talking to them that
19 help was on the way, right?

20 A: Yeah.

21 Q: It may take some time. It may take some money.

22 A: They were going to look for a solution.

23 Q: And you saw activity during that time as well, correct?

24 A: Yes, I did.

25 Q: For example, you told us about the tidal gate that got

1 | installed, right?

2 | A: Yes.

3 | Q: By this point in time, you'd seen DOT repave it twice,
4 | right?

5 | A: Yes. So we'd gotten action at that time. We assumed we
6 | would continue to get help to get the water problems solved.

7 | Q: At this point in time -- we're still talking pre-park.
8 | At this point in time, the water has not started to get on
9 | your property, right? Not --

10 | A: No. It started getting on my lot across the street some.
11 | And I don't know whether it's thirteen, fourteen up there on
12 | that lot, but we weren't getting water on our home lot.
13 | That's a separate TMS lot. It's separately taxed.

14 | Q: And then we jump ahead to the park project. Jump ahead
15 | in time to the park project. Now has the -- now that the park
16 | project is underway, has the flooding in the road, the
17 | frequency, increased?

18 | A: It increased greatly. It's slowed down some now because
19 | water is now going over in the park, but they're no longer
20 | maintaining all the dirt they put on the perimeter of the
21 | water either, and I think that has caused more water to come
22 | in under there but that's an opinion.

23 | Q: Once the park project was underway, did you again go and
24 | talk to City, County, or State folks?

25 | A: Yes, I did.

1 Q: And do you recall who you talked to?

2 A: It would have been the mayor again. It would have been
3 the people from Water and Sewer, and Mr. Pope, I think, was at
4 all of those meetings.

5 Q: Now, Mr. Pope had retired -- my recollection is that it
6 was like December 31st, 2017, I think, was his testimony.

7 A: They keep saying the project was finished in 2016. I
8 don't think it was completely finished in 2016.

9 Q: Did you ever talk to Mr. Pope in 2018?

10 A: I talked to Mr. Pope after retiring on one or two
11 occasions, and he told me he had retired, and I asked -- I
12 went through, I said, if he would, you know, I wish you would
13 make sure that they're up to date on what all has been done
14 across there.

15 Q: And what did he tell you?

16 A: I assumed that he would pass that on to his successor.

17 Q: Did the mayor or water manager say anything in response
18 to your complaints about the increase of flooding frequency?
19 In -- now post-park project, now we're in 2016 and beyond.
20 Did they tell you anything?

21 A: Well, the mayor, Brandon Barber, we met with him, and I
22 went through, he said they had money to do some of these
23 things across there. He looked for us to find a solution. He
24 acknowledged that more water was -- water was not down on the
25 parking areas where it had been earlier across there because

1 he walks around the park like I do -- did. And many of times
2 you'd have to cut up on the other side of the tennis courts to
3 walk up and walk because the water would be all through there
4 and you could not get there.

5 Now the water is back on there, and you've seen the
6 Phragmites grow back up, and there's water all the way back up
7 almost to East Bay now in the park.

8 Q: Did --

9 A: Almost all the way over to where the path is, the parking
10 path is.

11 Q: Did Tom Rice get money for Georgetown?

12 A: Yes.

13 Q: Did it get spent on fixing Front and Greenwich?

14 A: No. We got more water from other areas I think that were
15 fixed as they went.

16 Q: Did you have an understanding as to what -- in addition
17 to tennis courts and trails and boat landings, did you have
18 any understanding as to whether the park project, park
19 renovations, were to include any drainage work?

20 A: They said they were going to have a diversion of water,
21 and I assumed that they would work on that, and like I said, I
22 think the project -- I'm not sure exactly when, I think it
23 went beyond -- I keep saying 2016, I don't think it was
24 completely -- I think it was started basically in 2016,
25 completed maybe as late as 2017, probably '18.

1 Q: Well --

2 A: Again, it's hard for me to recall all of it because
3 --

4 Q: And, in fact, you don't live in the house anymore, but
5 you come and check on it occasionally, right?

6 A: About two or three times a week.

7 Q: And do you drive down past the park?

8 A: Oh yeah, I like to see all the water that's in the park
9 now.

10 Q: What's going on with the Alford building right now? Have
11 you noticed?

12 A: I've noticed they're doing something, but I don't know
13 exactly what they're doing.

14 **MR. EVANS:** Your Honor, I'm trying to balance between
15 what we need for you right now and what we need for the jury.
16 So I think -- I don't think we have any more representation
17 conversations at this point.

18 **THE COURT:** Okay. All right.

19 **MR. LINDEMANN:** We can cross at this point?

20 **THE COURT:** Yes.

21 **MR. LINDEMANN:** Thank you.

22 **CROSS-EXAMINATION OF MR. CHRISTMAS BY MR. LINDEMANN (PROFFER):**

23 Q: Good afternoon, Mr. Christmas.

24 A: Yes, sir.

25 **THE COURT:** Just for purposes of this cross, let's try to

1 keep it to the representations.

2 **MR. LINDEMANN:** I am, Your Honor.

3 **THE COURT:** I'm sure you are. Thank you.

4 **BY MR. LINDEMANN:**

5 Q: Mr. Christmas, did you ever go to any city council
6 meetings during this period of time and raise any of these
7 issues with city council directly?

8 A: No, I did not. I assumed they were being worked on and
9 taken care of.

10 Q: All right. But again, my question is, did you ever take
11 them personally yourself to city council?

12 A: No. No.

13 Q: All right. So there was never any city council meeting
14 where you made a public comment or make any type of request
15 related to what you believe were drainage issues regarding
16 your property?

17 A: No, because we didn't get any response at times when
18 things would get done [sic].

19 Q: All right. And the work that you were referring to, the
20 tidal gate was put on the end of Front Street, the pipe at the
21 end of Front Street in 2010, correct?

22 A: I think it was -- it could have been 2012, but I would
23 again -- if I remember it would not be an absolute date.

24 Q: Okay. Is that what you were referring to, getting things
25 done, that they put a tidal gate on --

1 A: And then later, the thing got where it was over covered
2 with mud and the floodgate disappeared. I heard somebody say,
3 you know, it disappeared, we went down there, but it was all
4 covered over, so it didn't really matter. I mean, it was
5 covered over with mud, there was no way that it was
6 functioning.

7 Q: Did --

8 A: And then they later put another floodgate on.

9 Q: And that floodgate was replaced in 2017, correct?

10 A: I think that's right.

11 Q: All right. And you testified also that at your request,
12 a plastic pipe was put in by the City that basically tried to
13 drain some of the surface -- some of the ponding right by the
14 end of your driveway on Front Street, correct?

15 A: That was done, yeah. I mean, like I said, we saw some
16 activity, and we saw them come out and actually, I guess, try
17 to pump some water out one time and do some stuff across
18 there.

19 Q: And city records showed that that piece -- basically that
20 was a piece of corrugated pipe that was basically laid between
21 the street and the closest catch basin, correct?

22 A: Yeah, but what you started also getting was water coming
23 out of the catch basin.

24 Q: And again -- I'm just trying -- I'm not trying to deal
25 with the specifics, I'm trying to get the dates and the

1 activities that you're talking about.

2 A: Okay.

3 Q: So there was -- at your request, there was work done

4 where a piece of --

5 A: (Inaudible)

6 Q: Let me finish, please. A piece of black pipe was placed
7 from the street to the catch basin closest to your driveway to
8 try to drain the area that had been standing or puddling right
9 by your driveway on Front Street, correct?

10 A: There was one there to pump -- put it in there to put
11 some water over. I just asked them to do whatever they could
12 to try taking care of this water. I don't know.

13 Q: I understand. Do you know when that work was done?

14 A: I do not.

15 Q: All right. If city records show it was done in September
16 of 2016, do you have any reason to deny that?

17 A: I have no reason to deny that.

18 Q: All right. As far as some of these meetings that you've
19 described with both Mayor Scoville and then later Mayor
20 Barber, do you have the dates -- do you know the specific
21 dates of any of those meetings?

22 A: I don't know the specific dates across there. I know
23 that the meetings took place, Robbie O'Donnell attended two of
24 them, I know of across there.

25 Q: And again, I'm just asking, do you know the specific

1 | dates?

2 | A: No, I do not.

3 | Q: All right.

4 | A: I didn't make contemporary notes. Again, I thought that
5 | they were being responsive to me as a citizen of the City and
6 | State.

7 | **MR. LINDEMANN:** No further questions. Thank you, Your
8 | Honor.

9 | **THE COURT:** Mr. Battle? Ms. Thomas?

10 | **MS. THOMAS:** Yes, Your Honor.

11 | **CROSS-EXAMINATION OF MR. CHRISTMAS BY MS. THOMAS (PROFFER):**

12 | Q: Good afternoon, Mr. Christmas.

13 | A: Yes, ma'am.

14 | Q: Did you ever make any formal complaint to the Department
15 | of Transportation, or did you just contact Richard Pope?

16 | A: I contacted Richard Pope, and I talked to somebody else
17 | down there one time. I don't remember if it was a person --
18 | I've forgotten what their title was down there, but -- yes,
19 | ma'am.

20 | Q: Okay. When you say you talked to somebody, was it
21 | somebody who had come to a meeting that you had requested, or
22 | just somebody that you saw in the area?

23 | A: No, it was somebody I called down there and asked about
24 | getting the water situation.

25 | Q: Do you know who that was?

1 A: I don't remember.

2 Q: Do you know when that was?

3 A: 2018, maybe. Again, I just don't remember exactly when.

4 Like I said, all this was a continuing saga.

5 Q: And I think we've had testimony that Richard Pope retired
6 at the end of 2017.

7 A: Yeah, I did not know that until I talked to him later,
8 and went through him and I had asked that he sort of bring
9 somebody, his successor up to date on what all the issues had
10 been, because they continued and we were continuing to have
11 issues.

12 Q: Now, when you would have these various meetings, Mr. Pope
13 would come, and he would listen along with the other officials
14 that you knew.

15 A: Yes. And then they'd talk about some type of solutions
16 while they were there, and one of them would be putting that
17 bigger pipe -- putting a bigger pipe, because again, you know
18 what a piece of flexible pipe looks like, a black pipe. I
19 mean, I've seen stuff like that put in people's yards as big
20 as that was for all the drains coming down from us from upper
21 areas and the quadrant there.

22 Q: At no time did Mr. Pope tell you that the Department of
23 Transportation could keep water from coming onto your
24 property, did he?

25 A: No. He never told me it could keep water from coming on.

1 They were looking at ways to keep the water from coming over
2 the road there which, like I said, they set up a trap, putting
3 some pipes up along the lots there where Robbie's and I were.
4 They talked about putting a bigger pipe covering it with dirt
5 and putting back-flow valves on there to make sure no water
6 came in from the plumbing.

7 Q: And are you aware of any work --

8 A: Nobody ever cleaned the ditch out even, because I thought
9 they would.

10 Q: Are you aware of any work that the Department of
11 Transportation has done pursuant to your request or your
12 complaint since the paving that was done in '06 and in '09?

13 A: I think they did some work on the pipes, is my
14 understanding.

15 Q: Okay. Do you know about that, or is that just something
16 you've heard?

17 A: That's something I've heard, and I've personally observed
18 it.

19 Q: Okay. So the last thing that you observed the DOT doing
20 in that area pursuant to your complaints or your request was
21 the repaving, which ended in '09.

22 A: No. I think it was when they were working on putting the
23 second -- I don't know who put the second valve in, whether it
24 was the City or State. I know the first valve the State gave
25 the City to put on.

1 Q: Okay. So you don't know who controls that flap valve, do
2 you?

3 A: No. When I was sitting across there, my understanding
4 was for a long time that Front Street was the City's and the
5 County -- I mean the State's was Greenwich, but I've heard
6 that it all belongs to the State. And I was not really aware
7 of that, because when they were talking about doing things,
8 they were both talking about interacting and doing things.

9 Q: So they were listening to your complaints and talking
10 about what might help you?

11 A: Yeah, they were. Yes, ma'am.

12 Q: Okay. So you don't know who put in the flap valve and
13 replaced that flap valve, do you?

14 A: The second time, no, I do not.

15 Q: Okay. So the last thing that you know for sure that the
16 Department of Transportation did pursuant to your complaints
17 or request was the paving in '09. Is that correct?

18 A: As far as I know, I know that they were talking about
19 working together and getting some solution because again, when
20 they talk about the trap, I always said put the trap in, and
21 they put the trap in, and they could have held on a good bit
22 of water in the pipe there but that did not take place.

23 Q: Now, after Mr. Pope retired, have you spoken with anyone
24 else at the Department of Transportation?

25 A: I talked to somebody one time down there, but I don't

1 know who it was and reiterated that we were still having
2 issues.

3 Q: And you don't know when that was?

4 A: It would have been after Mr. Pope's retirement, but
5 that's all I can tell you.

6 **MS. THOMAS:** Okay. That's all the questions I have.

7 **MR. CHRISTMAS:** Thank you.

8 **MR. EVANS:** Nothing, Your Honor.

9 **THE COURT:** Okay. All right, why don't we -- since we've
10 already got the jury out, let's just take a quick five
11 minutes. Is that good with y'all?

12 **MR. LUCEY:** Do you mind -- since I can't talk to the
13 witness during the break, do you mind if we tell him now
14 procedurally what's just happened?

15 **THE COURT:** Yes.

16 **MR. LUCEY:** And you might have to go back through some of
17 the testimony again with a different circumstance.

18 **THE COURT:** Yes. And, Mr. Christmas, what we've done is
19 we've taken proper testimony about your interactions with
20 these governmental entities. And that is so that I can make a
21 decision at some point in this trial in regards to a claim
22 that assuming that your attorneys are going to make in regards
23 to equitable tolling and statute of limitations.

24 As far as your testimony from now on, you cannot say
25 anything about what you have just testified to me about. That

1 is a matter of law. It is not a matter of fact for the jury.

2 So, when you testify again, when we bring the jury back
3 in, Mr. Evans will not ask you questions, or is not supposed
4 to ask you questions in regards to your contact or any
5 communication you've had with these entities.

6 Now, he can still ask you all the things about your home,
7 about the flooding that you've seen, that kind of stuff,
8 because that is a jury factual issue but in regards to the
9 communication, that is a matter of law. So again, I'm just
10 going to ask you to just remember that you're not to testify
11 about any communication you've had with these governmental
12 officials.

13 **MR. CHRISTMAS:** And I can't talk about the fact that
14 other neighbors told me that they had also talked to a
15 property owner?

16 **THE COURT:** That would be hearsay, so I'm assuming we'd
17 get an objection. Yes, sir.

18 **MR. CHRISTMAS:** Okay.

19 **THE COURT:** Is that sufficient, Mr. Lucey?

20 **MR. LUCEY:** Yes, Your Honor, but if I may, just in
21 layperson terms --

22 **THE COURT:** Sure.

23 **MR. LUCEY:** The government representations to you that
24 you heard, we've now given those to the Judge to consider, and
25 we won't be going back to what the representations were about

1 | what they will do but Mr. Evans will be asking you about what
2 | you observed and experienced over the last four years that
3 | y'all haven't covered yet.

4 | So your focus will be on Mr. Evans, and he's going to try
5 | to ask you questions that don't recover anything we already
6 | talked to the Judge about. But if you get confused, we'll
7 | work with you. Okay? Thank you, sir.

8 | **THE COURT:** Mr. Christmas, any questions about that?

9 | **MR. CHRISTMAS:** I don't understand with him but --

10 | **MR. LUCEY:** Sorry I didn't do any better.

11 | **THE COURT:** Well, if we run into an issue, I mean, we
12 | can, but again, it's -- I'm just asking you that you not speak
13 | about any of that communication or anything like that. Okay?

14 | **MR. CHRISTMAS:** Can I speak about the fact that my
15 | neighbor had me down to show where water went all the way
16 | through his house two doors back down on Front.

17 | **THE COURT:** Well, I'm assuming you're going to get an
18 | objection for hearsay of anything that your neighbor would
19 | say.

20 | **MR. CHRISTMAS:** Well, I walked up and looked and observed
21 | the water where the water went through and was there.

22 | **THE COURT:** You can testify to what you have seen.

23 | **MR. CHRISTMAS:** Okay.

24 | **THE COURT:** Okay?

25 | **MR. EVANS:** And also --

1 **MR. CHRISTMAS:** I'm just trying to make sure.

2 **THE COURT:** Yes, sir.

3 **MR. CHRISTMAS:** I don't want to do anything wrong.

4 **THE COURT:** Yes, sir. No, no, you're okay. Thank you.

5 **MR. EVANS:** Mr. Christmas, normally I'm going to try to
6 let you run with an answer, but if I cut you off --

7 **MR. CHRISTMAS:** I'll know why.

8 **MR. EVANS:** -- I'm going to -- it might be because you're
9 straying into something else.

10 **MR. CHRISTMAS:** All right.

11 **THE COURT:** All right. Let's take five then --

12 **MR. CHRISTMAS:** Yes, sir.

13 **THE COURT:** -- and we'll reconvene at 3:10.

14 **(COURT IS IN RECESS)**

15 (Proceedings resume at 3:08 p.m.)

16 **THE COURT:** All right. I believe everybody is here, so
17 we'll go back on the record. Mr. Lindemann, Mr. Battle, Ms.
18 Thomas, Mr. Lucey, Mr. Evans, anything before we need to -- or
19 anything we need to discuss before we bring the jury back in?

20 **MR. EVANS:** No, Your Honor.

21 **MR. LINDEMANN:** No, Your Honor.

22 **THE COURT:** Okay. All right. Please bring the jury back
23 in.

24 **REPORTER'S NOTE:** (Jury enters courtroom at 3:12p.m.)

25 **THE COURT:** Thank you, ladies and gentlemen. We had to

1 take up a couple matters of law, but I do appreciate y'all's
2 patience, and we'll get started back again. Mr. Evans, your
3 witness.

4 **MR. EVANS:** Thank you, Your Honor.

5 **MR. EVANS CONTINUES DIRECT EXAMINATION OF MR. CHRISTMAS:**

6 Q: Mr. Christmas, let's jump ahead to when the park
7 renovations are being completed around 2018. Tell us what you
8 saw with regard to flooding.

9 A: The water that came over the road on Front Street
10 increased greatly.

11 Q: It increased how?

12 A: I mean, it was much deeper. It got on our property, came
13 across, went in our backyard, came up the driveway, through
14 the gate there, across there, and we got sediment and things
15 all over there. You had to keep cleaning it, and water went
16 all the way over to Mr. O'Donnell's property and other
17 properties right behind me got water that went all the way
18 across --

19 Q: When you say behind --

20 A: -- across their property lines.

21 Q: When you say behind you, you mean up Front Street?

22 A: On Front Street.

23 Q: In addition to the depth or the quantity, amount of water
24 increasing, did the frequency change?

25 A: The frequency was much, much greater. It's subsided some

1 now since the side of the park there on the water is getting
2 filled, and some comes across.

3 Q: How frequent were you getting flooded?

4 A: We were getting flooded some weeks almost every day,
5 twice a day, where we had water standing several -- a couple
6 feet standing in our yard and on the road.

7 Q: When the water comes in and sits like that, how long does
8 it stay?

9 A: Two hours, two and a half hours, three hours, depending
10 on the amount of water in the roads.

11 Q: More water, more time?

12 A: Yes.

13 Q: There are a number of what are called inlets, and we've
14 also heard them called catch basins where water drains --
15 where water is supposed to drain around the corners of your
16 property, in the right of -- in the State's right of way. You
17 know what I'm talking about?

18 A: Yes.

19 Q: Have you seen any change to those?

20 A: We've had water come out of those with -- even we've had
21 water running through them when it's sunny and it had been
22 sunny for a couple days. So we've got water coming from
23 someplace that runs down, and the volume of water coming out
24 of them at times -- now, if you look at the grates there, the
25 grates have dropped twelve to eighteen inches all the way down

1 into the ground.

2 Q: How do you know? Do you have a benchmark? How do you
3 know?

4 A: Because it used to be level with my fence right there,
5 and if you look right there, it's twelve to eighteen inches
6 lower now.

7 Q: We've heard some testimony about barricades being put up.
8 Do you have any information to share with us about barricades?

9 A: Barricades went up, and they went up at East Bay and
10 Front Street. They went up at Prince over there and
11 Greenwich, and at times they even ran one right across there
12 going toward the park.

13 Q: Do you have a belief or understanding as to who it is
14 that puts the barricades up?

15 A: I'm not sure. I assumed it was the City, but I do not --

16 **MR. LINDEMANN:** Your Honor, if he doesn't know, he
17 shouldn't be speculating.

18 **THE COURT:** You can't speculate.

19 **MR. CHRISTMAS:** Okay. Then I'm not sure who puts them
20 out, but they're put out.

21 **BY MR. EVANS:**

22 Q: Has the frequency with which they're put out changed
23 after the completion of the park around 2018?

24 A: Yes.

25 Q: How so?

1 A: They were put out many more times across there because
2 you couldn't access anyplace there because of the amount of
3 water on the property and on the roads.

4 Q: We've heard a lot about -- we've heard some about these
5 being state-owned roads. Did you always believe they were
6 state-owned?

7 A: I always was told that Greenwich was state-owned. I
8 always thought that the City owned Front Street, through the
9 interaction of people talking about what would be done between
10 City and State.

11 Q: I'm going to show you what I've marked for identification
12 purposes only as Plaintiffs' Exhibit 48. It was provided to
13 counsel last week. Take a minute, Mr. Christmas, to flip
14 through the twelve or so pages that are in Plaintiffs' Exhibit
15 48. I know you're still looking through them, but do you
16 recognize them?

17 A: Yeah, they're pictures that I had taken.

18 Q: You took these photos -- or pulled the first two off of
19 the internet. Is that correct?

20 A: Yes.

21 Q: When did you take these photos?

22 A: I took these photos after the park project was basically
23 completed. And then while they were working on the project,
24 when they were doing the thing they did, when they showed how
25 high the tennis courts were going, being built up across

1 there.

2 **MR. EVANS:** Okay. Plaintiffs moved Exhibit 48 into
3 evidence.

4 **THE COURT:** Any objection?

5 **MR. BATTLE:** No, Your Honor.

6 **THE COURT:** Ms. Thomas?

7 **MS. THOMAS:** None, Your Honor.

8 **MR. LINDEMANN:** None, Your Honor.

9 **THE COURT:** Plaintiffs' Exhibit -- what was the number
10 again? I'm sorry.

11 **MR. EVANS:** 48, Your Honor.

12 **THE COURT:** All right. Plaintiffs' Exhibit Number 48
13 will be moved into evidence.

14 **(PLAINTIFF'S EXHIBIT NUMBER 48**
15 **IS ADMITTED INTO EVIDENCE)**

16 **BY MR. EVANS:**

17 Q: Mr. Christmas, you're welcome to look at the paperwork.
18 I think the monitor might be up for you as well, so whichever
19 is easier for you.

20 A: Sure.

21 Q: Bates Stamp Page 169. What is it that you're trying to
22 capture here?

23 A: I'm trying to show how high they're building up the park
24 area.

25 Q: All the park or a specific area?

1 A: This is where the tennis courts are going.

2 Q: And is that higher than it was before?

3 A: Oh, significantly higher. I'd say -- I would estimate
4 three to four feet.

5 Q: And this is just the dirt, so this doesn't include
6 whatever you put on top of the dirt to actually make a tennis
7 court, correct?

8 A: Yes.

9 Q: Turn to 175, please, the top photo. Where is this photo
10 taken?

11 A: This photo was taken on -- from my driveway, and it shows
12 a truck going down Greenwich Avenue towards the park work
13 site.

14 Q: This is from your Front Street driveway, correct?

15 A: This is my Front Street driveway, yes.

16 Q: And did you have occasion during the renovation of the
17 park to see trucks like this going down the road in your
18 vicinity?

19 A: Oh, yeah. We saw trucks go by almost like a caravan
20 sometimes.

21 Q: What do you mean by that?

22 A: Lots of trucks.

23 Q: And did you see them down Front Street?

24 A: Did not normally see them down Front Street. They
25 usually came down around onto Greenwich and came down

1 Greenwich and went straight across there.

2 Q: When you saw the trucks coming by during the park
3 project, you said coming down Greenwich --

4 A: They were coming down Highmarket, come around, get over
5 and ride down Greenwich all --

6 Q: Okay. And we don't have -- I'm not sure. Can you see
7 this map?

8 A: Yes.

9 Q: Okay. That's Front Street? What street is that?

10 A: Greenwich Street.

11 Q: And then where is Highmarket?

12 A: Highmarket is the next street up.

13 Q: The next block up somewhere around here?

14 A: Yes.

15 Q: And your testimony is you saw the trucks coming from
16 Highmarket and going where?

17 A: They would come right down Highmarket, turn onto
18 Greenwich and go straight down Greenwich.

19 Q: And ultimately go where?

20 A: To the park.

21 **MR. EVANS:** Turn to Bates Stamp 178, still in Plaintiffs'
22 48, both photos, please.

23 **BY MR. EVANS:**

24 Q: What is it that you're capturing here, Mr. Christmas?

25 A: Just capturing pictures of all the equipment that was

1 sitting all over the property at the park.

2 Q: Is there -- that's a dumpster, basically, correct?

3 A: That's a dumpster, yes. Of course, it looks like dirt.

4 Q: As well as some heavy equipment around it?

5 A: Heavy equipment around it, back over to the side and
6 other pieces.

7 **MR. EVANS:** And turn to 180, please, both photos.

8 **BY MR. EVANS:**

9 Q: And what is it that you're capturing here, Mr. Christmas?

10 A: I think this is dirt down lower, near where the building,
11 the little utility building, or whatever -- I forgot what they
12 called it, but it was usually called a community building.

13 Q: The Alford building?

14 A: Yeah. That's it. Excuse me.

15 Q: In fact, is that -- if you zoom in on the dump truck, is
16 that the Alford building in the background? I have a photo.

17 A: I think it is.

18 Q: Why are you concerned about flooding?

19 A: Because it has brought water up into my yard, across
20 there, even into my backyard, across over to Mr. O'Donnell's
21 yard.

22 Q: And why is the presence of the water concerning?

23 A: Because you can't get ingress and egress whenever you
24 have all this water there. It's too deep.

25 Q: You're concerned about being able to get in and out?

1 A: Yes. Ingress and egress.

2 Q: As you get older, does the concern increase?

3 A: Yes.

4 Q: Are you still living in the house?

5 A: No.

6 Q: Why not?

7 A: Because of the ingress and egress, and I have inner lung
8 disease, so...

9 Q: I don't mean to get overly personal, but what is that?

10 A: It's where your lung starts to get mastachioned [sic]
11 hard enough through the thing across there, and I take special
12 pharmacy medicine for it.

13 Q: And does that put you in a more emergency situation?

14 A: It could, yes.

15 Q: When did you move out?

16 A: Excuse me?

17 Q: When did you move out?

18 A: In 2019.

19 Q: Have you been back to the house since then?

20 A: We come down two or three times a week to get our mail,
21 check things out, make sure everything is all right with the
22 house.

23 Q: Still paying your county taxes?

24 A: Yes.

25 Q: Let me show you what's been marked for identification

1 purposes only Plaintiffs' Exhibit 39. Counsel was provided
2 last week.

3 **MR. LINDEMANN:** Your Honor, if he's planning on putting
4 that in with this witness, I mean, it's all hearsay.

5 **THE COURT:** Well, let's have him identify it first.

6 **BY MR. EVANS:**

7 Q: Take a moment, Mr. Christmas. There's six or so pages to
8 Exhibit 39. Flip through it. Let me know when you flip
9 through it.

10 A: Okay. Yes. I'm familiar with it.

11 Q: Okay. In the summer of 2021, did you solicit bids to fix
12 things on the property?

13 A: Yes, I did.

14 Q: And did you yourself get those bids? You contacted
15 folks?

16 A: I talked to -- I had everybody out to take a look. I was
17 recommended some of the people by others, by one of the large
18 builders in the county, and he told me who I should contact to
19 try to get that type of work done.

20 Q: And you yourself contacted them?

21 A: Oh, yeah. I talked to them, yes.

22 Q: And what work were you anticipating getting done with
23 these bids?

24 A: Having the pavers removed. The pool needs to be where
25 it's been damaged by having water and it just sort of pulls

1 water out to across that way, and having the pavers all taken
2 up, concrete taken up, and re-put back in.

3 Q: And if it helps, turn to the one that says RH
4 Construction. Was there work on that bid as well?

5 A: Well, I -- some work on that also. Oh, RH?

6 Q: Yeah.

7 A: See what that is.

8 **MR. LINDEMANN:** Your Honor, again, this hasn't been
9 admitted to be published to the jury. I mean, it's all pure
10 hearsay.

11 **THE COURT:** And it hasn't. He's just saying that he got
12 bids.

13 **BY MR. EVANS:**

14 A: Yes. RH Construction gave me a bid for fixing up where
15 the air conditioner had stuff come down -- say, the falling,
16 crackling of the property across there where they would have
17 to have something else replaced and have to have a thing where
18 the air conditioner stood up on the side of the building to be
19 done.

20 Q: Your AC unit sits on a stand?

21 A: Yes.

22 Q: And the legs got damaged.

23 A: Yes.

24 Q: Is that right? The legs for the stand?

25 A: Yes.

1 Q: The AC stand.

2 A: And I had it done, you know, with cobblestone that would
3 go on the side of the house.

4 Q: And did you -- Mr. Christmas, just to help move this, did
5 you also, if you turn the page, get an estimate to have the
6 iron fences removed so you can fix up things and then put it
7 back?

8 A: Yeah. They would have to -- they would have to take the
9 fence out to be able to come on-site to get the work done
10 across there, and the gates would have to have been where --
11 they would have to be redone and that iron was -- the people
12 who made it wasn't around when we did it. So I contacted
13 them, yes.

14 Q: And that wasn't to replace them, that was to reuse them.

15 A: Reuse them. You've got to take them up and then put them
16 back in, yes.

17 Q: Yeah. And then did you also get an estimate to have
18 someone oversee the work for you?

19 A: Yes.

20 Q: And if you'll turn to the last page there. You had a
21 company give you a bid to oversee all of the work.

22 A: Yes.

23 Q: And how were they going to bill you?

24 A: They would bill me based upon work completed across
25 there.

1 Q: And they were going to charge --

2 A: They were going to charge a fee, yes.

3 Q: A fee of eight percent to manage the job for you,
4 correct?

5 A: Yes. Yes, sir.

6 Q: Do you recall -- and I can get you a calculator if you
7 need to. Do you recall how much this work adds up to?

8 A: I don't remember --

9 **MR. LINDEMANN:** Your Honor, again -- this is hearsay,
10 Your Honor.

11 **THE COURT:** Well, he hasn't put it in.

12 **MR. LINDEMANN:** This isn't -- well, he's asking them to
13 total up what's in here.

14 **THE COURT:** He's asking him --

15 **MR. LINDEMANN:** And it's information that was provided by
16 a third party, Your Honor.

17 **THE COURT:** He said do you recall how much it was total.

18 **MR. LINDEMANN:** But again, he's communicating what is in
19 -- the hearsay in these documents.

20 **THE COURT:** Let me have the jury step out just for a few
21 minutes.

22 **REPORTER'S NOTE:** (Jury exits courtroom at 3:32p.m.)

23 **THE COURT:** All right. Mr. Lindemann, happy to hear from
24 you.

25 **MR. LINDEMANN:** Sure, Your Honor. Basically what -- I

1 don't know if you've got a copy of it in front of you but --
2 sure but it's basically a lot of invoices, e-mails, proposals.
3 I mean, it's all out-of-court statements that are --

4 **THE COURT:** But he hasn't introduced them yet. He's just
5 simply asking him if he knows what the total was. I mean, am
6 I correct? What you've asked him is did you get a quote for
7 this, did you get a quote for this, did you get a quote for
8 this.

9 **MR. LINDEMANN:** Well, yeah, but if he's going to ask him
10 what the total is, the total is going to be based upon the
11 inadmissible hearsay evidence. I mean, if one of them is ten
12 dollars and another one is twenty dollars, and -- that can't
13 come into evidence without being properly provided by the
14 person who came up with those numbers, but he didn't come up
15 with any of these numbers. Then if you ask him the total,
16 that's the product of the hearsay documents.

17 **THE COURT:** Well, but my point is what he's hasn't --
18 what he's asked him is if he knows the total of the quotes
19 that he's received, and I don't see why he can't testify to
20 that. He's not testifying --

21 **MR. LINDEMANN:** Because he would be testifying as to the
22 contents of these documents, Your Honor.

23 **MR. BATTLE:** The question is whether he can say what the
24 total is. If you say he can't say what the total is, that's
25 one thing. If you say, yeah, I know what the total is, and

1 that's the amount he puts in, then I don't think you have an
2 objection to saying I know what the total is.

3 **MR. EVANS:** Your Honor, I think I can ask him once --
4 preemptive again. We're getting into stuff that we have to
5 put on the record yet.

6 **THE COURT:** Right.

7 **MR. EVANS:** But I can ask him, do you have an
8 understanding as to what it's going to cost to fix your
9 property.

10 **MR. LINDEMANN:** Okay. Your Honor, yes. If he's asking
11 what the total is, as long as the next question isn't okay,
12 what is the total. But generally when people say do you know
13 what the total is, they'll say \$100,000, and that can't come
14 in because that's the -- that comes from the hearsay documents
15 plus he had absolutely nothing to do with valuing these
16 estimates, determining what they are. And plaintiffs, of
17 course, have the burden not only of giving the amount --

18 **THE COURT:** I'm going to let him answer it. You can
19 cross-examine him on that, but I'm going to let him answer it
20 and tell him if he happens to know what the answer is. Again,
21 I don't want him testifying as to what each individual, but if
22 he has an answer for what the total that his estimate was, I'm
23 going to let him testify to that.

24 **MR. EVANS:** Thank you, Your Honor.

25 **MR. CHRISTMAS:** I think it's around --

1 **THE COURT:** We've got to bring the jury back in.

2 **MR. CHRISTMAS:** I'm sorry.

3 **MR. EVANS:** I think we're ready to bring them back.

4 **THE COURT:** You can bring them back in.

5 **MR. EVANS:** Let me ask the question before.

6 **MR. CHRISTMAS:** Okay.

7 **MR. LINDEMANN:** Your Honor, I assume I'm protected for
8 the record.

9 **THE COURT:** Yes, you are.

10 **MR. LINDEMANN:** Thank you. But you're not allowing the
11 exhibit in, right?

12 **THE COURT:** Well, he hasn't tried to introduce the
13 exhibit. He's just asking the questions.

14 **MR. LINDEMANN:** I understand.

15 **REPORTER'S NOTE:** (Jury enters courtroom at 3:37p.m.)

16 **THE COURT:** Thank you, ladies and gentlemen.
17 Mr. Evans, you may proceed.

18 **BY MR. EVANS:**

19 Q: Mr. Christmas, do you have an understanding as to the
20 total cost to repair the hardscape, the HVAC stand, the brick
21 steps, and the pool?

22 A: Yes.

23 Q: And what's your understanding as to what that costs?

24 A: It was about \$850,000, I think, at this time.

25 Q: And this was in the summer of '21?

1 A: Yes.

2 Q: Do you have any understanding as to how the cost of
3 construction has increased since then?

4 A: I know that it has because I've had some work done on
5 another property that I own.

6 Q: And, if you know, any idea how much it's gone up,
7 percentage-wise?

8 **MR. LINDEMANN:** Your Honor, I don't believe he's
9 qualified --

10 **THE COURT:** He's not qualified to answer that. I'll
11 sustain your objection.

12 **BY MR. EVANS:**

13 Q: Mr. Christmas, you've been out of the house for almost
14 five years. Is that correct?

15 A: Yes.

16 Q: During that time, have you still had to carry insurance
17 on the property?

18 A: I've had to carry insurance on the property. I've had to
19 pay utilities, taxes. I've had to have the pool maintained,
20 the air-conditioning units maintained, et cetera.

21 Q: And do you know what you've paid, either on an annual
22 basis or in total over those five years, for that sort of
23 maintenance and upkeep and the carrying costs? I want to say
24 at least \$120,000 a year.

25 **MR. EVANS:** Thank you, Mr. Christmas.

1 **THE COURT:** Mr. Battle?

2 **CROSS-EXAMINATION OF MR. CHRISTMAS BY MR. KIRK BATTLE:**

3 Q: Mr. Christmas, my name is Kirk Battle. I'm the attorney
4 for Georgetown County in this matter. Do you recall having
5 your deposition taken on April 15th of last year?

6 A: Yes.

7 Q: All the questions I'm going to ask you are based on
8 statements you gave in that deposition. Does that sound fair?

9 A: That's fine.

10 Q: When your house was built, was it elevated above the
11 ground?

12 A: I think that it was. There was a little bit of dirt put
13 in the middle of it, but I think it was.

14 Q: Well, it's on pilings, sir?

15 A: It's on pilings, yeah. Oh, it's elevated.

16 Q: Yes, sir.

17 A: Yes, it's elevated. I'm sorry.

18 Q: You're okay. And is your neighbor, Mr. O'Donnell's house
19 on pilings?

20 A: I'm sure it is.

21 Q: Has your home ever taken on water damage?

22 A: The home itself, no. We've had twice, got water in the
23 garage. That was in Matthew and in what was called the
24 hundred-year water event.

25 Q: Absolutely, sir. But it's never gotten up to the house,

1 correct?

2 A: No, it would never get in the house.

3 **MR. BATTLE:** If I can approach please, sir?

4 **MR. CHRISTMAS:** Sure.

5 **BY MR. BATTLE:**

6 Q: If you could review that document for me, please, sir.

7 A: Yes.

8 Q: Is that the building permit for the original construction
9 of your home?

10 A: I assume that it is.

11 Q: And, if you look over in the right mid-column, does that
12 indicate that it's in flood zone AE10?

13 A: Yeah, right there, I see it.

14 Q: What is your understanding of what that means, sir?

15 A: AE10 means that you are in a flood zone, but it's not a
16 severe flood zone; 10 and 11 is not usually -- not bad.

17 **MR. KIRK BATTLE:** I'd like to enter this as -

18 **MR. CHRISTMAS:** If you have an event every 15 years or
19 whatever.

20 **MR. KIRK BATTLE:** Thank you, sir.

21 I'd like to enter this as a defense exhibit.

22 **THE COURT:** You want to show that to Mr. Lucey and --

23 **MR. KIRK BATTLE:** Okay.

24 **MR. LUCEY:** I believe we stipulated in the building
25 permit, the deed, and the elevation certificate.

1 **THE COURT:** Okay. Has that already been marked, Mr.
2 Battle?

3 **MR. LUCEY:** They're defense exhibits.

4 **THE COURT:** Has it been marked?

5 **MR. KIRK BATTLE:** No, it hasn't been premarked.

6 **THE COURT:** All right. And what number will that be?
7 All right. It's been admitted as Defense Exhibit Number 4.

8 **(DEFENDANT'S EXHIBIT NUMBER 4**

9 **IS ADMITTED INTO EVIDENCE)**

10 **BY MR. BATTLE:**

11 Q: If you could read it for me, would you do that, sir?

12 Okay. And is the base flood elevation for that certificate
13 ten feet?

14 A: Tell me where I'm looking -- yeah, right up here, I see
15 it.

16 Q: Is that -- and is that the elevation certificate, sir?

17 A: Yes, sir.

18 **MR. KIRK BATTLE:** I'd like to enter this as a defense
19 exhibit.

20 **BY MR. KIRK BATTLE:**

21 A: Now, of course, across the road there, there was a sign.
22 I think you showed one of the pictures where this -- and it's
23 a sign -- like a traffic sign that says we're in a nine-foot
24 flood zone. So I knew there was a nine-foot flood zone across
25 the street.

1 Q: Is that Number 47, Plaintiffs' exhibit, the picture that
2 was shown?

3 A: I guess, yeah.

4 **THE COURT:** Mr. Battle, are you moving to enter Defense
5 5?

6 **MR. KIRK BATTLE:** Yes, Your Honor.

7 **THE COURT:** And I understand that that's been stipulated?
8 Okay.

9 **MR. EVANS:** Correct, Your Honor.

10 **THE COURT:** Defense five is admitted.

11 **(DEFENDANT'S EXHIBIT NUMBER 5**

12 **IS ADMITTED INTO EVIDENCE)**

13 **BY MR. KIRK BATTLE:**

14 Q: And then, is this the sign you're referring to that was
15 that --

16 A: I think that probably is it. This used to be a much
17 higher point here, because when we bought the lot, you can
18 tell what tree it was. This was much higher. This ditch used
19 to be a true ditch down in there, and a dry ditch.

20 Q: What happened to the ditch, sir?

21 A: I think that the ditch brought in water and got filled in
22 a good bit after they filled in the perimeter around the park.

23 Q: When did that fill-in occur at the park?

24 A: I think they started it in, like, '12 -- you know, in
25 that area, range; it could be '12, it could be '13, it could

1 be '11.

2 Q: So, in 20 -- if I understand correctly, please tell me if
3 I'm wrong, in 2012, the perimeter of the park was filled in
4 with dirt?

5 A: Yes. It was filled in around the water side. Yes, sir.

6 Q: And the blue sign, or blue lettering, but that sign
7 across from your lot indicated you were in a flood zone as
8 well?

9 A: Yes.

10 Q: Is this spot right here where the old Georgetown County
11 ferry used to be?

12 A: Yes.

13 Q: Okay. What happened to the dock there, do you know?

14 A: Well, there was nothing but pilings when I bought the
15 lot, but the lay of the land when I bought it was just like it
16 was, and I have a book that shows where Pawleys down there
17 where it was at, and the lay of the land right there across
18 from my lot was the same when I bought it. It didn't have a
19 ditch in front of it either, and I think y'all have a picture
20 of that.

21 Q: In regards to your home, does it have an elevator that
22 allows access from the ground floor?

23 A: Yes, sir.

24 Q: Okay. And so when we look at the stairs in the front, if
25 you weren't going up those stairs, you would be taking the

1 elevator normally?

2 A: We walk on the interior stairs inside, not from outside,
3 as you already know.

4 Q: So is there -- do you have elevator access for --

5 A: I have elevator access to -- if I have anything with
6 heavy loads, I take it out of the car and put it in the
7 elevator, yes.

8 Q: Understood, sir. Thank you.

9 In regards to Plaintiffs' 47, those pictures were taken
10 during the construction of the tennis courts, correct?

11 A: Yeah. The pictures I took down there where they had to
12 dig dirt going up there across there for the tennis courts and
13 stuff, yes.

14 Q: Had your property flooded or had the water been coming
15 over Greenwich Drive prior to the renovations of the tennis
16 courts?

17 A: You got some water, and sometimes you get a little bit at
18 the lower end of my property line.

19 Q: And I don't mind getting to the crux of the question,
20 sir. Why were you documenting the construction project if the
21 flooding hadn't worsened yet?

22 A: Because I thought that it could. At one point, water
23 used to come across and even go through those baseball fields,
24 and all that water had gone away and when -- oh, it may not be
25 permissible. When I walked and I talked to somebody else who

1 walked the park who worked for the City, he acknowledged the
2 same thing, that you used to not be able to walk, you had to
3 cut before you got to the tennis courts and go up to East Bay,
4 there was water at some high tides.

5 Q: So, before the renovations were completed, you were
6 already concerned about water displacement?

7 A: No. They said they were going to do diversion. I just
8 wanted to make sure what they were going to do.

9 Q: So, at that time, you were just documenting the work they
10 were doing?

11 A: Yes. I was just documenting the work they were doing.

12 Q: Was this for your own records or to give to the City or -
13 -

14 A: No, it was for my records across there.

15 Q: So at high tide, I spoke to your neighbor, Judge
16 O'Donnell, the water comes across from here from Winyah Bay,
17 correct?

18 A: Yes.

19 Q: Crosses over here from Winyah Bay, correct?

20 A: Yes.

21 Q: And it crosses over here by the tennis courts, correct?

22 A: Yes.

23 Q: How do you differentiate between the water crossing here
24 and the water coming from the tennis courts?

25 A: The water that is coming from the park, and I'm not going

1 to say exactly where, because it came into Front Street and
2 became much deeper. Again, the house behind me, and I was on
3 the property of the house behind that belongs to Mr. Owens,
4 and water was going all the way through his garage, all the
5 way across the back of his property into where -- I guess, a
6 little bit -- Bobby's property wasn't back that far, but right
7 near in the back, where Bolick is.

8 Q: In regards to taxes, I believe you testified to the jury
9 earlier that you're still paying taxes on the property.

10 A: Yes, sir.

11 Q: Did the County drop the taxes after you showed the access
12 issue to the property?

13 A: Yeah, I think they dropped them twice, one when we
14 started getting some water and one after the water got out
15 because they were familiar with the fact that you could not
16 ingress and egress the property at a lot of times.

17 Q: So the County has dropped the property taxes?

18 A: Yes, sir.

19 Q: Okay. In regards to the construction price quotes you
20 had, is the plan to just replace everything exactly as it is
21 now?

22 A: Put it back just like it was. Again, the hardscape --
23 water doesn't -- it sits, it comes off. It drains off. I
24 mean, it doesn't hurt it across there at all. That's not
25 going in and making the soil sink or anything else because

1 it's impervious.

2 Q: The concrete is impervious?

3 A: Yes. I don't think it's pervious. That's my opinion. I

4 --

5 Q: I don't think you're going to rub anyone the wrong way
6 saying concrete is impervious, sir.

7 A: Okay.

8 Q: While you were working on your home, did you ever have
9 wild animals get into your swimming pool?

10 A: No.

11 Q: During -- prior to the renovations, did you ever have
12 sand crabs get into your swimming pool?

13 A: Sand crabs, before they did work on the park. After they
14 did work, we didn't have any sand crabs. We did get two
15 alligators.

16 Q: Now, I know you're not a biologist, but where do you
17 think the animals came from?

18 A: I assume they came from the marsh over there that's very
19 thick because we even had a wild boar in there one time. I
20 think the newspaper took a picture of it.

21 Q: And, if I may, sir, this marsh?

22 A: No. The marsh right down toward the park, right down
23 there.

24 Q: So the two alligators and the crabs came from here?

25 A: No, across the street on the water side.

1 Q: I'm sorry, sir. Right -- the other side of Greenwich
2 Drive?

3 A: The other side of Greenwich Drive and down. We had wild
4 pig in there and other things in there over time. Coyotes.

5 Q: I cut you off, sir. I'm sorry.

6 A: I said coyotes.

7 Q: You had a coyote? The coyote didn't get in the pool.

8 A: No, he didn't get in my pool, but he was in that marsh.

9 Q: Yes, sir. But --

10 A: The alligators did. Had to have somebody come get them
11 out.

12 **MR. BATTLE:** Thank you, sir. No further questions from
13 the County.

14 **CROSS-EXAMINATION OF MR. CHRISTMAS BY MS. THOMAS:**

15 Q: Good afternoon, Mr. Christmas.

16 A: Good afternoon.

17 Q: I wanted to go back briefly to Number 48. Plaintiffs'
18 48. I think that's the pictures.

19 A: Okay.

20 Q: Do you have that up?

21 A: I don't have it up now, but I guess it will come up.

22 **MR. EVANS:** Mr. Christmas, I think it's still on the desk
23 in front of you.

24 **MR. CHRISTMAS:** Oh, okay.

25 **MS. THOMAS:** I think it's that one right there.

1 **MR. CHRISTMAS:** All right. Yes.

2 **BY MS. THOMAS:**

3 Q: And I just wanted to ask one little question about that.
4 You told us when you first started talking about that, that
5 the first two pictures you got off the internet. Is that
6 true?

7 A: Yes. Yes.

8 Q: And the copy I have says Google Earth down at the bottom.
9 Is that where you got it from?

10 A: Yes.

11 Q: And then handwritten under the copy I have, it has May
12 2013. Do you know anything about why that's written on there?

13 A: I guess that's the date that it was pulled off -- that we
14 pulled it off.

15 Q: Okay. So the sign that has the hundred-year flood on it,
16 your belief is that was from a May 2013 picture?

17 A: I think that's the picture that's on there.

18 Q: Okay.

19 A: Yes. And it disappeared. The sign did. I don't know
20 where it went but of course, I didn't have a (audio
21 disruption) there either at one time. So...

22 Q: And we've had testimony already that you completed and
23 moved into your house in 2005. Is that correct?

24 A: Yes, ma'am.

25 Q: And there was already a road in front of your house and a

1 road coming down beside your house when you moved in.

2 A: Yes.

3 Q: And, when you built your house, I think you told us you
4 started in like 2003 and --

5 A: No, I think it was 2004.

6 Q: Okay.

7 A: End of 2004.

8 Q: So it took about a year.

9 A: Yeah.

10 Q: Round about to build it. And you didn't act as your own
11 contractor, did you?

12 A: Oh, no.

13 Q: You hired someone to --

14 A: I hired somebody to do that. I think I'd be -- it
15 probably wouldn't have stood two or three weeks, it would be
16 like the house that washes away in the Bible.

17 Q: I understand. And so the person that you hired or the
18 group of people that you hired, they designed your house based
19 on what you told them you wanted.

20 A: Yes.

21 Q: True?

22 A: What my wife told them she wanted.

23 Q: Even better. And so they came out, they took a look at
24 the lot.

25 A: Yes.

1 Q: They saw the position of the lot, where the marsh was,
2 where the roads were. They designed your house.

3 A: Yes.

4 Q: And part of that design was they put it up on pilings.

5 A: Yes.

6 Q: And in fact, your living space basically starts on the
7 second floor, correct?

8 A: Well, it's my garage, and it starts on what I call the
9 first floor but there's a garage underneath it, and again, the
10 house I think they said is ten feet up but I'm not sure;
11 that's probably right.

12 Q: Okay. And not only did you buy the lot that your house
13 is on, but you have the lot across the road going up into the
14 marsh, true?

15 A: I purchased a lot on the marsh, yes.

16 Q: And we heard testimony earlier that in years past,
17 yourself and Mr. O'Donnell would park on that lot? When you
18 had Christmas parties, you'd park on that lot?

19 A: Yeah, people would park on that lot. People came down at
20 lunchtime and sat in their trucks or got out and put out a
21 little wine and have picnics out there and on July --

22 Q: People you didn't invite parked on that lot.

23 A: Then July 4th, a lot of people parked on that lot to
24 watch the fireworks out there.

25 Q: And, in fact, you and Mr. O'Donnell mowed your lots over

1 | there for a period of time, didn't you?

2 | A: I did. To be a matter of fact, I put sod on them, DHEC
3 | let me do that, and I put a sprinkler system on them because I
4 | had no water on mine. I wouldn't have put a sprinkler system
5 | if I was having water. I paid to put one on.

6 | Q: So, if you were to look at -- stand on the street and
7 | look at the Winyah Bay in front of your house, you can tell
8 | the difference between your lot, Mr. O'Donnell's lot, and the
9 | other lots around it, can't you?

10 | A: Yeah. When I first moved there, all the lots were cut
11 | across there. I put the sea captain, who now has let it grow
12 | up, which I've done. It -- his was cut. All of them were cut
13 | all the way up to the end of the street there. There were
14 | only what, six houses on the street. One has now been taken
15 | down, and they're going to put, I understand, two houses on it
16 | but...

17 | Q: But currently, yours and Mr. O'Donnell's lots have
18 | different levels of spartina and marsh than the other lots
19 | around it, correct?

20 | A: I mean, I'm not sure what you're asking me.

21 | Q: They've been mowed more recently than the other lots
22 | around there, true?

23 | A: Well, mine haven't been mowed in the last three or four
24 | years so...

25 | Q: And a lot of times when the water would come over from

1 the Winyah Bay, and I think you testified in your deposition
2 that most of the water that comes into your yard comes from
3 the Winyah Bay. Isn't that true?

4 A: I think -- comes in the backyard comes from the Front
5 Street side. I think the water that comes in on the front
6 part is primarily coming from the bay.

7 Q: And it comes right through those two lots that are mowed,
8 doesn't it?

9 A: Right, but it used to not come through there at all.
10 That's why we put a sprinkler system in. We didn't have any
11 water on it then. I don't think water has risen enough. If
12 they hadn't filled in around the perimeter of the park, I
13 don't think we would have ever had that water come down.

14 Q: But that's where the water comes in now.

15 A: Yes. And the water is like taking when you were in
16 junior high and somebody brought a fish bowl and they put sand
17 down, and then they poured a little water in the front, and
18 you'd do a finger thing there, and the water would run right
19 in. That's what we had happen to us after they filled in.

20 Q: And, in fact, any problems that you have with draining,
21 if the water comes over from the Winyah Bay, it fills up those
22 drainage pipes out in the bay.

23 A: It fills up -- yeah, it does. Now it does. Yeah.

24 Q: And it's not going to drain out of the ditch when it does
25 that.

1 A: No, it comes out of the ditch, out of the drainage.

2 Q: And we've already talked about the hardscape, that most
3 of your lot is hardscape.

4 A: Yes.

5 Q: Both the front yard and the backyard.

6 A: Yes.

7 Q: And that's --

8 A: I was going to say there are twenty-one palmetto trees on
9 the property as opposed to the two I heard about yesterday.

10 Q: And that's what you're claiming has been damaged by
11 water.

12 A: The hardscape has, yes, and the pool.

13 Q: Now, there's been some testimony that there was some
14 paving done on the road in 2006 and again 2009.

15 A: Yes.

16 Q: Has there been any paving in that area since then?

17 A: Not that I know of.

18 **MS. THOMAS:** That's all the questions I have for Mr.
19 Christmas.

20 **THE COURT:** Yes, sir.

21 **MR. LINDEMANN:** May it please the Court?

22 **THE COURT:** Yes, sir.

23 **MR. LINDEMANN:** Thank you, Your Honor.

24 **CROSS-EXAMINATION OF MR. CHRISTMAS BY MR. LINDEMANN:**

25 Q: Good afternoon, Mr. Christmas.

1 A: How you doing.

2 Q: Just a few follow-up questions. First of all, I think
3 you indicated that you purchased the property in 2003. Is
4 that correct?

5 A: I think that's when the deed -- I actually purchased it I
6 think in 2002. I put the money in escrow while a property
7 issue was taken care of.

8 **MR. LINDEMANN:** And, Your Honor, I have what I pre-marked
9 as City's 3 and 4, but I think we'll probably just mark it as
10 defense -- the next two defense exhibits.

11 **THE COURT:** The ones that were stipulated?

12 **MR. LINDEMANN:** He just stipulated, too. I'm sorry if
13 that wasn't heard.

14 **MR. EVANS:** Yeah, it's --

15 **THE COURT:** Thank you, Mr. Evans.

16 **MR. LINDEMANN:** All right.

17 **THE COURT:** Is this 6 and 7? All right. Thank you.

18 **MR. LINDEMANN:** Yes, Your Honor.

19 **(DEFENDANT'S EXHIBIT NUMBERS 6 & 7**
20 **ARE ADMITTED INTO EVIDENCE) 0000**

21 **BY MR. LINDEMANN:**

22 Q: Just real quickly, just to get you to identify Mr.
23 Christmas; they've already been admitted to evidence. Show
24 you Defendants' Exhibit Number 6. Do you recognize that?

25 A: Well, I don't know what is.

1 Q: It looks like -- it's a deed --

2 A: It's a deed. It's a deed, yes, it is.

3 Q: All right. And it was recorded back in 2003, I believe.

4 Okay.

5 A: Okay. But, yes, that's what I had paid for the lot

6 before then. That's correct.

7 Q: All right. And then let me show you the second deed,
8 which is the Defendant's Exhibit Number 7. Are you familiar
9 with that document?

10 A: Is this the lot across the street?

11 Q: I believe that's your house.

12 A: Okay.

13 Q: I believe it's both. I believe it's -- think it may be
14 both.

15 A: -- there were two separate tracts, plots.

16 Q: Yeah, I think it shows two different legal descriptions.
17 And, in fact, they show two different tax map numbers.

18 A: They do.

19 Q: All right. And this is -- Exhibit Number 7 is where you
20 deeded half the property to your wife, correct?

21 A: Well, this is when they -- the bank asked me to have my
22 wife added to it.

23 Q: Okay.

24 A: Across there.

25 Q: So you deeded half the property to your wife.

1 A: I thought it was right, so I think it's on there, both of
2 us, yes.

3 Q: Well, if you want to look at Defendant's Exhibit Number
4 6, I don't believe your wife is included on that.

5 A: Okay, maybe she was not then. Okay.

6 Q: All right. This is the most current deed though in 2020,
7 correct?

8 A: Right. They -- the bank asked that it be done in joint
9 where I have a mortgage.

10 Q: All right. Mr. Christmas, as I understand your testimony
11 from earlier, at some point you and your wife stopped living
12 on a full-time basis. Well, did you ever live on a full-time
13 basis on 101 Greenwich Drive?

14 A: Yes.

15 Q: Okay. When you first moved to Georgetown County, you
16 actually had a place up in Garden City, right?

17 A: Yes.

18 Q: And you all kept that place in Garden City, right?

19 A: Yes.

20 Q: Okay. And I think I have the address as 1453 Basin
21 Terrace.

22 A: 73.

23 Q: I can't read my own writing. 1473 Basin Terrace,
24 correct?

25 A: Yes.

1 Q: All right. And so that's where you lived initially until
2 you built this house?

3 A: Yes.

4 Q: But you ended up keeping that residence as well?

5 A: Yes.

6 Q: And ultimately, at some point, as I understood your
7 testimony earlier, you and your wife stopped living on a
8 regular basis at 101 Greenwich and actually just go and check
9 out the property a few times a week?

10 A: About three times a week.

11 Q: And that's still your legal residence, correct?

12 A: Yes, it's still my legal residence.

13 Q: And you still receive mail there?

14 A: Yes. As soon as they get the water problem fixed, I want
15 to go back home.

16 Q: All right. So ultimately, where did you move to, to the
17 Garden City address?

18 A: I moved to a condo that my son lived in, and me and my
19 wife was on the deed because when he bought it, he had to have
20 extra financial support.

21 Q: And I know you testified earlier that you're claiming
22 damages for five years. When specifically did you all move --

23 A: In 2019.

24 Q: Okay. So 2019 would be four or less years ago.

25 **MR. EVANS:** Objection.

1 **BY MR. LINDEMANN:**

2 A: Maybe eighteen, I don't remember exactly.

3 Q: Well, that's what I'm asking. I'm trying to understand -

4 -

5 **THE COURT:** I think there's an objection. I'm sorry, Mr.
6 Christmas. I'm sorry.

7 **MR. EVANS:** Just math with the years.

8 **THE COURT:** Yeah.

9 **MR. LINDEMANN:** I don't know that math is a valid
10 objection.

11 **THE COURT:** What was the question? I'm sorry, I --

12 **MR. LINDEMANN:** Well, he testified earlier that he's
13 claiming damages for five years for taxes, insurance, all of
14 those things, and I'm trying to understand when it is that he
15 moved out.

16 **THE COURT:** All right. Ask him when he moved out then.
17 Just ask him that basic question.

18 **BY MR. LINDEMANN:**

19 Q: Tell me when he moved out --

20 A: I think it was 2019.

21 **MR. LINDEMANN:** All right. And then, Your Honor, I just
22 followed up with that because the math would suggest that that
23 would be four years, and I just wanted to double check and
24 make sure 2019 is the --

25 **BY MR. LINDEMANN:**

1 Q: So it's 2019 that you contend --

2 A: It would be about four and a half years, probably.

3 Q: All right. Whatever ---

4 A: I did a schedule from the time we went out, but I think
5 y'all provided it.

6 Q: Well, I'm not sure I've seen that, sir, but so if you
7 know that -- if you can give the jury the date that you moved
8 out or the month you moved out, that would be helpful.

9 A: I can't remember the exact date.

10 Q: All right. Have you ever taken any action whatsoever to
11 address some of the drainage issues on your own property?

12 A: My water automatically would slope down and out. There's
13 no place for the water to go otherwise.

14 Q: Have you ever had any --

15 A: Like I said, we've had some pervious ground there where
16 the flowers are on one side. I have the thing behind the
17 fence in the back where we put all that stuff, the vegetation,
18 to sort of block the pool area. And then we had some running
19 by Robbie's across there. We had boxwoods and --

20 Q: Did you ever put any type of drains in?

21 A: Not that I know of.

22 Q: Not that you know of?

23 A: No. I mean --

24 Q: All right.

25 A: -- during construction, I'm not sure what they did there.

1 Q: Did you ever consult with Mr. Castles about any ways to
2 improve the drainage on your property?

3 A: I don't think he felt that we needed to. I mean, I was
4 fine when I talked to him because, again, I can't go through
5 that stuff on my own.

6 Q: All right. Now, as far as the timing of when the
7 flooding -- when the water situation changed in your mind,
8 that was roughly 2012, 2013, I believe. Is that correct?

9 A: 2012, I got with the -- I believe, fell about '12, '13,
10 somewhere there, early '14. I mean, I got with them because
11 they were having water where they had filled in around the
12 park that was coming into the ditch, and it was beginning to
13 get silt and stuff in there and get more water in it.
14 Therefore, more water was coming through the pipe because
15 there was no back flow valve on that sixteen-inch, I believe
16 they said, plastic pipe there, that water was coming in and
17 coming and causing a problem if it was raining across there,
18 getting water on the road.

19 Q: So roughly 2012, 2013 is when you first identified that
20 they were flooding issues, drainage issues that you were first
21 identifying?

22 **MR. EVANS:** Objection, Your Honor. He said somewhere
23 between '12 and '14 --

24 **MR. LINDEMANN:** Oh, I'm sorry.

25 **MR. EVANS:** -- off of last year.

1 **BY MR. LINDEMANN:**

2 Q: Between 2012 and 2014 is when you first recognized that
3 there were some changes in the drainage that you were
4 recognizing could be problematic?

5 A: Where we had water every day, yes.

6 Q: All right.

7 A: That was because I was worried about getting water on my
8 lot across the street. It had nothing to do with the property
9 my house was on, because we weren't getting any water even
10 across the road in front at that time.

11 Q: But that was affecting the lot across the street from
12 you?

13 A: No, I said we weren't. I was afraid it would, because if
14 it kept wet -- how it used to be, if you look at one of the
15 maps out there, you had a little sort of circular piece out
16 there on the end of their lot that was just a piece on the
17 right-of-way lot, and it had gotten washed away after they
18 filled it, and water was coming down and we were getting silt
19 coming in some, too, filling the thing, because it was getting
20 larger and narrower, and it was getting wide in the ditch
21 there.

22 Q: And this is the right-of-way that's adjacent to your
23 property?

24 A: It's the right-of-way across the street on the marsh
25 side.

1 Q: Okay. On the marsh side of Greenwich?

2 A: Yes, it's the one they put a back flow valve on to keep
3 that water from coming back up and coming on the street.

4 Q: All right. So you're talking about the right-of-way on
5 your lot across Greenwich from your house?

6 A: Yes.

7 Q: But that's the other lot you own?

8 A: Yeah, that's what I was talking about. It had nothing to
9 do with my house lot at that time.

10 Q: Okay. But you were saying that there was a change in the
11 drainage on that particular lot in that 2012-2013 time frame?

12 A: We were getting to get water, and I was afraid it was
13 going to encroach over and start putting water on my lot.

14 Q: I understand.

15 A: When I had paid to put a sprinkler system on to sod.

16 Q: All right. Now, as far as the high tides, as you've seen
17 them, have you ever had to actually walk through any of the
18 high tides?

19 A: One time out there, and the water on Greenwich Inn on the
20 Front Street, as Mr. O'Donnell said, knee-high.

21 Q: Well, I think you testified in your deposition it was
22 calf-high, right? It was -- it came up to your calf.

23 A: Well, I'm thinking about up to your knee, which is where
24 your calf is right next to it across there. I think that's
25 the whole calf muscle there.

1 Q: All right.

2 A: I mean, I have the same water conditions he has.

3 Q: Well, again, and I -- he obviously testified, but you
4 testified in your deposition about what you experienced,
5 right?

6 A: Well, I said calf, and I meant all the way up calf.

7 Q: And I think in your deposition you estimated twelve
8 inches, did you not?

9 A: No, I said twelve inches, not whatever. Twelve inches
10 was early on when we had water out there.

11 Q: All right. Let me show you your deposition.

12 **MR. LINDEMANN:** Your Honor, may I?

13 **THE COURT:** Yes, sir.

14 **BY MR. LINDEMANN:**

15 A: If I am, I'm going to say it.

16 Q: Let me hand you, sir --

17 A: Sure.

18 Q: -- a copy of your deposition.

19 A: Sure, tell me what page.

20 Q: I will in one second. Do you remember giving your
21 deposition in the case?

22 A: I do remember.

23 Q: All right. And do you remember you took an oath to tell
24 the truth that day as well?

25 A: Oh, yes. I'm trying to tell the truth.

1 Q: If you look at the bottom of the page, start at Page 98.
2 I'm going to let you read it to yourself, starting at Page 19
3 [sic] if you'd read over to Page 100 and let me know -- just
4 to yourself, and then I'll go through it with you.

5 A: I see that. Then let me amend it to say the water was
6 all the way up to your knee and I have a picture somewhere
7 that shows somebody that came to work on my air conditioner
8 that has my wading boots and it's up to the knee --

9 Q: And let me just ask you about your deposition testimony.
10 Now that you've had a chance to review it, you had talked
11 about that you yourself hadn't walked through, but you'd seen
12 someone else do it --

13 A: Yeah, I --

14 Q: -- and it was basically up to their calf.

15 A: I hadn't walked through when it was high out there into
16 the road or anything across here like that because I wasn't --
17 don't have anything but tennis shoes.

18 Q: All right. Right now I'm asking you about what you
19 testified to in your deposition. You testified, sir, did you
20 not, that you hadn't walked through there, but somebody else --
21 -- you observed somebody else doing it and it was basically up
22 to their calf, and then you estimated that to be about twelve
23 inches.

24 A: Well, I'm just mistaken.

25 Q: Okay. I mean, I'm just trying to understand your

1 testimony, but you agree with me the way I've characterized
2 your testimony.

3 A: Yeah, you said that I said calf, and then later you came
4 back in and then you said six inches, and I said no, it was
5 more than that --

6 Q: And you said I asked you how much, and you said twelve
7 inches.

8 A: -- twelve inches --

9 **MR. EVANS:** Objection, Your Honor.

10 **BY MR. LINDEMANN:**

11 A: I did that.

12 Q: All right.

13 **THE COURT:** Let me hear the objection.

14 **MR. EVANS:** Objection, Your Honor.

15 **THE COURT:** Yes, sir.

16 **MR. EVANS:** Rule of completeness, the deposition is read
17 all the way through Page 100, Line 5. We'll see what Mr. --

18 **MR. LINDEMANN:** Your Honor, I didn't publish it. I gave
19 him the opportunity to -- I didn't impeach him improperly. I
20 gave him the opportunity to review it, and he accepted his
21 deposition testimony.

22 **THE COURT:** It has not been put into the record. It's not
23 been published.

24 **MR. LINDEMANN:** I mean, certainly they can publish
25 whatever they like in their case in chief, but I don't -- it

1 wasn't necessary for me to read it because he agreed that I
2 characterized his deposition correctly.

3 **THE COURT:** Overruled. Go ahead.

4 **BY MR. LINDEMANN:**

5 Q: Anyway, I just wanted to touch on one other thing with
6 you. You talked about concern about access to the house. I
7 mean, some of the photographs that we've seen were actually
8 taken at high tide and taken from a vehicle that was able to
9 make its way through the water. Wouldn't you agree with that?

10 A: I don't know. I mean, none of the pictures I took did I
11 ride through high water.

12 Q: All right. So you've never seen anybody be able to drive
13 through the water?

14 A: Oh, I've seen one or two people attempt to drive through.
15 Most people turn around and go back down the park and go back
16 out. And now they put things out there so nobody is going to
17 drive on it, barrels.

18 Q: And I think --

19 A: And sometimes what I would call little horse things
20 across there.

21 Q: I think you told me at your deposition that one of the
22 vehicles you owned is a Range Rover, correct?

23 A: Yes.

24 Q: All right. And a Range Rover -- I think you said it was
25 a Range Rover HSE, right?

1 A: Right.

2 Q: Do you still have that vehicle?

3 A: No, I don't.

4 Q: Oh, you don't? When did you get rid of that vehicle?

5 A: Last year.

6 Q: All right. But, at the time of your deposition, you had
7 that, right?

8 A: Yes.

9 Q: And are you aware of what the wading depth of that
10 vehicle is, what a Range Rover -- what kind of water can go
11 through?

12 A: I don't know but I wouldn't take it through that water
13 that has some salt in it across there because it can mess up
14 the electronics.

15 Q: Do you know what height a Range Rover can go through
16 water?

17 A: I don't know.

18 Q: Did you ever look that up in the specs?

19 A: No, I've never -- I've never done it. So, to me, a car
20 is dry.

21 Q: All right. And what did you replace that Range Rover
22 with?

23 **MR. EVANS:** Objection, Your Honor; relevance.

24 **THE COURT:** Yeah, let's move on from this. I find that
25 it's not relevant.

1 **MR. LINDEMANN:** All right.

2 **THE COURT:** He already said he doesn't know the height of
3 a Range Rover.

4 **MR. LINDEMANN:** Well, I was just trying to find what
5 vehicle he has now, what he replaced it with.

6 **MR. EVANS:** Same objection, Your Honor.

7 **THE COURT:** I'll let him answer that single question. We
8 need to move on from this.

9 **MR. CHRISTMAS:** I own a Range Rover Defender.

10 **BY MR. LINDEMANN:**

11 Q: Okay. You replaced one Range Rover with another?

12 A: A smaller one.

13 Q: All right. And what's the model that you have now? A I
14 don't -- it's a black Defender.

15 Q: Okay. Fair enough.

16 **MR. LINDEMANN:** Thank you, sir. I don't have any further
17 questions.

18 **THE COURT:** Mr. Evans?

19 **MR. EVANS:** -- Your Honor.

20 **THE COURT:** All right. Mr. Lucey, anything?

21 **MR. LUCEY:** Your Honor, the plaintiff rests.

22 **THE COURT:** Okay. Mr. Christmas, you may step down.

23 Ladies and gentlemen of the jury, we have some matters to
24 take up outside of your presence. These are some matters of
25 law, so I'm going to ask you to retire to the jury room for

1 just a few minutes. We may have a few other things, or we may
2 let you go tonight. Okay? But you will just, again, hang out
3 in the jury room.

4 **REPORTER'S NOTE:** (Jury exits the courtroom at 4:17p.m.)

5 **THE COURT:** Yes, sir. I'm assuming that y'all have some
6 directed verdict motions you would like to make and to renew
7 some of your prior motions. I don't know if y'all want to do
8 that this afternoon or if you want to do it first thing in the
9 morning.

10 I'm fine for either, but if we're going to do it this
11 afternoon, I would propose that we go ahead and send the jury
12 home.

13 **MR. LINDEMANN:** Your Honor, as far as I'm concerned, I'm
14 fine with doing it whenever you wish. I think it -- obviously
15 won't be as time-consuming as Monday, but in addition to some
16 of what you heard Monday, there are going to be some
17 additional ones now that obviously Your Honor has heard
18 evidence.

19 **THE COURT:** Right.

20 **MR. LINDEMANN:** So it could be time-consuming. I
21 certainly don't think we're going to need the jury anymore
22 today, but if we want to do it tomorrow morning, that's fine
23 with me as well.

24 **THE COURT:** Yes, sir.

25 **MR. BATTLE:** I vote that we send the jury home as opposed

1 to 5:00. You're going to send them home at 5:00 -- I can tell
2 you now, from my experience in this trial, that you're not
3 going to get this done in thirty minutes.

4 **THE COURT:** No. No, absolutely not. Mr. Lucey, any
5 reason we can't --

6 **MR. LUCEY:** Whatever pleases the Court, Your Honor.

7 **THE COURT:** All right. Ms. Thomas, anything to add?

8 **MS. THOMAS:** Whatever Your Honor desires.

9 **THE COURT:** All right. Well, let's bring the jury back
10 in, and we'll go ahead and send them home for the evening.

11 **REPORTER'S NOTE:** (Jury enters courtroom @ 4:19p.m.)

12 **THE COURT:** Thank you, ladies and gentlemen. The matters
13 we have concerning the law that we have coming up are probably
14 going to take us into almost 5:00. That being said, those
15 would not be in your presence, anything outside of your
16 presence.

17 So, you are going to be excused for the evening, but
18 please report back tomorrow morning at 9:30. Okay? Thank you
19 again for your patience, and again, I've watched y'all. Y'all
20 have paid attention, and you don't know how much I appreciate
21 that. I know the litigants do as well. Thank you.

22 **REPORTER'S NOTE:** (Jury released for the day at 4:20p.m.)

23 **THE COURT:** Counselors, we're going to probably, as Mr.
24 Battle said, there hasn't been anything we can really do
25 that's going to take less than thirty minutes. How about we

1 take a few minutes just to -- if somebody needs to go relieve
2 themselves, just take a break for about five minutes. Does
3 that work for everybody? And then we'll start on motions.
4 Thank you.

5 **MR. LINDEMANN:** Thank you, Your Honor.

6 **(COURT IS IN RECESS)**

7 **THE COURT:** All right. Before we get started, I do want
8 to let you know I more than likely am going to take most of
9 this stuff under advisement just so I can go home and quite
10 frankly sleep on it because I do take these matters very
11 seriously but, that being said, who would like to start?

12 **MR. BATTLE:** I would like to start, Your Honor.

13 **THE COURT:** Yes, sir, Mr. Battle.

14 **MR. BATTLE:** I hope I set the tone for everybody else and
15 it might be still not as much.

16 There are two causes of action against the County that --
17 actually, one cause of action against the County that you need
18 to decide whether they have submitted enough evidence to the
19 jury to succeed on that cause of action at this point, and
20 that is their negligence cause of action, and under the South
21 Carolina Tort Claims Act, -- excuse me.

22 **THE COURT:** I know what you're talking about.

23 **MR. BATTLE:** Georgetown County is only responsible for
24 the acts of its employees. We've heard about acts of Green
25 Wave Contracting who settled down. We've heard nothing about

1 any acts from the employees of Georgetown County.

2 For that reason, there is no evidence of any negligence
3 on the part of any employee from Georgetown County. Maybe
4 that goes something to the taking that you will have to decide
5 but as far as negligence to the jury, that does not go to the
6 act of an employee.

7 If you go to Paragraph 29 of the complaint for
8 negligence, he sets out the specifications of negligence. The
9 first one is raising the project substantially above the
10 previous existing grade, causing excessive flooding onto
11 plaintiffs' property. There is no evidence in the record that
12 the -- that there was -- in light of the common enemy rule on
13 surface water, there is no evidence that we could not use our
14 property in that way, that we were negligent in some way,
15 simply by elevating the property.

16 There are two standards that deal with that. One of them
17 deals with urban property, and sometimes they say elevation
18 constitutes a taking or could be considered negligence, but
19 you can build a house, you elevated that portion of the
20 property. We're talking about two acres of land, and they're
21 saying puts enough water to go all the way up to Highmarket
22 Street, based on some theory of negligence. So I think that
23 has not been proven or shown any evidence on that part.

24 Altering the course and increasing the amount of surface
25 water flooding onto the plaintiffs' property. Well, you

1 already ruled that Mr. Castles couldn't talk about that.

2 There is no evidence that the water actually leaves the tennis
3 court and is cast onto Mr. Christmas's property from the
4 tennis courts. And that's all we've done.

5 We have a two-acre tract, and three of those acres had
6 raised property. Actually -- all that acreage property was
7 raised, and then we've got another additional area. So we
8 just crammed six tennis courts over what was once three tennis
9 courts.

10 Altering the natural -- this is C. Altering the natural
11 flow of waters causing increased flooding onto the plaintiff's
12 property. There's no negligence there. There's nothing that
13 says you can't alter the flow of water.

14 Matter of fact, under the common enemy rule, you have the
15 right to treat surface water. Everybody has the right, and
16 I've put a charge in there for you to look at in terms of, you
17 know -- and that's been pretty well litigated in which they've
18 tried to say, well, Judge, we want you to adopt the New Jersey
19 rule which says you can't alter your property in such a way as
20 to create additional water. Virginia rule is different. It's
21 got to be -- it has to be done something along the lines of an
22 -- and that's cited in the property. So I'm saying that that
23 is not a sufficient cause.

24 And failing to take such action as a reasonable and
25 prudent person would do to prevent excessive flooding. That

1 is -- that does not stay the standard. It does not stay
2 anything. It just says do what some reasonable person would
3 be to do -- I don't find that to be any sort of an allegation.
4 And I don't see where they said we have not taken or shown
5 what we could have done reasonably, reasonably to have avoided
6 the tide from Winyah Bay coming in and flooding Mr.
7 Christmas's property. And failing to operate and maintain the
8 stormwater drainage systems. The County has no responsibility
9 for the stormwater drainage systems.

10 And all other particulars revealed during the discovery
11 process are a result of the trial. Nothing has been revealed
12 in discovery or at trial to show that the County has engaged
13 in any act or any employee of the county has engaged in any
14 act. Maybe they got some on -- if you can generally say heavy
15 trucks came up and down, but nothing that an employee of the
16 County has done that and later on -- well, that's basically
17 our motion.

18 **THE COURT:** Let me hear plaintiffs' response to that
19 motion rather than trying to stack everything up. Yes, sir.

20 **MR. LUCEY:** Yes, Your Honor. It's undisputed that they
21 did raise above the existing grade, and they then cast all
22 their waters north. And they cast it into a drainage basin
23 that was having difficulty handling what it already had,
24 twenty-six acres going into a single 18-inch pipe. A stated -
25 - as the evidence shows, a stated purpose of the park

1 improvements was to correct drainage.

2 It's been shown that they actually did improve and
3 correct their drainage in the center of the park by casting
4 all that water in two directions towards the north, one toward
5 the wetlands that flood into Front Street, and the other
6 towards the ditch that runs down to Front Street and floods
7 into Front Street. Both cast water onto my client's property.
8 The entire basin becomes a holding area for water at mid-tide
9 or higher.

10 There has been a discharge problem -- under the testimony
11 the Court has seen, there's been a discharge problem in these
12 pipes with the water coming through the pipes the wrong
13 direction since the latest 2010 when they put the first back
14 flow device on --

15 **THE COURT:** Let me ask you one question about that. It's
16 my understanding that's a city pipe, though, not a county
17 pipe?

18 **MR. BATTLE:** Yes, Your Honor. All the drainage in the
19 roads are city or state.

20 **THE COURT:** Okay. All right.

21 **MR. LUCEY:** No. It's a city pipe for sure, Your Honor,
22 outside of the state right-of-way where the tidal gate is but
23 it's the county casting their water into this basin that can't
24 handle any more water. It's the County that solved their
25 storm flooding problem in the middle, both rain from above and

1 tidal from outside. The County solved their storm problem in
2 the middle of the park by elevating and casting the waters to
3 the north, to the wetlands, and to Front Street, none of which
4 could handle their waters, and it floods at the foot of Front
5 Street from two to -- as I was starting to say, then we got
6 distracted by who owns the pipe. The installation of the
7 tidal gate in 2010 shows us that the powers that be understood
8 that there is no drainage in this drainage basin when the
9 tidal gate is shut by the river.

10 There is no drainage there, and the drainage that used to
11 go elsewhere from the middle of the park is being cast into
12 this catch basin that everybody knows is on all likelihood
13 shut for somewhere between five and twelve hours a day because
14 the tide is high enough that the flap is not going to work.
15 And we know that because they put the flap in there to solve
16 the problem of the tide coming out of the roads and soaking
17 all of the ditches.

18 So we know that that flap is being held shut because they
19 needed to put a flap in there because water was coming in. So
20 they're casting this excess water into the north there, and
21 all the testimony has been they did solve their flooding
22 problem in the middle, both rain flood, storms flood, and
23 tidal flood. They stop in the middle. All that water is
24 going to the north, and it's overwhelming the ability of the
25 drainage systems in the north to handle it, and it's flooding

1 my property -- my clients' property. His house, his property
2 is now part of the tidal basin at the bottom that holds the
3 water until the tide goes back down.

4 **THE COURT:** Let me ask you, again -- there was a question
5 asked, I think it was of Mr. Castle, about his pictures, and
6 it said -- you know, and I apologize, I think it was Mr.
7 Battle that asked the question that said it appears to be a
8 sunny day when you took these pictures and there's been no
9 rain, indicating that it was flooding regardless of any kind
10 of rain activity or anything.

11 My concern is this, is that it seems to be almost a
12 perfect storm. If it's raining -- and I don't mean that to be
13 a -- I guess that's a -- I don't know what you want to call
14 it, but if it is raining and it's high tide, it appears
15 there's nowhere for the water to go. I mean, regardless of
16 any kind of which way it's going but that's in any spot where
17 you've got tides that are coming above a drainage pipe.

18 My concern is, is that there's been testimony, too, that
19 there appears to be rising water in the pipes, which would
20 indicate to me, I would think, and I guess a jury could, if
21 believed, would say that that flap gate is not working, that
22 water is coming in, and so it's not allowing any of the tidal
23 water to subside.

24 Again, it's almost like a you're dang if you do and
25 you're dang if you don't, because if the flap gate is working

1 and it's shut, then any water that's going through that
2 drainage system can't get out, and vice versa. If it's not
3 shut, then tidal water's coming up and it's raising it.

4 **MR. LUCEY:** And with that being the known conditions
5 since 2010, because we know from them, because of the
6 installation of the tidal gate, with that being the known
7 condition, the County who publicly announced the purpose of
8 its improvement to the park to fix the drainage, directed
9 their drainage toward that flap gate that they noticed either
10 is not working --

11 **THE COURT:** Which I haven't heard any evidence about
12 that, that that was what they did, that they publicly
13 announced that -- they may have, but it's not in the record.

14 **MR. LUCEY:** Mr. Christmas testified that that was the
15 announced purpose of the improvements.

16 **THE COURT:** But he's not -- Mr. Christmas is not a
17 representative of the County.

18 **MR. LUCEY:** The County announced its plans. If he hears
19 those plans and he testifies about them, I believe that's
20 competent evidence that that is, until they want to refute it
21 in their case, which they can't because it's in their
22 documents, but until they want to refute it, I think the only
23 evidence in here is that they did announce that one of the
24 purposes was to improve drainage at the park. And they
25 improved their drainage at the expense of Mr. Christmas.

1 And that North Basin, yes -- and, sir, I'm sorry.

2 **THE COURT:** No, no, no, no, I was just listening. I'm
3 sorry.

4 **MR. LUCEY:** And you're right, there is a perfect storm,
5 but the perfect storm that used to be there flooded the center
6 of the park, and not us. And now it's -- they've done their
7 improvements, they've raised their tennis courts, they've
8 doubled their tennis courts, they have channeled the water
9 into this basin, both on the back side of the tennis courts,
10 through the wetlands, and on the front side of the tennis
11 courts in the ditch down to the intersection, and they've cast
12 their water, more of their water, where there's no ability for
13 the water system to do anything with it for half of the day on
14 a bad tide day, and in a situation where their water is ending
15 up flooding my client's property and preventing access to my
16 client's property.

17 **THE COURT:** All right. Mr. Battle, next.

18 **MR. BATTLE:** Your Honor, the next one is the fourth cause
19 of action.

20 **THE COURT:** Yes.

21 **MR. BATTLE:** That's one where he says we have violated
22 South Carolina Code 531.450. My position is simple. I, of
23 course, would say Mr. Lindemann is correct in his assessment,
24 but this statute only places a duty on municipalities. It
25 specifically excludes or it does not include any county, and

1 | you cannot take a duty imposed by a statute on a municipality
2 | and say, well, we're going to impose that same duty onto the
3 | County.

4 | You cannot read language into the statute, and there's
5 | some cases on that point, but it's basically we have no
6 | business being in 531.450.

7 | **THE COURT:** Well, I read that statute as well, and while
8 | I have not gone over the notes, I noticed that as well. Mr.
9 | Lucey, any response to that?

10 | **MR. LUCEY:** Your Honor, we believe that municipality
11 | includes any government entity short of the State. In this
12 | case, that would include the County, and they have cast water
13 | into a system which we've clearly shown doesn't work a third
14 | of the year. And so there is not -- we've shown there's not a
15 | system to handle it.

16 | The only question left is whether the statute applies to
17 | them, and we believe the municipality and the way it's used
18 | here would be any government entity that has responsibility
19 | for that discharge.

20 | **THE COURT:** Do you have any legal -- any case law or any
21 | statute to back up that theory?

22 | **MR. LUCEY:** No, sir, I do not, or I would have put it in
23 | my --

24 | **THE COURT:** The reason I ask is counties were
25 | incorporated prior to 1902. Is that when that statute was?

1 **MR. LINDEMANN:** That's correct, Judge.

2 **THE COURT:** I tend to believe that if the legislature
3 wanted it included at that point, they would have included it.

4 **MR. BATTLE:** In fact, there is a statute which imposes
5 some duties on the County for municipalities that are greater
6 than 86,000 people, but they did not do this for this type of
7 drainage.

8 **THE COURT:** All right. Mr. Battle, on that ground, I am
9 going to grant your motion for that single cause of action.

10 **MR. BATTLE:** I mean, the taking is yours, and I'm going
11 to let you decide that on your own.

12 **THE COURT:** Ms. Thomas, Mr. Lindemann, who would like to
13 go next?

14 **MR. LINDEMANN:** I'm fine with either one, Your Honor.

15 **MS. THOMAS:** I don't mind going. I will give you what I
16 think is my strongest argument first out of several, which is
17 the statute of limitations. It is undisputed in all of the
18 testimony that, number one, DOT has not done any work out in
19 that area since the latest 2009.

20 Mr. Christmas testified that the last time that anyone
21 from DOT was even part of a meeting where drainage, tidal
22 flooding was discussed was 2017. Now, he said he talked to
23 Richard Pope after he retired in 2018 and, of course, we would
24 say he's no longer an employee of the DOT at that point.

25 Your Honor, we were brought into this suit on December

1 7th, 2021, which is clearly over two years from the last date
2 of any involvement.

3 Now, Your Honor, we would take exception that promises
4 were offered because nobody has testified to those. Nobody
5 has testified that we said -- the DOT said, relax, we're going
6 to handle this, we're going to fix it, we're going to stop all
7 the flooding from Winyah Bay. No one has testified to that,
8 Your Honor.

9 So we would put forth that the entire action against us
10 is barred by the applicable statute of limitations.

11 **THE COURT:** Thank you, Ms. Thomas. Mr. Lucey, Mr. Evans,
12 your response.

13 **MR. LUCEY:** Yes, sir. Well, for starters, Your Honor,
14 the negligence is (inaudible) law, which the statute of
15 limitations applies to, for any of the other causes of action,
16 it would be laches. And there's been no evidence of laches on
17 my client's part. So this argument would only address the
18 legal cause of action.

19 And, with regards to that, Mr. Christmas testified about
20 regular meetings with all three government entities, and they
21 continued -- and he did not know Pope had left DOT when he
22 talked to Pope the last time. And the assurances, the prior
23 assurances, which I'll address in a second, had never ended.

24 He talked to Pope, and he said, would you please make
25 sure -- I'm using my words -- would you please make sure that

1 you brought your replacement up to speed on what we've been
2 working on.

3 There's no evidence that Mr. Pope in any way said, no,
4 I'm not going to do that, or we stopped work, or in any way
5 said to Mr. Christmas, you should stop relying on the prior
6 efforts.

7 Let's talk about what the prior efforts were. Mr.
8 Christmas met with the mayors, and notice that one of the
9 mayors included was Mayor Barber. Mayor Barber came into
10 office, I believe, late 2017 and stayed in office, I believe,
11 until late 2022. Mayor Barber is the attendee at several of
12 these meetings as is, of course, Mr. Pope and others. And
13 what was discussed regularly at these meetings that occurred
14 over a number of years was, here are the possible ways that we
15 could resolve this. We can do this holding pond thing, we can
16 do this pump station, we can do the large pipe. We can do
17 this, we can do that, fancy stuff that my client would never
18 have understood necessarily, although he did explain one of
19 the things up there --

20 **THE COURT:** And I understand where you're coming from.
21 None of that is in the record. I mean, that hasn't been put
22 forward as evidence. Even when he testified, when Mr.
23 Christmas did, he didn't say anything about a pump station or
24 any of that.

25 **MR. LUCEY:** He described a number of alternatives that

1 they are considering, enlarging the pipe was in there.

2 **THE COURT:** I heard that.

3 **MR. LUCEY:** And he discussed that they were going to
4 build some sort of trap box, I think might have been his
5 words, a trap box with different pipes coming in and out of
6 it. And they'd also talked about having a holding area for
7 the water, and my understanding is there was four or five
8 different options, but that regardless of what was decided
9 upon as the best way to handle it, one, you'd have to figure
10 out what should we be doing, which was something that was a
11 work in process. And the second is that whatever it was, it's
12 going to require permitting, so it's going to require time for
13 us to solve it.

14 In other words, Mr. Christmas shouldn't be feeling like
15 he's abandoned it if it doesn't happen the next day, the next
16 month, or the next year, because this is an ongoing process.
17 They're going to have to figure out what it is, and they are
18 going to have to permit it. And, by the way, somewhere along
19 the line, there was a discussion that we need some money for
20 this, and it was announced to him as he testified in there,
21 Tom Rice. The money came from Tom Rice. There was the money
22 there now to do these improvements, and that was actually
23 discussed in his presence.

24 And I believe Tom Rice was in office as the U.S.
25 representative at that time and would have been responsible --

1 **THE COURT:** Well, let me ask you -- let me just ask you
2 this one question.

3 **MR. LUCEY:** Yes, sir.

4 **THE COURT:** I understand these meetings with Mayor
5 Barber. The motion that's before us right now deals with DOT,
6 and that would be a different -- I mean, it's my understanding
7 DOT has nothing to do with the park other than there's some
8 right-of-way and that there's the area that potentially floods
9 in front of -- Mr. Christmas and Mr. O'Donnell's house.

10 So, in that regard, as far as the ongoing with DOT,
11 please let me hear that.

12 **MR. LUCEY:** I believe the testimony by Mr. Christmas was
13 until Mr. Pope left DOT in December of 2007, he was part of
14 these meetings, and that's why when he called them again later
15 in 2018, he did not know Mr. Pope had left, but he was part of
16 these meetings until then. And the DOT in their motion and
17 argument keeps using the word "promise." There's no need for
18 estoppel to apply. There's no need for there to be a promise.

19 All there needs to be is conduct that would lead one to
20 believe that this issue is being addressed. In other words,
21 if three or four people in the powers-that-be are telling you,
22 we're looking at this, we're going to handle this, is there a
23 reason to sue them. No, there's not. They have looked at you
24 and said, we're looking at this and handling this.

25 And I would add also to the Court --

1 **THE COURT:** Well, and I -- and let me just tell you this.
2 The most recent case on equitable estoppel specifically says -
3 - this was an unpublished opinion, but I'm quoting it, this is
4 Bennett v. Theola Pitts. This was very recent, where our
5 courts -- they said the statute of limitations -- the argument
6 was should the statute of limitations have been equitably told
7 due to an employee's efforts to resolve the matter outside of
8 court in that the tolling did not take place and the Court of
9 Appeals has said that that's okay. They affirmed that the --
10 that was Judge Price.

11 **MR. LUCEY:** Your Honor, as the Court mentioned, that's an
12 unreported decision. I think that --

13 **THE COURT:** Well, it's reported, it's unpublished. Yeah.

14 **MR. LUCEY:** We think we could look to Judge Newman who
15 was sustained in Magnolia North by our Supreme Court, and
16 there the -- or the -- it was actually the Court of Appeals, I
17 believe, there the court said:

18 "A defendant will be estopped to assert the statute of
19 limitations in a bar or plaintiff's claim when the delay that
20 otherwise would give operation to the statute has been induced
21 by the defendant's conduct. The doctrine is, of course, most
22 clearly applicable where the aggrieved party's delay in
23 bringing suit was caused by his opponent's intentional
24 misrepresentations but deceit is not an essential element of
25 estoppel. It is sufficient that the aggrieved party

1 reasonably relied on the words and conduct of the person to be
2 estopped in allowing the limitations period to expire. The
3 conduct might involve either inducing the plaintiff to believe
4 that an amicable adjustment of the claim will be made without
5 suit or inducing the plaintiff in some other way to forbear
6 exercising his right to sue."

7 Some courts hold that repairs by a defendant may toll the
8 statute of limitations.

9 **THE COURT:** Well, and my question in regard to SCDOT is
10 if -- even if we were to say that 2018, they weren't brought
11 in until December 7th of '21.

12 **MR. LUCEY:** Yes, sir. He had had years of continued
13 assurances. It wasn't until after he moved out.

14 **THE COURT:** But my point is, when he discovered that he
15 was no longer with DOT, what assurances did he have? What --
16 at that point, what had DOT done to assure him?

17 **MR. LUCEY:** There had been a course of conduct for a
18 number of years that they were going to fix it, and he asked
19 Pope, where he learned he was no longer employed there, to
20 make sure his replacement had been brought up to speed on what
21 the efforts were. And he did not get a rejection from Pope on
22 that and never heard back from Pope or DOT or anybody else
23 that they had stopped working.

24 It wasn't until the expiration of further time that he
25 realized that relying on these people was not going to do any

1 good and he had to just bring suit. And the -- when he
2 actually did bring suit, and after he brought suit, it was
3 learned of who owned the roads, DOT was brought in within two
4 years of the initial suit being brought.

5 And one other thing I wanted to mention too, Your Honor,
6 Pope did testify here that it could take years to get to the
7 top of the pavement list. So if, in fact, the solution to the
8 sunken portions of the road, the appropriate solution was
9 using the district paver to bring the road back up to its
10 design and build height, under Pope's statement and sworn
11 testimony, that would take years to accomplish, and the fact
12 that it didn't get accomplished in eighteen months or two
13 years of when Pope left would not be evidence that it wasn't
14 going to happen, because he had already told them and he had
15 already testified here in court it takes years to get to the
16 top of the pavement list.

17 **MS. THOMAS:** Your Honor, if I may response.

18 **THE COURT:** Ms. Thomas, I'll let you respond. Yes, ma'am.

19 **MS. THOMAS:** First of all, plaintiffs' counsel is trying
20 to turn the fact that a state employee listened to the
21 concerns of a citizen into some type of reassurance that we
22 will fix your problem. Mr. Christmas didn't testify that Mr.
23 Pope told him we're going to handle it, the DOT is going to
24 fix everything. And Mr. Pope definitively testified that, no,
25 I never gave him that assurance, I didn't have the authority

1 to give him that assurance, and definitely when I was no
2 longer an employee, I couldn't bind the Department of
3 Transportation to do anything.

4 So, the Department of Transportation is not responsible
5 for Mr. Christmas's misunderstanding of how things work. The
6 facts that have been admitted, the only undisputed testimony,
7 is that the DOT didn't do anything out there that would give
8 anyone the idea that they were working on solving the flooding
9 or had agreed to solve the flooding, hadn't done any work
10 since '09. And the last communication that anyone who even
11 formally was an employee of the DOT had was 2018, and I think
12 the statute of limitations is pretty clear on that.

13 **THE COURT:** Thank you, Ms. Thomas. Mr. Lucey, what was
14 the case you quoted? You said it was Judge Newman. I'd want
15 to take a look at that.

16 **MR. LUCEY:** They affirmed Judge Newman in Magnolia North
17 Property Owners Association, 397 S.C. 348, 725 S 2d 112 (Court
18 of Appeals 2012)

19 **THE COURT:** Okay.

20 **MR. LUCEY:** And I don't have it, but my memory it but
21 cert was denied on that a year later.

22 **THE COURT:** Okay. Ms. Thomas?

23 **MS. THOMAS:** I have further arguments, Your Honor.

24 **THE COURT:** Yes, please.

25 **MS. THOMAS:** Also, we believe we're entitled to a direct

1 verdict on the negligence cause of action because number one,
2 no duty for the DOT to do anything has been established, and
3 there are several Tort Claims Act exclusions; number one,
4 being discretion in when and how to pave, the fact that the
5 water encroaching from the bay is a nuisance, and the fact
6 that the drainage, no one, not even Mr. Castles, has testified
7 that there is anything wrong with the drainage pipes in the
8 DOT's right-of-way, and Mr. Castles specifically said, I can't
9 testify to that.

10 He further admitted that the mere fact that you can see
11 water in a ditch doesn't mean that there's anything wrong with
12 the drainage, specifically if the flap valve is working
13 appropriately.

14 In addition, I'm not sure they've asserted this, but that
15 we're not liable for the design or the maintenance of the
16 road, definitely they've talked about maintenance. There is
17 no duty that they've established anywhere that we have to
18 maintain the road at a certain level, and even the dips in the
19 road are defects. That has not been established anywhere.

20 Likewise, there's been no causation established that any
21 of the encroachment, anything done by the DOT, has caused the
22 flooding onto Mr. Christmas's lot. Even Mr. Castles had to
23 admit in his study of rising global tides that there had been
24 an increase in tides.

25 As such, Your Honor, that would either be a natural

1 condition or an act of God for which the DOT would not be
2 liable.

3 So, even under the negligence cause of action, which we
4 believe is barred by the statute of limitations, they still
5 failed to make a prima facie showing.

6 **THE COURT:** Yes, sir, Mr. Lucey.

7 **MR. LUCEY:** Once the SCDOT is put on notice of a defect,
8 it is required to correct the condition within a reasonable
9 time. Gianni v. South Carolina Department of Transportation,
10 378 S.C. 573 (2008). Steinke v. South Carolina Department of
11 Labor:

12 "While provisions establishing limitations upon and
13 exemptions from liability of a government entity must be
14 liberally construed to limit liability, we also must presume
15 in construing a statute that the legislature did not intend to
16 perform a futile thing."

17 And that's why they put the exception in the Tort Claims
18 Act for maintenance. You're not liable on maintenance unless
19 you're put on notice of the defect. Once that happens, you
20 have a legal duty to correct the defect within a reasonable
21 amount of time as held by the Gianni case.

22 So there is a duty. We have shown that they were put on
23 notice of the flooding problem. And, in fact, Mr. Pope
24 testified that he saw that was occurring due to a dip coming
25 up over the road. And so it affects that dip. The very

1 logical conclusion is when it starts happening again that
2 you've got to check that dip or check for a dip, which they
3 apparently did not do and did not correct.

4 But, at any rate, they still got notice again from Mr.
5 Christmas, and they got notice from Mr. Castles in his report
6 two years ago and still have not done anything to correct that
7 road.

8 So there is a duty for them to correct that road. The
9 road is a dip that is 1.54 feet below original construction,
10 and it's 1.5 feet below the rest of the road. I mean, it's
11 not like it's not obvious. And they testified -- DOT was
12 here, our first witness. They testified their inspectors
13 inspect secondary roads for problems once or twice a year. So
14 DOT should have inspected this road now at least four or eight
15 times since all that truck traffic went over it and should
16 have seen the dip in the roads that were causing this
17 flooding.

18 In fact, even if Mr. Christmas had not gotten them
19 involved in trying to solve the flooding problem, just by
20 sheer coincidence, if they're checking this road as often as
21 they say they are, they would have come upon it one time when
22 there was flooding, and they would have seen for themselves
23 that there was a defect but they've been put on notice many
24 times.

25 The DOT inspectors also inspect for alligatoring. We've

1 showed clear pictures to the jury of alligatoring on this
2 road. The road is suffering. It's suffering damage. There's
3 been plenty of notice to DOT that they've got a failed road
4 here at least at the five-hundred-odd feet where these three
5 deflections are that's letting the water come over and flood
6 this area of town.

7 With regards to DOT not being liable for drainage, that's
8 not the same evidence that I heard in this courtroom. DOT may
9 not be the one that installed the flap valve. Apparently,
10 Pope gave the flap valve, either helped with it or gave it to
11 the City to install. They may not own the flap valve, but
12 it's their pipe under that intersection that has been
13 permitting the waters from the river to come and flood the
14 other side to saturate the soils, to do the saturation and dry
15 cycle on the soils that have weakened them on the tides when
16 there is no overtopping and on the tides when there is
17 overtopping.

18 Those are their pipes that the seawater is traveling
19 through and damaging our client's property and, in fact,
20 filling this basin. So, as to this directed verdict, it
21 should be denied, Your Honor.

22 **MS. THOMAS:** Your Honor, if I could briefly respond to
23 that argument.

24 **THE COURT:** Yes, ma'am.

25 **MS. THOMAS:** The Gianni case cited by Mr. Lucey talks

1 about notice of a hazardous condition. We've all driven on
2 roads that have different elevations. No road is completely
3 smooth. The fact that it's not completely smooth is not in
4 and of itself a defect. No one has testified to that. No one
5 has established that.

6 What they have testified to is that there is a difference
7 in elevation there that they don't like. In no way has it
8 been deemed a hazardous condition.

9 Also, they've not established that the purpose of the
10 road is to prevent flooding. No one has testified that the
11 road is designed, intended to prevent flooding. And, in that
12 sense, Your Honor, they've still established no defect
13 requiring us to fix the road in the manner that they are
14 requesting.

15 **MR. LUCEY:** Mr. Pope did testify that his intended
16 purpose of patching the road and then having it repaved was to
17 stop the water coming over the top. And there's obviously
18 several reasons why the Department would do that. One is to
19 preserve their roads but he did it in response to Mr.
20 Christmas's complaint about water coming over the top.

21 That was his solution. So the evidence is that bringing
22 the road back up to its proper elevation is a part of normal
23 maintenance and is what they do.

24 And, as to the hazardous condition, the Tort Claims Act
25 does not require it to be a hazardous condition. All they

1 require is notice of the defect. Then you're liable for
2 inadequate maintenance.

3 If you want to elevate the standard and talk about a
4 hazardous condition, Mr. Christmas might not have used that
5 testimony, but the reason they moved out of the house was
6 because they can't safely get to their property anymore and
7 they can't safely get emergency treatment if something happens
8 in the middle of the night.

9 And even Engineer Geiger testified about the fact that
10 the edges of this road are breaking off, that the water has
11 undercut the pavement causing the edges to fail and that one
12 has to be careful not to sprain their ankle when they're
13 walking around these -- the differential that has occurred in
14 this right-of-way due to the undercutting of the road and the
15 undercutting at the catch basins. Thank you, sir.

16 **THE COURT:** Let me ask you a question, Mr. Lucey. Mr.
17 Thomas made a valid point I think about anything -- and I've
18 been thinking this, the same thing, do you have any -- I don't
19 know if it would be code or anything that says that a road has
20 to maintain its original height, anything that says that?

21 **MR. LUCEY:** No, sir. No, sir, but as we can see by Mr.
22 Pope's testimony, it was part of standard DOT maintenance in
23 the year 2006 and 2009.

24 **MS. THOMAS:** Your Honor, if I may, Mr. Pope testified
25 that he was already out there fixing potholes and --

1 **THE COURT:** Yeah, I -- I don't remember Mr. Pope saying
2 that he was out there doing routine maintenance on the road.
3 The last routine maintenance or the last time that that road
4 was paved was when, '15?

5 **MR. LUCEY:** Approximately 2009 is all I know, Your Honor.

6 **THE COURT:** '09. Okay. All right. All right. Ms.
7 Thomas, any other motions?

8 **MS. THOMAS:** Yes, Your Honor. And I don't know if you
9 want to -- the others are for your consideration. Of course,
10 the Mandamus, the inverse condemnation takings, if you wanted
11 to hear those now or --

12 **THE COURT:** Yeah, I'm happy to hear. Go ahead.
13 Why don't we do the inverse condemnation first?

14 **MS. THOMAS:** First of all, Your Honor, no one has
15 testified of any aggressive, affirmative, positive act by the
16 DOT that caused a problem for Mr. Christmas. In fact, the
17 very basis, as I understand it, of their argument is that we
18 didn't do anything. So we think it fails under that
19 provision.

20 Also, that there has been a taking for public use. The
21 road preexisted Mr. Christmas's building his home. The road
22 was built in 1955. The road has not been modified. It's
23 simply been maintained. So we think it fails under that as
24 well.

25 Those are our main arguments that there has been no

1 inverse condemnation.

2 **MR. LUCEY:** I'm sorry, I didn't hear the second one.

3 **MS. THOMAS:** That there's no public use. You've not
4 demonstrated that we had an aggressive, affirmative act for
5 some type of public use.

6 **MR. LUCEY:** Your Honor, the DOT represented that they
7 would work with the City to solve the problem according to Mr.
8 Christmas's testimony, and they did not do so. That's an
9 affirmative act.

10 They represented that they had gotten the money from Tom
11 Rice to make the repairs, and they spent that money elsewhere.
12 That's an affirmative act.

13 They failed to make the repairs after notice, and that is
14 an affirmative act.

15 They knowingly allowed Mr. Christmas's access to be
16 impeded and then completely ruined, and we contend that that's
17 an affirmative act. And, with regards to the public access,
18 the Court is probably aware of the law of South Carolina
19 recognizes that an adjoining landowner has a right to access
20 his property on the adjoining road, and he has now been
21 deprived of that. That is a deprivation.

22 And the public benefit, Your Honor, we showed the Court
23 in Exhibit 49, Mr. Christmas's property serves in part as a
24 holding area for all of the storm drainage generated by the
25 upper Front Street drainage area and the park and the houses

1 behind Mr. Christmas, and in fact running all the way up to
2 Highmarket.

3 There's a period of the rising tide and two, two and a
4 half hours afterwards where Mr. Christmas's property serves as
5 that holding area. There is no public drainage left for that
6 entire drainage basin once that pipe gets shut off. All the
7 water, all the city water, all the residential water, all the
8 park water has to be held somewhere until that pipe is
9 reopened, and part of where it's held is now on Mr.
10 Christmas's property, and it's on the roads immediately
11 adjacent to his property, so he cannot get to his property.
12 Thank you, sir.

13 **MS. THOMAS:** Your Honor, briefly. In Hawkins v. City of
14 Greenville, which is a Court of Appeals case --

15 **THE COURT:** I'm reading it right now.

16 **MS. THOMAS:** -- Pensacola -- at 594 SE 2d 557, I believe
17 Page 562 -- actually 290 -- 562 is where I'm citing. The
18 Court held that allegations of mere failure to act are
19 insufficient, and I think that's directly on point.

20 **THE COURT:** Ms. Thomas, I had that up as you were saying
21 it. I'm going to take it under advisement.

22 Let's hear your arguments on the Mandamus.

23 **MS. THOMAS:** Your Honor, our main argument is that there
24 is no ministerial act. What the plaintiff is asking us to do
25 is basically redesign the road. They're not asking us just to

1 | pave a road. They're asking that the road be raised several
2 | feet, so this is not a ministerial act.

3 | Of course, for the reasons we've already argued, we don't
4 | have a duty to do this. It is simply not a ministerial act,
5 | and furthermore, Your Honor, there's no special duty created
6 | to Mr. Christmas by the fact that there was a road there
7 | before he came to it. If anything, there is a duty to the
8 | public. So there is no special right of having the road
9 | paved, either the entire road or just in front of his house,
10 | due from a ministerial act to Mr. Christmas.

11 | **THE COURT:** Mr. Lucey?

12 | **MR. LUCEY:** Yes, sir. Sir, the plaintiff has not only
13 | not used the word "redesign," the Court ruled that we couldn't
14 | use the word "redesign," that we couldn't go outside certain
15 | boundaries, and we've been kept in those boundaries this
16 | entire time. All we've asked for is a repair.

17 | Pope testified that his leveling repair in 2006 took one
18 | day. He just grabbed a local drag box that he keeps at his
19 | yard. He grabbed a couple of his workers. He grabbed a
20 | little asphalt, and he built the pavement up, took a day, and
21 | then it would have been -- I don't know if we have a time
22 | period for the paving that occurred two years later, but it
23 | was just a standard paving. It's something the DOT does every
24 | day, day in and day out.

25 | Now, if the DOT was in the business of pushing paper,

1 pushing paper would be a ministerial act. The maintenance
2 division of the DOT is in the business of paving roads.
3 Paving 500 feet of damaged road is like nothing to them. It's
4 a ministerial act. They don't have to do any design work.
5 They don't have to issue any engineering orders. They don't
6 need any blueprints. They don't need to have Columbia approve
7 it in advance. They don't need district headquarters to
8 approve it in advance.

9 And, if the Court may recall, I believe it was a nine-
10 county district. They do not need a district headquarters to
11 approve it in advance. The work orders that the DOT issues
12 are just computerized. They just, you know, if you take a
13 call -- I think maybe Mr. Pope said, you know, we also respond
14 to calls by homeowners or by residents. He might have used
15 the word "residents." We might be out here because it's
16 scheduled or maybe we got a call from a resident that we're
17 going to take a look at and it's -- these are purely
18 ministerial acts. There's been no evidence at all that the
19 road needs to be redesigned.

20 **THE COURT:** Well, here's my issue with that statement
21 right there. I didn't say you couldn't bring it in
22 discussions with me for this. I said you couldn't say it in
23 front of the jury as far as redesign or anything like that but
24 my question is this: If you add an inch and a half of
25 asphalt, if -- because that's what Mr. Pope said that they do.

1 He said, well, we would just do a little bit of fill and add
2 an inch and a half of asphalt. Mr. Castles said that -- what,
3 2015, that it would have -- the tides would have breached it
4 145 times?

5 **MR. LUCEY:** 139.

6 **THE COURT:** 139. And that if it was a foot higher, it
7 was still over, was it ninety-something? I mean, my point is,
8 is how is that not a redesign? I mean, let's say we did put a
9 foot of compaction on top of it, it's still going to be
10 topping it.

11 **MR. LUCEY:** Let me back up for a second.

12 **THE COURT:** All right.

13 **MR. LUCEY:** Pope's first repair was a six-inch layer.

14 **THE COURT:** Right.

15 **MR. LUCEY:** A six-inch layer in the center but tapered
16 out. Apparently, while there may have been some bumpiness in
17 it, it didn't all get six inches. It got six inches in the
18 center, and it tapered out to either end going up towards
19 Judge O'Donnell's office -- or house and then over towards the
20 park first.

21 Second of all, we know part of that worked because the
22 center of that intersection is still at 3.15 feet, and that's
23 one of the reasons that Mr. Castles, I believe, used that as
24 his floor for even looking at tides, because even though we
25 have one low spot over here at 2.7 feet, the center is at 3.15

1 feet. The center of that intersection is only ten inches
2 below the 1958 road that's 300 feet away that's not flooding.

3 **THE COURT:** But, by your own pictures, there was water in
4 the 3.15.

5 **MR. LUCEY:** There is. It has to come up also, but I'm
6 just showing -- his repair did work in the center. There are
7 just two other low spots, three other low spots developed over
8 time but you can see that his testimony and what he did worked
9 because the center did get built up. There are several
10 remaining low spots.

11 **THE COURT:** But let me just ask you this. If that was to
12 happen, how would that intersection not have to be redesigned?
13 If you raise that up a foot, you don't -- I mean, you'd be
14 running into pavement. I mean, you'd have to redesign the
15 whole intersection.

16 **MR. LUCEY:** Well, Your Honor, the lower part of Front
17 Street has suffered subsidence also, and that would be brought
18 back up to -- in his drawing, would be brought back up to the
19 original built elevation, nothing more. And what you have on
20 either side, you still have the original 1958 -- 1957 roads.
21 They may have subsided a half inch. They may have had one
22 repavement come back up but basically, you still have these
23 four-and-a-quarter foot roads on either side that don't flood.

24 And so if this small five-hundred-foot stretch was
25 brought back, repaired back to its original condition, we

1 wouldn't be here today. And there's no testimony that it has
2 to be redesigned to occur.

3 In fact, Mr. Pope had no problem laying six inches across
4 and then coming back to two more inches on a repavement, which
5 is ten inches. And to fix the lowest point is a foot and a
6 half below what it originally was and the average point, if
7 you use the center of the intersection as your go-by, the
8 average point is maybe ten inches low in this dip. Front
9 Street has suffered the same problem. It needs 150 feet of
10 repair, too.

11 And those exact measurements are actually in evidence in
12 Exhibit 38 and in Exhibit 43. So what I'm summarizing, the
13 actual measurements are in evidence as to what the current
14 state is today versus the original four and a quarter-foot
15 road. And, in fact, Mr. Castles used the exact inclines that
16 are set forth in the 1956 plans to look at what the elevation
17 is at those low points compared to what it would have been as-
18 built, even using the original decline in those plans.

19 The Court might have heard testimony from Mr. Castles.
20 In those plans, each of those roads have an intentional slope
21 of 0.1 percent to 0.2 percent, depending on which street it
22 is. So there is an intentional depression, not like we see
23 there now, but there is some, and his calculations included
24 that intentional depression.

25 **THE COURT:** Yes, Ms. Thomas.

1 **MS. THOMAS:** Your Honor, two points. Number one, Mr.
2 Castles did not testify -- appropriately did not testify,
3 about what it would take to redo this road. And I would put
4 forth to Your Honor that it's a little more complicated than
5 counsel has made it sound, and it would, in fact, have to be
6 redesigned, funded.

7 What I did want to put on the record is what the Courts
8 had decided that a ministerial act is defined at, and I'm
9 quoting Edwards v. State, 678 SE 2d 412, on Page 419. And
10 there the Court said:

11 "A ministerial act or duty is one which a person performs
12 because of a legal mandate which is defined with such
13 precision as to leave nothing to the exercise of discretion."

14 And I think even Mr. Pope testified that he had
15 discretion to do the work that he did out there because he was
16 already out there fixing the road.

17 **THE COURT:** Thank you, Ms. Thomas. Ms. Thomas, any other
18 arguments?

19 **MR. LUCEY:** I did have a third ground that we didn't get
20 to --

21 **THE COURT:** Sorry.

22 **MR. LUCEY:** -- in opposition to what she said, Your
23 Honor. There was a reference that there was no duty to Mr.
24 Christmas.

25 There's actually a constitutional right in this state to

1 access to the nearest street. If there's a constitutional
2 right in this state for a homeowner to have access to and use
3 of his nearest street, and that's the foundation part of many
4 inverse condemnation cases, if I have a right to get to that
5 street, there has to be a duty on the part of the owner of
6 that street to the owner of that lot that has a constitutional
7 right to access.

8 So I would dispute that, too. Thank you --

9 **MS. THOMAS:** Your Honor, I would simply comment that that
10 has not been raised in any of the pleadings, and this is
11 probably about the fifth new theory we've had in this case,
12 nor has any evidence been put forth about violations of the
13 constitutional right.

14 **THE COURT:** Thank you, Ms. Thomas.

15 **MS. THOMAS:** Your Honor, one last, if you want to hear
16 the injunction.

17 **THE COURT:** Yes.

18 **MR. LUCEY:** The Mandamus and injunction cause of action
19 is the same, so I don't -- the plaintiff doesn't believe
20 there's two different causes of action.

21 **THE COURT:** All right. Mr. Lindemann?

22 **MR. LINDEMANN:** Thank you, Your Honor. May it please the
23 Court.

24 **THE COURT:** Yes, sir.

25 **MR. LINDEMANN:** Your Honor, there are a number of

1 different grounds, so bear with me. First of all, I sort of
2 wanted to -- and I certainly adopt Mr. Battle's arguments as
3 far as the negligence claim, but I want to add a little bit to
4 them.

5 First of all, I would point out that the plaintiffs'
6 negligence claim is based entirely on Mr. Castles' testimony.
7 Mr. Geiger was purely looking at the yard itself and didn't --
8 his testimony goes to the issue of damages as opposed to
9 liability, and I guess to some degree, to proximate cause, but
10 not to duty or breach of a duty.

11 I agree with Mr. Battle and adopt his arguments based on
12 the common enemy rule. Those are similarly applicable to the
13 City of Georgetown as well. I would also point out that Mr.
14 Castles has made very clear that -- in fact, in response to a
15 question, and I wrote down a question -- exact quote from him,
16 he said, "I never said that the runoff of stormwater was a big
17 issue."

18 The focus of his testimony was the water that was coming
19 from Winyah Bay, the tidal flooding, and of course, most of
20 those allegations are directed at the issue dealing with the
21 roads, which Ms. Thomas just dealt with on behalf of SCDOT.

22 What is very clear and undisputed is that the City of
23 Georgetown does not own any of the roads that are at issue in
24 this particular case. So obviously we don't have any duties
25 of care as far as the maintenance, the design, the

1 construction, anything dealing with Greenwich Drive, Front
2 Street, East Bay Drive.

3 So, on those particular issues, we would be entitled to a
4 directed verdict I would submit.

5 Now, as far as the stormwater issues concern, Mr. Castles
6 has testified that he had done -- first of all, you didn't --
7 correctly did not qualify him as a hydrologist. No
8 hydrological study was done. There's been no testimony
9 whatsoever from Mr. Castles as to any water that was cast upon
10 the plaintiff's property from the park.

11 In fact, his testimony was clear that the watershed
12 itself does not even include the south part of the park from
13 the Alford Building back south, which would include the
14 renovations to the ballfields and the renovation of the -- or
15 the addition of the boat landing parking, which is all outside
16 the watershed by their own expert's testimony.

17 The only thing that the City was involved with that was
18 allegedly within the watershed was a portion of the walking
19 track. That was never addressed by Mr. Castles, separate and
20 apart from anything else. There's no testimony in this record
21 going to this jury as to any increase in surface water coming
22 from the creation of the track -- the walking track, and there
23 certainly is no testimony that any water came off of the water
24 track.

25 There was -- you know, there was some focus on the tennis

1 courts, but there was nothing specifically about the walking
2 trail generating any type of runoff that was not captured at
3 the low point of the watershed, which is the wetlands. That
4 was, again, his testimony. He agreed to that.

5 And, quite frankly, just from a purely physics standpoint
6 or fluid dynamics standpoint, Your Honor, it's common sense,
7 as we indicated, water flows downhill. Well, Mr. Christmas's
8 property is higher up than that wetlands. And so basically
9 you're looking at a bowl, and the bottom of the bowl where the
10 water is flowing to is the wetlands at the corner of Front and
11 Greenwich.

12 So the water isn't going to then flow back uphill onto
13 Mr. Christmas's property from the East Bay Park area. And
14 there's no evidence that it has done so.
15 There is absolutely -- as we indicated, there was no -- and
16 Your Honor, it's already recognized -- there was no study --
17 surface water study, that has been done, and that's how you
18 prove these types of stormwater cases.

19 So again, with ninety percent coming from the tide --
20 even his own testimony, ninety percent coming from Winyah Bay
21 -- and he couldn't tell the Court -- he couldn't tell his jury
22 where the other ten percent came from. He didn't even look at
23 what the effects were from, as I had questioned him in my
24 cross-examination, that the watershed extended up north of Mr.
25 Christmas's property.

1 In fact, in redirect, they pointed out that the watershed
2 also stretches to the west of Mr. Christmas's property. And
3 so there's been no study done as to how those properties and
4 the flow of water affected Mr. Christmas's property
5 whatsoever.

6 So the bottom line is, without the absence of expert
7 testimony on that issue, it does not support a negligence
8 claim, and does not defeat the common enemy rule and the
9 Virginia rule, as Mr. Battle has already explained and I won't
10 go into.

11 But I did want to submit that obviously that requires
12 expert testimony, and they don't have the expert testimony to
13 address that particular issue.

14 And I don't know if you want me to stop at the end of
15 each one, or how you want me to do this, but --

16 **THE COURT:** Do you have other arguments for the
17 negligence claim?

18 **MR. LINDEMANN:** Well, I have a statute of limitations, I
19 have a number of immunities as well, Your Honor.

20 **THE COURT:** Let's allow Mr. Lucey to respond to your
21 negligence claim. I'm assuming, Mr. Lucey, it's going to be
22 very similar to your response to Mr. Battle's claim.

23 **MR. LUCEY:** Yes, except there's many more grounds as to
24 the City, Your Honor.

25 **THE COURT:** Okay.

1 **MR. LUCEY:** The City obviously was responsible for that
2 flap that was supposed to keep the water from coming back
3 under. They're actually responsible for providing a
4 stormwater system in Georgetown.

5 We have shown that in this basin there is no stormwater
6 system for a number of hours a day, a week, a month, a year.
7 It all shuts down. There's no discharge. You can't have a
8 stormwater system if there is no means of discharge.

9 The City itself, because of the way it's doing this, it's
10 using the streets and this area as its basin -- its storage
11 basin for this water until tides go down and it can discharge
12 the water. And it's taking control of the streets while it
13 does that, Your Honor. You heard about the blockades.
14 Originally, they were portable blockades, and then they put up
15 steel poles on them. The city employees actually use chains.
16 They take control of these streets. They use chains, and
17 nobody can get down these streets during flooding.

18 And that -- the reason that's interesting for several
19 reasons, one of which is that there is a statute, a state
20 statute, which requires the City to keep all roads in its
21 jurisdiction in good repair. So that brings back in the
22 Greenwich Boulevard Road.

23 Now, the first thing the City is going to do is say,
24 well, it's a state road. You know, that's outside of that.
25 Well, the statute does not exempt other roads from that good

1 repair. And, in fact, there's a second statute, 575-140, that
2 says ownership of a state road by somebody -- excuse me,
3 ownership of a road within a city that -- by somebody else
4 does not prevent the city from performing the maintenance on
5 that road.

6 And if you go to the Vaughan case -- and, Your Honor, I
7 have these statutes in the Vaughan case in my jury charges,
8 which, since the Court is taking the matter up for both under
9 advisement, I would ask that it take my jury charges with that
10 but the Vaughan case is in my jury charges, and under Vaughan,
11 if the State takes control -- or excuse me, if the City takes
12 control of a road, that it can be responsible for the repairs.
13 And, as there's already a statute requiring them to keep the
14 roads in its jurisdiction and do repairs, that all just makes
15 sense.

16 So they actually -- they facilitate some of the water
17 coming under the road by the flap and saturating the other
18 side, causing the wet-dry cycles that have both damaged the
19 road and damaged my clients' property.

20 And, contrary to what the Court just heard, there was
21 testimony that the walking trail on the north side was
22 elevated, that a base that was mucked out, and that a base was
23 installed before the asphalt for that. That was by Mr.
24 Castles. And there was testimony that the frisbee golf that
25 is inside of the walking trail on the north side had

1 additional dirt on it, that's in addition to the additional
2 dirt on the tennis courts, and all of that is shedding more
3 water down towards the wetlands.

4 As to the tennis courts itself, there was testimony that
5 that was a joint effort by both the City and the County. The
6 County did the work, but they did the work in consultation
7 with the City, and the City owns the property anyway. The
8 County couldn't do anything there without the City's
9 permission. And the lease that's in evidence I believe is
10 clear on that, that the City approves improvements on their
11 property, and the City lease is in evidence as Exhibit Number
12 1. Thank you, sir.

13 **MR. LINDEMANN:** Your Honor, first of all, I was dealing
14 with the park. The maintenance issue I was going to deal with
15 separately, but just to address certainly one of the points
16 that he makes, 57-5-140 does not create a duty on the part of
17 a city to maintain roads that are owned by the State. It
18 says, "Nothing in this chapter shall prevent a municipality
19 from undertaking any improvements or performing any
20 maintenance work on city highways, in addition to what the
21 department is able to undertake with available funds."

22 But it does not require the City to maintain or repair
23 state-owned roads. And there is absolutely no case law that
24 supports that provision. And secondly, just as an aside of --
25 he's provided the Court with proposed jury instructions. I

1 don't believe the defendant --

2 **THE COURT:** I don't think I have them.

3 **MR. LUCEY:** I have them to provide to the Court --

4 **THE COURT:** Oh, okay. I was about to say, I don't have
5 them.

6 **MR. LINDEMANN:** Yeah, I haven't seen those but anyway,
7 Your Honor, obviously there's a big difference between making
8 an affirmative mandatory duty to -- and quite frankly, we
9 don't control those particular roads. They're DOT's roads.
10 So, ultimately, the point of that statute is, if the
11 municipality steps in and performs beyond their duty to do
12 some type of maintenance work, that's permissible to do but
13 that's not required to do. There's obviously a big difference
14 between something that's a duty of care and something that's
15 allowed by law.

16 And to go back to the original issue dealing with the
17 park itself, again, I don't believe that Mr. Castles'
18 testimony satisfies the burden of proof of the common enemy
19 rule. And I didn't really hear Mr. Lucey actually address the
20 common enemy rule in response to my arguments.

21 As far as the maintenance goes that was performed, again,
22 the evidence is undisputed that the drainage systems in play
23 here are within the DOT's ownership and control. There is no
24 law that I'm aware of -- and he didn't cite one, he just said
25 there's a statute -- that says we have to provide a stormwater

1 management system within the City.

2 Of course, there is a stormwater management system. It's
3 -- part of it is city-owned, the parts that are within city
4 right-of-ways, but not in this particular part of town. This
5 particular part of town, it's SCDOT stormwater drainage
6 systems, with the exception of the end of the pipe that goes
7 out into the marsh at the end of Front Street, because that's
8 outside the right-of-way. And I'm nebulous as to who's
9 responsible for that, but the City has put a flap valve on
10 that pipe and has maintained it. And there is no evidence
11 that it's not working.

12 In fact, the only evidence is Mr. Castles never did look
13 at it. And he couldn't address any other flap valves around
14 the park.

15 So there isn't any evidence in this record that, number
16 one, that that's not working, or number two, that that is a
17 breach of some standard of care. I mean, certainly Mr.
18 Castles didn't testify that it was inappropriate to have a
19 flap valve on that particular pipe.

20 And, ultimately, Your Honor, as well, Mr. Castles never
21 got into addressing whether it was an appropriate design
22 stormwater system, whether it's DOTs or the cities or whoever.
23 I mean, there is no expert testimony to suggest that it's not
24 an appropriate system that's in place.

25 Obviously, there are challenges because of the tides, as

1 Your Honor's comments earlier, yourself recognize but
2 ultimately, if you're going to build on the coast and have a
3 (inaudible) on the coast, you've got to address those issues,
4 and that's the way these are addressed. And there's no
5 evidence that that's a breach of any type of standard of care,
6 a breach of any type of legal duty that would give support to
7 a negligence theory against the City.

8 And I would also submit, Your Honor, the Tort Claims
9 itself does not create duties of care, and that's the Harrison
10 v. Summers Construction Company. The duties of care have to
11 exist either by statute or by common law, and -- or in cases
12 where expert testimony is needed, where then the standard of
13 care is provided by an expert witness.

14 So I would conclude by going, as far as a breach of the
15 duty of care, they have not been able to show it.
16 In addition to that, Your Honor, there are a number of other
17 defenses that go to the negligence claim.

18 Number one, you've got a statute of limitations claim
19 that I'll adopt a lot of what Ms. Thomas argued, but the
20 bottom line is with the equitable estoppel argument, number
21 one, it's very difficult to show it's estoppel against the
22 government. I would call the case of Morgan v. South Carolina
23 Budget and Control Board that talks about that it's just
24 single acts of unauthorized individuals do not estop the
25 government actors.

1 And the bottom line is, Your Honor -- and there's also a
2 case that I can hand up to Your Honor -- I have to find it --

3 **THE COURT:** That Morgan case, do you happen to have the
4 site for that?

5 **MR. LINDEMANN:** I don't. I think it's either cited in
6 the other case that I did pull, which was -- if you give me
7 one second, Your Honor. I'm sorry. I should have had that
8 pulled already. Well, we did talk, Your Honor, earlier about
9 equitable estoppel and I gave you the copy of the Black v.
10 Lexington County School District case. That case also, Your
11 Honor, addresses what's required to show it's estoppel.

12 It's the McCrowey v. Zoning Board of Adjustment of City
13 of Rockville case, and I believe that this -- and I can get
14 Your Honor the Morgan case. I think this case is either cited
15 in Morgan or -- and this is what it says. It says:

16 "It is generally held that no estoppel can grow out of
17 dealing with public officers of limited authority, and the
18 Doctrine of Equitable Estoppel cannot ordinarily be invoked to
19 defeat a municipality in the prosecution of its public affairs
20 because of an error or mistake of one of its officers or
21 agents."

22 And then it cites South Carolina Coastal Council v.
23 Vogel, a Court of Appeals decision that says -- it holds that
24 the Doctrine of Equitable Estoppel cannot be used to deprive
25 the state of due exercise of its police power to frustrate its

1 application of public policy.

2 So, ultimately, Your Honor, as I indicated, it's very
3 difficult to use equitable estoppel against the government.

4 The Morgan case, incidentally, is 377 S.C. 313.

5 **THE COURT:** 313.

6 **MR. LINDEMANN:** But, to continue on that point, Your
7 Honor, again I think what's very important to focus on is Mr.
8 Christmas never testified that anybody told him, don't sue, we
9 will resolve this, let's settle this. Never gave him any
10 assurances that it would be worked out between them.

11 It's similar to what Ms. Thomas indicated with Mr. Pope,
12 indicated being -- trying to deal with a constituent. The
13 responses based on his testimony was, we'll look into it,
14 we'll try to see if there's something that can be done, et
15 cetera, et cetera, but ultimately, that is not enough to
16 establish estoppel under the case law, including the Black
17 case that I provided the Court earlier.

18 And, in addition to that, Your Honor, a particular city
19 official, even the mayor himself, this is not a mayor -- this
20 is not a strong mayor government here in the City of
21 Georgetown. And they certainly didn't put in any evidence of
22 what the form of government is but ultimately, a mayor has
23 just one vote like everybody else, and I know Your Honor has
24 been on, I think, city councils before.

25 **THE COURT:** That's right.

1 **MR. LINDEMANN:** And so you know that very well. And so
2 one particular council person cannot bind the council to any
3 type of action. And what I think is significant here, as I
4 brought out on cross-examination, Mr. Christmas never took
5 this issue to county council -- city council. He never even
6 went to a public hearing or asked to make a public statement
7 during a regularly scheduled hearing. He never brought this
8 issue before a city council.

9 And obviously, the only way that the City can be bound is
10 by actions of its governing body, not by individual employees,
11 not by individual members. And that's where that McCrowey
12 case kicks in, because even if there had been an employee who
13 made him some type of promises, they're not authorized to do
14 so, And that doesn't give rise -- an authorized act by a
15 public employee does not give rise to estoppel against the
16 government.

17 So ultimately, Your Honor, the lawsuit was filed in April
18 of 2020. The Court has heard a lot of testimony that the
19 flooding issues began in 2012. He had complaints in 2012. He
20 made complaints to city officials and other officials in the
21 2012-2014 time frame. The park itself, the renovation
22 project, was begun in 2016. Mr. Christmas himself testified
23 that he had concerns about it already. And by 2016-2017,
24 that's why he started taking pictures. He said it affected
25 the lot across the street from his by 2017. He testified to

1 that just a few moments ago. And all of that is more than two
2 years prior to the filing of this lawsuit.

3 So we believe that a statute of limitations defense
4 applies to the City of Georgetown as well.

5 And then I can go into the different immunities, but I
6 don't know if you want me to stop.

7 **THE COURT:** Let's let Mr. Lucey respond to that.

8 **MR. LUCEY:** Thank you, sir. With regards to the drainage
9 system, Your Honor, Exhibit 49, as the Court heard from the
10 defense I believe, Exhibit 49 is their printout of their
11 drainage system. So there's no doubt whose drainage system it
12 is. It may be the DOT right away, but the City of Georgetown
13 has assumed control over their drainage system, and it's in
14 evidence as Exhibit 49.

15 And, with regards to the common enemy doctrine, Your
16 Honor, you're right, I did already address that. I thought I
17 addressed that with DOT as the same issue --

18 **THE COURT:** Yes.

19 **MR. LUCEY:** Yes, you can cast the water off your
20 property. No, you cannot cast it onto somebody else's. And
21 that's what we have alleged and shown here.

22 And, Your Honor, the estoppel, it sounds like an
23 attractive argument, but I think they're mistaking the
24 estoppel. You can't aggressively, you cannot offensively use,
25 offensively use estoppel to bind a government entity to do

1 something or not do something except in rare circumstances.

2 That's not in this Court. This is an issue where the
3 City is asserting aggressively that we waited too long. And
4 we're simply saying defensively, we waited because you
5 represented you were handling it. That's a different type of
6 estoppel, and I suspect that they can't show the Court a case
7 where that type of estoppel is frowned upon.

8 It's a defensive estoppel, and it's completely different.

9 **THE COURT:** I don't quite follow what your argument is on
10 that, between an offensive and a defensive estoppel.

11 **MR. LUCEY:** Offensive estoppel is when I'm trying to make
12 a city do something because they promised me to do it.

13 **THE COURT:** Okay.

14 **MR. LUCEY:** Or when I'm trying to keep them from doing
15 something because they promised me they wouldn't do it. We're
16 not here, we're not trying to make the City do something they
17 promised.

18 This is not a promissory estoppel claim in this case.
19 What we're saying is you said we waited too long, and we're
20 only asserting estoppel by saying, well, you told us you were
21 working on it. There was no reason for us to sue you. It's
22 not that we're trying to make them fulfill a promise by
23 estoppel. We're simply saying we relied on your words. And I
24 don't believe you'll find that the cases that they've cited to
25 the Court are applicable.

1 With regards to the statute of limitations as to the
2 flooding, Your Honor, for instance, you just heard them argue
3 about what might have happened on the marsh grass, the lot
4 across the street from Mr. Christmas that he does own.

5 That marsh grass lot across the street has nothing to do
6 with any claim in this case. It's on the wrong side of the
7 road. It's not getting the flooding under the road. It's not
8 part of the catch basin.

9 What happened over on that lot has nothing to do with the
10 flooding that's at issue in this case. The flooding at issue
11 at this case is best exemplified by Judge O'Donnell's
12 testimony as to what happened after the park improvements. It
13 didn't flood in the center of the park anymore. It flooded
14 all the way up -- not only did it flood into the Front Street
15 and its houses on Greenwich, it flooded through those houses,
16 further up Greenwich Street, through the backyards, through
17 the garages.

18 He described the length of flooding that began after the
19 park improvements, and that's the actionable flooding in this
20 case. There was nothing to sue over before those park
21 improvements were completed. There wasn't any actionable
22 flooding of any consequence.

23 With regards to the statutes that were cited, Your Honor,
24 it's Statute 527.120 that requires the municipality to keep
25 all roads in their municipality in good repair. It does not

1 exempt state roads.

2 And then it's two statutes later, 527.140, which says the
3 ownership of the roads shall not prevent a municipality from
4 maintaining it.

5 **THE COURT:** What about the Vaughan case, Vaughan v. Town
6 of Lyman, that specifically says that that statute requiring
7 town to maintain its street did not create a special duty?

8 **MR. LUCEY:** Until the town takes control of the streets -
9 - in Vaughan, it took control -- here, we've shown they took
10 control of the streets by the barricades during the water
11 events. And, once they have taken control of the streets,
12 then they can be deemed to have undertaken responsibility of
13 the streets. And --

14 **THE COURT:** I don't necessarily know if that's taking
15 ownership of the streets by putting up a barricade. In the
16 Vaughan case, it actually was a sidewalk.

17 **MR. LUCEY:** I'm sorry. If I said ownership, I misspoke.
18 I was addressing the control, taking control of the streets,
19 such as I believe was at issue in Vaughan.

20 **THE COURT:** I think in Vaughan, they had budgeted to do
21 maintenance on sidewalks, slip-and-fall sidewalks, which would
22 certainly be a little different than putting a barricade out
23 to allow -- not allow somebody to come into an area that's
24 flooded.

25 **MR. LUCEY:** Vaughan was definitely sidewalks, but I

1 | believe the analogy -- taking control and assuming
2 | responsibility, the analogy is there. And then, of course, we
3 | still have those two statues, those two state statues as the
4 | backdrop of both of those.

5 | And, Your Honor, on the --

6 | **THE COURT:** Let me ask you this question.

7 | **MR. LUCEY:** Yes, sir.

8 | **THE COURT:** Because this did get brought up about -- and
9 | I think it was on cross, and I don't remember if it was Mr.
10 | Lindemann or Mr. Battle, but one of them asked if he had gone
11 | to a council meeting and made any assertions at council
12 | meetings. Council meetings generally are at least twice a
13 | month, and at every council meeting, there's a public input
14 | where anybody in the public can state what they would like,
15 | and generally speaking, the mayor is who sets the agenda for
16 | council meetings, and that's normally how a council gets
17 | notice of problems in the community.

18 | It gives me concern that that's not how anything
19 | happened, that it was a -- you know, potentially a meeting as
20 | somebody was walking around a park and then met a couple
21 | times, but you know, you brought up the defense of well,
22 | they've been put on notice and all of this, but I guess my
23 | question is, did they get put on notice? Did the City? Did
24 | the County?

25 | **MR. LUCEY:** If putting the mayor on notice -- if putting

1 the top dog on notice --

2 **THE COURT:** But that's not how council works. The mayor
3 is not the top dog. The mayor has no more power than any
4 other person on council.

5 **MR. LUCEY:** I would respectfully submit to the Court that
6 to the average American, the mayor of a city or town is the
7 leader of that municipality, and I get that some of us that
8 get involved in that kind of stuff might know the difference
9 between a strong council and a weak council or a strong mayor
10 and a weak mayor. I don't think that that's something that
11 the average public really focuses on, and I think if a mayor
12 represents to you, we're working on it, we're working on
13 solutions, we're going to get the money for it, I don't feel
14 as though you should feel -- a citizen should feel like, okay,
15 I can't rely on that. I need to go make sure council knows
16 what this mayor has told me, or they need to go ask council
17 separately.

18 I think that's asking a lot, respectfully, sir, of your
19 typical resident.

20 **THE COURT:** You may continue.

21 **MR. LUCEY:** And, I mean, we can debate about a strong
22 council and a weak council, but I mean, just take your typical
23 corporation. I mean, if you think -- one would think if you
24 talked to the president of a corporation, you have talked to
25 the corporation. And, you know, a non-profit entity, they

1 have board of directors. If you think -- if you talk to the
2 chairman of the board that you have done your job, you've
3 communicated, you may not know that that chairman of the board
4 is powerless, that he needs to have a board vote to do what
5 you're talking about, where you may assume that he has enough
6 control or influence that that's something he can handle.
7 That's within his sphere, but I don't -- I think if you're
8 talking to what appears to be the lead person in an entity,
9 you can think that you're talking to the entity.

10 And with regards to -- Your Honor, on the drainage issue,
11 not only is the entire drainage system in Exhibit 49 theirs,
12 it's off their computer, their GIS system, the tidal gates are
13 theirs -- the tidal gates, the evidence is, is that they were
14 not blocking the water and the water was still coming onto the
15 roads and saturating the soils on the other side of the roads
16 and causing or contributing to the damage. And that's City.
17 That's City and State. City was maintaining roads and the
18 City was addressing the tidal gate.

19 Thank you, sir. I'm happy to answer any further
20 questions.

21 **THE COURT:** No further questions.

22 **MR. LINDEMANN:** Your Honor --

23 **THE COURT:** Yes, sir.

24 **MR. LINDEMANN:** -- before we move on to the next issue --
25 and I'm sorry it's getting late, I'm --

1 **THE COURT:** No, no.

2 **MR. LINDEMANN:** -- at a little bit of a disadvantage
3 going last, but the statutes that he cited -- he touched on
4 this from the Vaughan case, 5-27-120, and one -- I've written
5 down 140, I'm not sure if that's what he said, because that
6 actually doesn't even deal with -- that deals with --

7 **THE COURT:** Well, I had 57-5-140, I think it was one that
8 was --

9 **MR. LINDEMANN:** Oh, okay. But the bottom line is, Your
10 Honor, that's where the public duty rule comes in, and we pled
11 the public duty rule in this case.

12 **THE COURT:** That's 57-5-140.

13 **MR. LINDEMANN:** Yeah. I mean, those statutes are not
14 intended to create a duty of care. They're intended to lay out
15 -- and I know Your Honor is familiar with the public duty
16 rule, and I can go into the Arthurs case *ad nauseam* if you
17 need me to, but the bottom line is, the public duty rule says
18 that provisions of -- statutory provisions that set forth how
19 government is to function is not -- it creates public duties,
20 it does not create duties to any specific individuals. And
21 the classic case of it is the statute he's relying on.

22 And this argument that -- I don't know where there's any
23 evidence in this record that the City assumed control or took
24 over the SCDOT roads or drainage system. I mean, there is
25 just not evidence of that. And the only thing he pointed to

1 | remarkably was Exhibit 49, because somebody said that came off
2 | the City's website.

3 | That's not evidence of the City taking over or assuming
4 | control of drainage facilities or roads that don't belong to
5 | it. Nor do I think we have the authority to take over. I
6 | think SCDOT would probably take exception if a city thought
7 | they had the authority to take over their property. It would
8 | sort of defeat the purpose of encroachment permits but -- so
9 | again, that just shows how weak, for all practical purposes,
10 | the plaintiffs' case is.

11 | But let me go to the community arguments real quickly,
12 | and I won't belabor those.

13 | **THE COURT:** Sure.

14 | **MR. LINDEMANN:** They've been touched on -- a couple of
15 | them were touched on by I believe Ms. Thomas, and I certainly
16 | will join in her argument but recognizing the Rayfield case --
17 | and I can get the -- it's the Rayfield v. South Carolina
18 | Department of Corrections case where Judge Bell, who used to
19 | be such a great voice for governmental issues, Judge Bell
20 | explained, and it's often overlooked, that tort claims --
21 | sovereign immunity and tort claims act immunities, you
22 | actually assume that there's a duty and you assume there's a
23 | breach of duty, and then you get to the immunities with the
24 | assumption that there's liability. You don't even have to
25 | reach immunities if there's no liability but ultimately, there

1 are several provisions in the Tort Claims Act that are
2 directly at play here.

3 Number one is 15-78-60 subsection 7, which I mentioned
4 the other day --

5 **THE COURT:** Right.

6 **MR. LINDEMANN:** -- and it talks about a governmental
7 entity is not liable for a loss resulting from a nuisance.
8 And that doesn't mean simply that you can't bring a nuisance
9 claim. You can't bring a nuisance claim, but you also can't
10 bring a negligence claim by simply renaming it -- I mean,
11 basically bring a nuisance claim in the name of negligence.
12 You know, I cited to Your Honor the other day, the Erickson v.
13 Post and Courier case where the South Carolina Supreme Court
14 said the exact same thing with defamation.

15 You can't bring, in that particular case -- and I've
16 actually used this before, that the statute of limitations was
17 shorter for defamation, so I had an opponent who simply
18 brought it as a negligence claim to try to beat the statute of
19 limitations, and you can't do that.

20 So our law, our common law, recognizes in these sorts of
21 instances the cause of action is for nuisance or trespass.
22 Well, they didn't bring a trespass claim and a nuisance claim,
23 we're entitled to sovereign immunity. And you can't get
24 around that sovereign immunity by simply using a label and
25 calling it something else.

1 So I believe Subsection 7 applies. Subsection 8 also
2 applies. I think that actually has been termed by the Warren
3 v. South Carolina Highways and Public Transportation case as
4 essentially the act of God provision that was codified in the
5 Tort Claims Act because it talks about snow and ice
6 conditions, but it also talks about -- and I don't have it
7 right in front of me, I had it on my phone, but it talks about
8 temporary weather conditions to attempt -- hold on one second,
9 Your Honor, if you don't mind. Let me get this right. And I
10 apologize. I just want to make sure I'm giving you the exact
11 same language. It's actually in a charge that I submitted.

12 Subsection 8 reads as follows: So a governmental entity
13 is not liable for a loss resulting from snow or ice conditions
14 -- certainly don't have that -- or temporary or natural
15 conditions on any public way or other public place due to
16 weather conditions. And then there's an exception for snow and
17 ice that's affirmatively caused by the negligent act of an
18 employee but that obviously didn't apply -- it doesn't apply
19 to temporary natural conditions on any public way.

20 That's what we're dealing with here. I mean, our whole
21 argument primarily against DOT, but to the extent they're
22 trying to lump us in for the roads and for the drainage system
23 and it applies to the City as well, it deals with temporary or
24 natural conditions on any public way. And again, in the
25 Vaughan case as well as the Presley case as well, South

1 Carolina Appellate Courts have viewed that as act of God
2 claims being attributable to a Tort Claims Act case.

3 So I believe that that applies as well, Your Honor. And,
4 as I argued the other day, I believe that Subsection 20 also
5 comes into play because everything that was done by the City
6 with the park renovations was all done through contractors.
7 And for the most part, they've abandoned most of the arguments
8 that they had originally made in opposition to summary
9 judgment. They didn't put in RFPs. They didn't put in any
10 design documents. I mean, none of that is any more at issue
11 in this case based on the way they presented their case in
12 chief.

13 I think the only thing that might be left, and barely, is
14 this idea of the trucks damaging the road. And again, there's
15 no evidence whatsoever it was ever a city truck. I think
16 there's one photograph of a truck that got into evidence with
17 Mr. Christmas. Nobody ever identified it as a city-owned
18 truck.

19 To the extent it's a contractor, it's not our
20 responsibility. To the extent it caused damage to SCDOT
21 roads, that's SCDOT's property. That would be their argument,
22 their claim to make anyway but the bottom line is, to the
23 extent that's still a viable issue at this point in the trial,
24 it would be barred by 15-78-60 Subsection 20 because clearly
25 all the work that was done on the park renovations was done by

1 contractors. There's no evidence to suggest -- in fact, it's
2 been -- actually Mr. Battle made this argument for the County.
3 It's the same for the City. There's not been a single witness
4 who testified that anything, any act or omission, any action
5 whatsoever by a city official is at issue in this case. I
6 mean, we haven't heard a city official's name mentioned in the
7 testimony of the plaintiff other than Mr. Arteaga met with Mr.
8 Castles prior to the suit being filed at his office.

9 So, again, I think the negligence claims are many, many
10 different grounds as we've gone through to dispose of that
11 claim. And I can very quickly go through the other grounds if
12 Your Honor wishes.

13 **THE COURT:** Is this on the negligence or is this on --

14 **MR. LINDEMANN:** This will be on other causes of action,
15 Your Honor. I mean -- and then one that's -- two of them that
16 go to the entire lawsuit.

17 **THE COURT:** Now, when you're saying other causes, are you
18 joining in on the inverse condemnation claim?

19 **MR. LINDEMANN:** I have. I have an additional argument
20 over what was made by my colleagues --

21 **THE COURT:** Let's hear that briefly.

22 **MR. LINDEMANN:** It probably applies to both of them, so
23 they might join in.

24 **THE COURT:** All right.

25 **MR. LINDEMANN:** Do you want to hear that?

1 **THE COURT:** Yes, please.

2 **MR. LINDEMANN:** All right. That one is actually very
3 simple. Your Honor, the measure of damages for inverse
4 condemnation is spelled out very clearly in our law in South
5 Carolina. If it's a temporary taking, the measure of damages
6 is the lost rental value of the property.

7 If it is a permanent taking, the measure of value is the
8 diminution of value of the property. And that's it. It's not
9 damages. It's not repair costs. And I don't know whether
10 they're pursuing --

11 **MR. LUCEY:** We haven't put on our condemnation damages
12 yet because you haven't ruled on the taking.

13 **THE COURT:** I know. I know but I --

14 **MR. LINDEMANN:** So, Your Honor, that was supposed to be
15 in front of the jury at this point. They didn't even put that
16 in in their case-in-chief.

17 **MR. LUCEY:** We can't put it in until he makes a ruling on
18 taking. He can't do without --

19 **THE COURT:** That would be the bifurcation portion of it.
20 I believe you're correct on that.

21 **MR. LINDEMANN:** Well, anyway, Your Honor, as far as the
22 inverse condemnation goes, I would certainly join in the other
23 arguments. There has been no affirmative act. There hasn't
24 been a showing that there was a taking for public use. Again,
25 the water is coming, according to Mr. Castles -- it all goes

1 back to that same argument -- that it's coming from the bay,
2 and it's not coming from the park. They haven't established
3 that there's been any flow whatsoever from the park that has
4 entered Mr. Christmas's property.

5 And, again, the physics of it doesn't make sense. I
6 mean, water isn't kind of go to the lowest point and then go
7 back uphill again. It just doesn't flow that way. And the
8 common enemy rule would apply to the inverse condemnation as
9 well, Your Honor.

10 Ultimately -- you want me to address a couple of the
11 other issues as --

12 **THE COURT:** Well, I was just going to say, Mr. Lucey, I'm
13 assuming you make the same defenses that you previously stated
14 on the inverse condemnation.

15 **MR. LUCEY:** Yes, sir. And as to the negligence -- excuse
16 me, the nuisance, we've shown actual damages. This is not a
17 nuisance claim. As to the act of God, we've shown that acts
18 of human beings have had a much greater effect on this case
19 than acts of God. So that defense does not apply. You must
20 show that a but-for test for an act of God's defense to
21 supersede.

22 As to the third-party exemption, Your Honor, we're not
23 suing them for any actions by third parties. All the items of
24 negligence we've discussed in the last hour and fifteen
25 minutes, those have been owner actions, owner decisions by the

1 governmental defendants.

2 And, as to the affirmative acts, the Court's already
3 aware of the park permits. And, with regards to the City, the
4 additional defect of failing to keep the water out from
5 underneath the roads and coming into our property. Thank you.

6 **THE COURT:** All right.

7 **MR. LINDEMANN:** Subsection 8, Your Honor, does not have
8 an exception for temporary or natural conditions on a public
9 land. They do for snow and ice but the fact that they did it
10 for snow and ice and not the remainder of Subsection 8 shows
11 they didn't, the General Assembly didn't intend to have that
12 exception.

13 **THE COURT:** Okay.

14 **MR. LINDEMANN:** So I would submit to you that this
15 completely falls under Subsection 8.

16 **THE COURT:** I think last would be the writ.

17 **MR. LINDEMANN:** I'm sorry, Your Honor?

18 **THE COURT:** I said would your last argument be on the
19 writ?

20 **MR. LINDEMANN:** No. A couple of arguments that go to the
21 case as a whole.

22 **THE COURT:** Okay.

23 **MR. LINDEMANN:** I want to reiterate them and granted --
24 obviously I can't rely on summary judgment arguments. So I
25 have to reiterate them here today. I won't go into quite the

1 extent of the arguments as I did before.

2 And, with the Court's permission, I'll rely on the
3 arguments that were made on the record on Monday but obviously
4 we've got the 15-78-70(d) argument. I know Your Honor denied
5 summary judgment but of course, denial of summary judgment
6 doesn't establish the law of the case. And, in fact, I think
7 your ruling Tuesday morning was saying you -- we had to -- we
8 had to leave the reassert which obviously we're required to do
9 in a directed verdict anyway.

10 But obviously the settlement with Green Wave Contracting
11 -- and I actually pulled a copy of the release.
12 Your Honor, I'd like it to be part of the record. Again, it
13 has a confidentiality provision in it. So I don't know how
14 best to do that, but maybe make it a sealed exhibit. You
15 know, again, I'll leave that up to the Court. I mean, I
16 wasn't a party to this settlement, but it says plaintiff and
17 settling party will keep the terms of the settlement
18 confidential but I don't know how plaintiffs want to deal with
19 it, but I do think it needs to be part of the record.

20 **THE COURT:** Mr. Lucey or Mr. Evans?

21 **MR. LUCEY:** With regards to confidentiality, sir?

22 **THE COURT:** He's saying -- asking whether it needs to be
23 under seal, but he wants to make it a part of the record to
24 preserve the record.

25 **MR. LUCEY:** Yes, sir. I don't have Green Wave's consent.

1 Can we just recognize that it exists? I mean, he's already
2 put its terms of the record three times.

3 **MR. LINDEMANN:** I don't have a problem -- I don't have a
4 problem if we'll just stipulate that there's a settlement
5 agreement.

6 **THE COURT:** Mr. Lucey, will you stipulate that there's a
7 settlement agreement?

8 **MR. LUCEY:** Yes, sir.

9 **THE COURT:** Okay.

10 **MR. LINDEMANN:** And for the payment of money, we don't
11 need to disclose what it was.

12 **THE COURT:** Okay.

13 **MR. LINDEMANN:** All right.

14 **THE COURT:** Mr. Lucey, is that good with you?

15 **MR. LUCEY:** I'm sorry?

16 **THE COURT:** To stipulate that there was a settlement and
17 that money was paid, but we're not putting into the record
18 what the money was.

19 **MR. LUCEY:** Yes, sir. Fine, thank you.

20 **THE COURT:** Okay.

21 **MR. LINDEMANN:** All right. And, again, Your Honor, as --
22 just for the record real quickly so that nobody can later
23 argue that I didn't make this at the appropriate time, we
24 submit that the plaintiffs' claim is barred by operation of
25 15-78-70(d) based upon the settlement that was entered into

1 between the plaintiff and Green Wave Contracting.

2 Again, that particular section says, quote, "A settlement
3 or judgment in an action for a settlement of a claim under
4 this chapter," meaning the Tort Claims Act "constitutes a
5 complete bar to any further action by the claimant against an
6 employee or governmental entity by reason of the same
7 occurrence."

8 We would argue, Your Honor, that this statute applies
9 just as the South Carolina Supreme Court spelled out in the
10 Wade v. Berkeley County because this lawsuit was brought
11 against -- initially against the City, the County, and Green
12 Wave Contracting. It was brought under the Tort Claims Act.
13 There is no other way to sue the County and the City. This
14 was an action from the very beginning that distinguishes the
15 Wade case where there was initially a claim brought against a
16 county employee in his personal or individual capacity.

17 That was then settled, and a second lawsuit was brought
18 against Berkeley County. The Supreme Court, in that case,
19 said 70(d) did not apply but ultimately, the Supreme Court did
20 state, "to invoke the provisions of 15-78-70(d), there must be
21 a settlement or judgment in action under the act or a
22 settlement of a claim under the act."

23 And, in this particular case, as I indicated, we do have
24 a claim under the act that was settled. And, of course, the
25 repercussions of that to the governmental entities, including

1 the City, is that we lost the ability to apportion fault under
2 15-78-100(c) for any type of fault by Green Wave Contracting.
3 And, of course, under the Contribution Act, governmental
4 entities don't have the right of contribution anyway.

5 So that's why apportionment was the device that was
6 created by the General Assembly in order to protect
7 governmental entities and make certain that the taxpayers are
8 only liable for their own degree of fault, the damages
9 attributable to their own degree of fault, and they're not
10 paying the fault of any other parties, either any other
11 governmental entities or any other non-governmental entities.
12 And, actually, that's consistent with a provision in the South
13 Carolina Constitution that says the government can't pledge
14 its credit in support of any type of private party.

15 So the bottom line is, Your Honor, the settlement by the
16 plaintiffs with Green Wave Contracting basically implicates
17 15-78-70(d) and should be deemed as a matter of law and a bar
18 on any further claims against the City for any torts in this
19 particular case.

20 Ultimately, Your Honor, we would also move for a directed
21 verdict on our previous arguments on the fourth cause of
22 action brought under 5-31-450. Again, with the Court's
23 permission, I'll incorporate my arguments from the previous
24 summary judgment arguments --

25 **THE COURT:** Yes.

1 **MR. LINDEMANN:** -- but in summary fashion, 5-31-450 was
2 impliedly repealed by the adoption of the Tort Claims Act.
3 The analysis going through that shows that in 1986, when the
4 Tort Claims Act was adopted, as the Supreme Court explained in
5 the case of Murphy v. Richland Memorial Hospital cited in our
6 supplemental memorandum, the General Assembly initially
7 restored sovereign immunity in its entirety. That got rid of
8 the, "scattered patchwork of sovereign liability" that existed
9 prior to McCall v. Batson when there were various statutes
10 that allowed some limited governmental liability. All of
11 those statutes were then basically wiped clean. Sovereign
12 immunity was reinstated, and then the Tort Claims Act was a
13 limited waiver of governmental immunity, allowing certain
14 liability to take place and certain liability not to exist.

15 That has been recognized by the two circuit court
16 opinions that I gave you from Judge Markley-Dennis and Judge
17 Bentley Price. Again, the Wiggins and McKittrick decisions I
18 handed up to Your Honor, I recognize they're not precedent,
19 but would submit to Your Honor, they're persuasive. And then
20 also the Sadek v. Lambert case that I argued at length the
21 other day, where Judge Terry Wooten applied the same rationale
22 to rule that another similar ancient statute, Section 16-5-60,
23 the civil rights statute, was not irreconcilable with the Tort
24 Claims Act, and therefore, was in -- appeal when the Tort
25 Claims Act was passed.

1 And again, as I mentioned, Judge Wooten's opinion has
2 been cited numerous times by other Federal judges, including
3 Judge Gergel and Judge Joe Anderson.

4 So, again, there's substantial logic and rationale beyond
5 this. And, quite frankly, the claims don't meet this claim.
6 It's essentially redundant of a negligence claim.

7 So, to the extent they have a negligence claim, and I
8 submit that they don't based on the other arguments, this
9 claim doesn't add anything to it. It is simply an old tort
10 statute that is not applicable.

11 Again, just to repeat my arguments from the other day, to
12 the extent the Court even finds that it is applicable, they
13 haven't pled nor made a showing of the various elements of
14 that cause of action.

15 In addition, I will renew my argument that 5-31-450, if
16 it hasn't been impliedly repealed, it violates the Equal
17 Protection Clause. In fact, Your Honor just made that very
18 point here today, I don't disagree with you that it doesn't
19 apply to the county, it doesn't apply to SCDOT. There's no
20 rational basis for saying it applies only to roads that are
21 within municipalities and doesn't apply to any others.

22 And again, so on the basis of equal protection, if that
23 statute exists, certainly there's no rational basis for it,
24 and it should be stricken for that additional reason.

25 Lastly, Your Honor, we also have an argument, very

1 | briefly, that the plaintiff in this case, the only plaintiff
2 | that brought suit is Ron Christmas. We put in evidence of the
3 | deeds here a short time ago. Half of this property is owned
4 | by Deborah Christmas. Mr. Christmas does not have standing to
5 | assert damages, claims or any type of causative action that
6 | belong to Mrs. Christmas.

7 | This is an issue that we raised back in May of 2020 in
8 | our very first answer. I don't know why the plaintiffs never
9 | joined Mrs. Christmas, but they never did, and of course the
10 | statute of limitations has clearly run for her as well but the
11 | bottom line is, since they own the property as joint tenants,
12 | they have equal ownership interests in the property, and he
13 | can't claim the damages that would rightfully belong to her.
14 | So that's an additional argument for directed verdict.

15 | And, if the Court will just give me one second, Your
16 | Honor.

17 | **THE COURT:** Let me hear from Mr. Lucey on that last
18 | argument.

19 | **MR. LINDEMANN:** Thank you.

20 | **MR. LUCEY:** Yes, Your Honor. As to standing, clearly as
21 | a joint tenant, he has complete standing to bring it, and
22 | either joint tenant, as a matter of joint tenant law, can
23 | operate on behalf of the joint tenancy. And so that --
24 | there's actually no foundation whatsoever for that argument,
25 | Your Honor.

1 And, with regards to the analogy he was trying to
2 describe as to 15-5-60 being impliedly repealed, it's actually
3 been expressly repealed by the legislature. So that has
4 absolutely no application whatsoever.

5 With regards to his first two arguments regarding Green
6 Wave and the City stormwater statute being implicitly
7 repealed, Your Honor, we discussed those -- we briefed those
8 and discussed them for almost an hour on Monday. If the Court
9 will permit me to incorporate my briefing in opposition from
10 Monday, I will save the Court some time.

11 **THE COURT:** I will.

12 **MR. LUCEY:** Thank you, sir.

13 **THE COURT:** Thank you.

14 **MR. LINDEMANN:** Your Honor, I missed that one. What has
15 been repealed?

16 **THE COURT:** I missed that, too. I think that may have
17 been a misquote. It's my understanding that the statute in
18 regards to Green Wave was what you said was impliedly
19 repealed. I think there was a misquote on that. Am I --

20 **MR. LINDEMANN:** That section of the Tort Claims Act is
21 still very much in --

22 **THE COURT:** Right.

23 **MR. LUCEY:** No, it was a different statute he was trying
24 to draw an analogy from as being impliedly repealed that has
25 actually been repealed. So the analogy would not apply.

1 **MR. EVANS:** With regard to the stormwater statute.

2 **MR. LINDEMANN:** Well, yes.

3 **THE COURT:** I'm -- the what now?

4 **MR. LINDEMANN:** 16-5-60, at the time of -- I don't know
5 that it's been repealed now, but at the time --

6 **MR. LUCEY:** It has, Your Honor.

7 **MR. LINDEMANN:** -- that Judge Wooten ruled in 2014 --

8 **THE COURT:** Oh, okay. So it's on Judge Wooten's, that
9 one.

10 **MR. EVANS:** And it's currently -- it's actually repealed
11 in the legislature.

12 **THE COURT:** Okay, gotcha.

13 **MR. EVANS:** And then with regard to 15-78-70, you've got
14 to read the entire section. 1578-70 is, "liability for act of
15 government employee requirement that agency or political
16 subdivision be named party defendant, effective judgment or
17 settlement."

18 Right, we didn't sue Mr. Arteaga, we didn't sue --

19 **THE COURT:** Well then, we discussed in the briefing that
20 there was a statute -- if you go further in the statute where
21 it has the definitions, it actually defines what an employee
22 is. I understand. I'll corporate --

23 **MR. EVANS:** And what is not.

24 **THE COURT:** And what is not. I'm incorporating that into
25 y'all's argument. I understand.

1 **MR. LINDEMANN:** And, Your Honor, 15-78-70(a), (b), and
2 (c) provides that you can't sue an employee. So Subsection D
3 does not provide that type of immunity. That immunity is
4 already provided, so you can't read that statute as being
5 meaningless.

6 **THE COURT:** Right.

7 **MR. LINDEMANN:** It obviously does something more than
8 what the previous two statutes do. You can't sue a
9 governmental employee under the Tort Claims Act unless it's
10 outside the scope of their official duties, crime of moral
11 turpitude, intent to harm, malicious -- actual malice, or
12 actual fraud. And we don't have any of those issues here.

13 **THE COURT:** Mr. Battle, yes, sir.

14 **MR. BATTLE:** Me too. On all these arguments.

15 **THE COURT:** Okay.

16 **MS. THOMAS:** And to the extent any are applicable to me
17 as well, I will --

18 **THE COURT:** Well, let me ask you this. Ms. Thomas, were
19 you -- did you have the fourth cause of action? Was that
20 against DOT? I thought it was just the City and County.

21 **MS. THOMAS:** It is.

22 **THE COURT:** Okay. All right.

23 **MS. THOMAS:** It's just against the City and County.

24 **THE COURT:** I thought so.

25 **MS. THOMAS:** But I'll (inaudible).

1 **THE COURT:** Gotcha.

2 **MR. LUCEY:** If I may approach --

3 **THE COURT:** Yes, sir.

4 **MR. LUCEY:** -- and bring up the jury charges, and we're
5 going to email them to counsel right now.

6 **THE COURT:** Okay.

7 **MR. LUCEY:** Thank you, sir.

8 **THE COURT:** Thank you.

9 All right. Mr. Lindemann, anything else?

10 **MR. LINDEMANN:** I don't believe so -- oh, yes, one more,
11 and I've got a feeling that Ms. Thomas is going to join me on
12 this. The immunity provision under the Stormwater Management
13 and Sediment Reduction Act, Section 48-17-160, Subsection 1,
14 provides, "Nothing contained in this chapter and no action or
15 failure to act under this chapter may be construed to impose
16 any liability on the state, department, districts, local
17 governments, or other agencies, officers, or employees thereof
18 for the recovery of damages caused by such action or failure
19 to act."

20 So, again, that's the Stormwater Management and Sediment
21 Reduction Act, Your Honor, which is extremely on point --

22 **THE COURT:** Did you say 48-17-160?

23 **MR. LINDEMANN:** 48-14-160, Subsection 1.

24 **MS. THOMAS:** Your Honor, that is also covered in our
25 briefing --

1 **THE COURT:** Okay. Sorry, I'm trying to make as many
2 notes as I can. I don't have the cases y'all are citing in
3 front of me, so I'm going to have to go back and look at --

4 **MR. LINDEMANN:** And I'll join the other parties on the
5 mandamus as well.

6 **THE COURT:** Okay.

7 **MR. LINDEMANN:** I don't have anything to add on that.

8 **THE COURT:** All right. Well, I'm glad we got -- I hate
9 that we've had to keep staff here, but I'm hopeful that that
10 means we won't be here late any other night.

11 Well, thank you all, and let's be back at 9:30 tomorrow.

12 **MR. BATTLE:** Judge, I just have a quick question.

13 **THE COURT:** Oh, yes, sir.

14 **MR. BATTLE:** You said that you had a conflict tomorrow
15 afternoon --

16 **THE COURT:** I don't. I took care of it. I have an
17 appointment, and I've got it moved. So I didn't want to take
18 up any of that jury's time.

19 **(COURT IS IN RECESS)**

20 (Proceedings resume on 8/17/2023 at 9:31 a.m.)

21 **THE COURT:** All right. Ladies and gentlemen, I'm sorry
22 for taking a little bit of time. I normally would have my law
23 clerk come out and set all this stuff up for me but he's
24 enjoying the good life in Portugal right now but...

25 I took a bunch of motions under advisement last night and

1 | went home and probably in the chagrin of my wife and children,
2 | spent quite a bit of time at my office in Conway working on
3 | these and going over the multitude of cases that you guys
4 | mentioned yesterday as well as the statutes involved with the
5 | Tort Claims Act as well as the waivers of the immunity for
6 | tort claims.

7 | And I did want to start, I believe, with Ms. Thomas. I
8 | think she argued first yesterday.

9 | Ms. Thomas, the argument that I found most compelling
10 | towards you is your argument over the statute of limitations.
11 | When I read into that, and I did go back and read Magnolia
12 | North v. Heritage Communities, which defense counsel was kind
13 | enough to hand up and I went back and read that, and it's a
14 | case by Judge Newman and -- but I think it's far different
15 | than this case.

16 | It involves property owners association being turned over
17 | by the builders. The property owners association was unable
18 | to file suit until it was turned over from the builders.
19 | Obviously, in that, there was a tolling on the statute of
20 | limitations because they could not file suit.

21 | I believe that in an instance like this, the plaintiff
22 | bears the burden. And, based on the testimony and evidence
23 | that I have in the record, I found that they had not met that
24 | burden. And so, in regards to the Department of
25 | Transportation, it's the finding of the Court that based on

1 the evidence and testimony that they are -- I find that the
2 case was originally filed December the -- excuse me, I had it.
3 Excuse me, the amended case was filed December 7th, 2021 and
4 served upon the Department of Transportation January the 20th
5 of '22. And then there was a second amendment filed 10/21 of
6 '22.

7 I believe that the evidence in the record would show that
8 there was no positive action done by the DOT to allow Mr.
9 Christmas to in any way think that the DOT was acting in his
10 interest within two years of that December the 7th, 2021 date.

11 So, for that, I am going to grant your motion for
12 directed verdict in regards to the statute of limitations.

13 In regards to mandamus, I also specifically find that
14 mandamus is not proper in this action. I believe that the
15 case law on point dealing with mandamus and ministerial acts
16 is Edwards v. State. And in that, it defines a ministerial
17 act as a duty -- or excuse me, it says that a ministerial act
18 or duty is a factor for issuance of a writ of mandamus as one
19 which a person performs because of a legal mandate, which is
20 defined with such provision as to leave nothing to the
21 exercise of discretion.

22 A quick Google search showed me that the South Carolina
23 Department of Transportation maintains 41,000 miles of roads
24 in the State of South Carolina. To indicate that they don't
25 have discretion on which roads they're working on I think

1 it's just not correct.

2 So, for that, I am going to deny the grant of the writ of
3 mandamus.

4 And, as to all parties, at this point, I find that
5 there's no evidence to indicate that there has been a taking
6 in regards to the claim for inverse condemnations. I am
7 pulling the evidence from that from Hawkins v. City of
8 Greenville. In Hawkins v. City of Greenville, it specifically
9 states that -- give me one second.

10 In that case, it specifically says that to establish an
11 inverse condemnation, a plaintiff must show an affirmative,
12 positive, aggressive act on the part of the governmental
13 agency. A taking -- the taking is for public use and that the
14 taking has some degree of permanence. In that case, the Court
15 of Appeals agreed that the city's design and maintenance of a
16 drainage system did not constitute inverse condemnation.

17 Reading that case, it is almost identical to this case.
18 The only difference is that in the Hawkins case, it involved a
19 business and not an individual.

20 So, for that, I am -- I have found that there's not
21 enough evidence to support a taking. And there's also not
22 evidence to support the permanence in that regard. So I am
23 going to deny the plaintiffs' motion or their claim for
24 inverse condemnation.

25 Mr. Battle, yesterday, I granted your motion in regards

1 to 531-450 because it did not in any way relate to the County.
2 That's simply a civil -- a city or state ordinance -- excuse
3 me, state statute. And that ruling will stand because I do
4 believe that in regards to that, that it does only apply to
5 cities.

6 With that being said, I have gone back and looked at that
7 statute, and I do find that that statute has been impliedly
8 repealed by the Tort Claims Act. You can't read that statute
9 and then read the Tort Claims Act and the waivers of immunity
10 and sovereign immunity and say that it was not.

11 So, for that, I am going to dismiss that 531-450 claim.

12 I'm going to grant your motion for directed verdict, Mr.
13 Lindemann, on that, which leaves us to the negligence.

14 In that regard, I've already granted the motion to
15 dismiss for -- or motion for directive verdict in regards to
16 the Department of Transportation because of the statute of
17 limitations. I decline to do that for the County and the
18 City. I believe there has been evidence to show that, if
19 believed, that there could be some continuing operation
20 through the city mayor.

21 With that being said, I am going to go back to Hawkins v.
22 City of Greenville. Mr. Lindemann, you gave me quite a few
23 different things yesterday afternoon and I did want to let you
24 all know that I went back and read your pretrial briefs. I
25 also read your motions that you had made, went and reread

1 those just so that I could make sure that I was fully informed
2 of everything that had come before us.

3 And, quite frankly, I find that the exceptions to the
4 waiver of immunity found in 15-78-61, which is legislative,
5 judicial, or quasi-judicial action or inaction, as well as 15-
6 78-65, which is the exercise of discretion or judgment by the
7 governmental entity or employee, or the performance or failure
8 to perform any act or service which is in the discretion or
9 judgment of the government, entity or employee, I believe both
10 of which apply to this case.

11 I believe you could also in some way say that Subsection
12 8, snow or ice conditions are temporary or natural conditions
13 on any public way other than the public place due to weather
14 conditions, unless the snow or ice therein is affirmatively
15 caused by a negligent act of the employee.

16 It was the testimony of the plaintiffs' witness that
17 ninety percent of this water was coming from the tides.

18 So, for that, it also brings me back to the Hawkins v.
19 City of Greenville case, wherein the courts in that case
20 specifically said that a city's design and maintenance of
21 drainage systems was quasi-judicial function subject to the
22 governmental immunity under the Torts Claims Act, and that the
23 city was not liable under the act and business owners'
24 property near the drainage system flooded during the
25 rainstorm.

1 Mr. Lindemann, I understand you made this motion for
2 summary judgment, and I did not grant it at the time because I
3 needed to hear more, to be quite honest. That being said,
4 I've heard the evidence that is in, and I've heard the
5 testimony of the plaintiffs' witnesses.

6 I do find that the City and the County are subject to
7 immunity under the Tort Claims Act. So I'm going to direct
8 both of your verdicts on that.

9 I don't believe we have any other pending matters at this
10 time. Anything from the plaintiff?

11 **MR. LUCEY:** Yes, Your Honor. The plaintiff moves for a
12 new trial based upon the restrictions on the admission of
13 evidence that the Court made during the prosecution of the
14 plaintiff's case, and we don't believe the jury was able to
15 hear a fair amount of the evidence that plaintiff had brought
16 to present to the jury because of those rulings, and we
17 respectfully request that we be granted a new trial for those
18 reasons, Your Honor.

19 **THE COURT:** Thank you. Anything from the defense in
20 regards to his motion?

21 **MR. BATTLE:** I think you ruled properly.

22 **THE COURT:** Thank you. All right. Mr. --

23 **MR. LINDEMANN:** And that's the same for the City as well.

24 **THE COURT:** All right.

25 **MS. THOMAS:** And the DOT.

1 **THE COURT:** Thank you.

2 **MR. BATTLE:** There's one point that I do think is
3 important to bring out. The law has changed on whether the
4 taking requires permanence, and it doesn't require permanence.
5 That was changed a little bit.

6 **THE COURT:** Right.

7 **MR. BATTLE:** As far as the other part, active aggressive
8 affirmative act that caused -- that part of your ruling, I
9 don't want to -- what I want to avoid --

10 **THE COURT:** Sure.

11 **MR. BATTLE:** -- is having Mr. Lucy take this up and say
12 you did it on permanence, and that's been changed a little
13 bit. So take that into consideration --

14 **THE COURT:** Well, and I'll add this. In the Hawkins
15 case, there was actually a double box culvert that was put in.
16 There were many things that could have been looked at as
17 potentially an overt act. In that case, the court found that
18 that was not an overt act and enough to be a taking.

19 In reading that case and looking at the facts of this
20 case, I specifically find that there is no taking that's been
21 put into the evidence.

22 And, Mr. Lucey, in regards to your motion, I certainly
23 understand your motion. I'm going to respectfully deny your
24 motion. Anything else?

25 **MR. LUCEY:** No, sir.

1 **THE COURT:** Anything from the defense?

2 **MR. BATTLE:** Nothing, Your Honor.

3 **MR. THOMAS:** No, sir.

4 **THE COURT:** All right. All right. We'll be at ease, and
5 I'll go ahead and excuse the jury. Okay? Thank you.

6 **MR. LUCEY:** Thank you, sir.

7 **(COURT IS ADJOURNED)**

8

Christmas v. County of Georgetown, et. al.

Case No.: 2020-CP-22-00356

PLAINTIFF'S CHARGE NO. 1

(Negligence)

I charge you that:

In order to successfully prove a cause of action in negligence, a plaintiff must show the following: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that legal duty; (3) damages proximately caused by the defendant's breach of that legal duty.¹

There are a number of sources of duty. An affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance.² Many statutes impose an affirmative duty on public officials to perform certain acts.³ Duties can also be created by accepted standards of conduct or by the voluntary assumption of a duty.

¹ J.T. Baggerly v. CSX Transportation, Inc., 370 S.C. 362, 368-369, 635 S.E.2d 97, 101 (2006).

² Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991).

³ Arthurs v. Aiken County, 338 S.C. 253, 264, 525 S.E.2d 542, 547 (Ct. App. 1999); Wells v. City of Lynchburg, 331 S.C. 296, 306, 501 S.E.2d 746, 752 (Ct. App. 1998).

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PLAINTIFF'S CHARGE NO. 2

(Duty-Statutory)

I charge you that:

The City has a statutory duty to the general public 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.”⁴

⁴ S.C. Code Ann. § 5-27-120.

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PLAINTIFF'S CHARGE NO. 3

(Duty – Operation and Maintenance of Drainage System)

I charge you that:

A municipality has a common law duty to exercise due care in its operation and maintenance of its drainage system.⁵

⁵ See Graham v. Town of Latta, S.C., 417 S.C. 164, 187, 789 S.E.2d 71, 83 (Ct. App. 2016) (holding testimony and evidence, including “Town's inability to precisely locate its own sewer line—much less reach it in order to properly maintain it—certainly supports the inference that the Town failed to exercise due care in the operation and maintenance of its system.”); see also Snow v. City of Columbia, 305 S.C. 544, 555–556, 409 S.E.2d 797, 803–804 (Ct. App. 1991) (reversing the trial court's grant of directed verdict for the defendant on negligence claim as competing inferences might reasonably be drawn as to the city's failure to exercise due care in installation and maintenance of water main).

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Case No.: 2020-CP-22-00356

PLAINTIFF'S CHARGE NO. 4

(Duty – Dual Responsibility by Municipal Undertaking)

I charge you that:

Under South Carolina law, “[n]othing prevents a municipality from undertaking any improvements or performing any maintenance work on state highways in addition to what the department is able to undertake....”⁶ In other words, ownership of a road by another entity does not prevent a municipality from maintaining or controlling the same road.⁷

A city, county, or other municipality that undertakes maintenance, repairs, or control of state-owned roads within its limits is duty-bound to do so with due care.⁸

⁶ S.C. Code Ann. § 57-5-140; see also Vaughan v. Town of Lyman, 370 S.C. 436, 447, 635 S.E.2d 631, 637 (2006) (whether town undertook the duty of maintaining city streets, even though not all city streets were owned by town was a jury question, noting evidence of sidewalk maintenance in town minutes, ordinances regulating sidewalks, and previous complaints from town residents about sidewalks handled by town).

⁷ See Vaughan, 370 S.C. at 444, 635 S.E.2d at 636.

⁸ Id. at 446-47, 635 S.E.2d at 637.

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PLAINTIFF'S CHARGE NO. 5

(General Duty – Undertakings)

I charge you that:

A person must exercise due care in all undertakings not to cause injury to another or to create a dangerous situation in which injury is foreseeable. This premise covers acts of omission and requires that a complete job be done whenever a job is undertaken.⁹

⁹ Restatement (Second) of Torts, Section 323 cmt. a. (1965) (Regarding skill and competence, “a contract to render services, a gratuitous offer to render them, or even merely giving them at the other’s request, may carry with it a profession or representation of some skill and competence; and if the actor realizes or should realize that his competence and skill are subnormal, he must exercise reasonable care to inform the other. If he does not do so, he is subject to liability for physical harm resulting from his deficiencies.” See also 7 S.C. Jur. Architects and Engineers § 16.

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PLAINTIFF'S CHARGE NO. 6

(South Carolina Code § 5-31-450)

I charge you that:

South Carolina requires that:

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.¹⁰

In other words, under this statute (referred to as the “South Carolina Stormwater Statute”), a municipality who receives a demand from an owner of property must provide sufficient drainage to prevent surface water from any street or public way from passing over that private property.¹¹

Liability exists under the South Carolina Stormwater Statute when there is some affirmative act by the municipality which alters the course or increases the amount of stormwater runoff onto private property.¹²

¹⁰ S.C. Code Ann. § 5-31-450.

¹¹ Id.

¹² See, e.g., Brown v. Sch. Dist. Of Greenville County, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968) (holding if 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).

The Statute does not aim 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.”¹³ Similarly, “[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.”¹⁴ Moreover, “[u]nder 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.”¹⁵ Rather, a plaintiff’s “cause of action is complete if, after demand, the municipality has failed to provide, along or under the street on which the drainage work has been done, sufficient drainage to prevent the passage of the surface water from such street over the landowner’s property.”¹⁶

¹³ Hall v. City of Greenville, 227 S.C. 375, 386, 88 S.E.2d 246, 251 (1955).

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

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PLAINTIFF'S CHARGE NO. 7

(Duty – Notice Requires Repair of Defect)

I charge you that:

Once SCDOT is put on notice of a defect, it is required to correct the condition within a reasonable time.¹⁷

¹⁷ Giannini v. South Carolina Dept. of Transp., 378 S.C. 573, 664 S.E.2d 450 (2008) ("Once SCDOT was put on notice, the first sentence in section 15–78–60(15) [of the South Carolina Tort Claims Act] required SCDOT to correct the condition within a reasonable time. See Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) ("While provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend to perform a futile thing.").

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PLAINTIFF'S CHARGE NO. 8

(Common Enemy Rule)

I charge you that:

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.¹⁸ 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.¹⁹

¹⁸ 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).

¹⁹ 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) (a plaintiff may seek damages for negligent construction of an embankment).

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PLAINTIFF'S CHARGE NO. 9

(Water Law – the Virginia Rule)

I charge you that:

South Carolina law provides that an upper landowner is liable to the lower landowner if the presence of an artificial drainage system causes an increase in surface water drainage.²⁰

²⁰ See Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 n.2 (1986) (“The Virginia law, as defined by the Court in McCauley v. Phillips, 216 Va. 450, 219 S.E.2d 854 (1975), states: We hold that where no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system.”; the Irwin Court stated the trial judge properly elected to charge the Virginia Rule which adequately modernizes the South Carolina law and more closely parallels our Common Enemy Rule).

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PLAINTIFF'S CHARGE NO. 10

(Duty – Created by Undertaking)

I charge you that:

Where there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care.²¹ In this regard, South Carolina law provides that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to that third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of harm;
- (b) he has undertaken to perform a duty owed by the other to the third person; or
- (c) harm is suffered because of reliance of the other or the third person upon the undertaking.²²

Stated differently, when someone undertakes the performance of services, he is duty-bound to perform those services with the care due given the kind of undertaking.²³ It is the undertaking itself that gives rise to this duty, not whether there is a contract to pay for services in place.²⁴

²¹ See Hurst v. Sandy, 329 S.C. 471, 480, 494 S.E.2d 847, 851 (Ct. App. 1997); 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.”).

²² Restatement (Second) of Torts, Section 323A (1965); see, e.g., Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); see also Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding when lender in effect took over a project and undertook to market units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose) (citing Restatement (Second) of Torts, Section 323).

²³ Id.

²⁴ See Sherer v. James, 290 S.C. 404, 407–08, 351 S.E.2d 148, 150 (1986); see also 17 Am. Jur. Proof of Facts 3d 49 (Originally published in 1992) (“A contract to pay the engineer for the services in question is not essential to the creation of a professional duty of care. Such duties can also be created when an engineer voluntarily performs or agrees to perform professional services.”).

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PLAINTIFF'S CHARGE NO. ||

(Easement – Property Owner Right of Access)

I charge you that:

A property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has additional access to and from another public road.²⁵

²⁵ Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011).

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PLAINTIFF'S CHARGE NO. 12

(Denial of Access is a Compensable Damage)

I charge you that:

If a plaintiff no longer enjoys the reasonable means of access to which he was entitled, a physical taking has occurred.²⁶ An obstruction that materially injures or deprives a plaintiff of ingress or egress to and from his property is a “taking”, for which recovery may be had.²⁷

Once a taking has been established, a plaintiff may recover for a loss of access to his property that reduces his property value.²⁸

²⁶ Hilton Head Auto., LLC v. S.C. Dep't of Transp., 394 S.C. 27, 32, 714 S.E.2d 308, 311 (2011) (clarifying that “[t]he ‘material injury’ test is firmly rooted in our jurisprudence.”); see also S.C. State Highway Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965) (“[A]n obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a ‘taking’ of the property, for which recovery may be had.”); Sease v. City of Spartanburg, 242 S.C. 520, 524–25, 131 S.E.2d 683, 685 (1963) (“The protection of [the South Carolina ‘takings’ clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street.”).

²⁷ Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 388, 752 S.E.2d 269, 275 (Ct. App. 2013).

²⁸ S.C. Dep't of Transportation v. Powell, 424 S.C. 206, 214, 818 S.E.2d 433, 437 (2018) (“Although the court of appeals held Carodale limited Powell's right to compensation, that case addressed damages stemming from *loss of traffic flow*, rather than those flowing from loss of access as involved in Wilson. We find Powell's case more analogous to Wilson because he claims the closure of the Intersection and the termination of the frontage road into a cul-de-sac impaired his *access* to the Bypass which, according to SCDOT's own appraiser, resulted in a fifty percent reduction in value to his nearly \$1 million piece of property.”).

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PLAINTIFF'S CHARGE NO. 13

(Loss of Use)

I charge you that:

If Plaintiff is unable to use his property or residence for a period of time because of the Defendant's wrongful act, you should award the Plaintiff compensation for this loss of use if you believe it was proximately caused by the Defendants' conduct.²⁹

This rule applies when a defendant's acts have made the owner's use of his land dangerous or unhealthful.³⁰ Compensation you may award includes (a) the value of the land's use during the time the owner is prevented from using it; or the value of the use of a substitute; or the amount paid for a substitute, and (b) harm to the land or other harm resulting from the owner being prevented from using his land.³¹

²⁹ See Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil §11-6 (2d ed. 2016) (noting that the general measure of damages in an action for negligence against a builder includes “[t]he value of the house use during the time in which the plaintiffs were necessarily deprived of its use, known in the law as ‘loss of use.’ Rental costs may be shown in reference to that particular matter;”).

³⁰ Restatement (Second) of Torts § 931, at cmt. a (1979). (“The rule here also applies to one who has dispossessed the owner of land or by tortious conduct has prevented the owner from using the land, as when the defendant by acts on his own land has made the use of the plaintiff's land dangerous or unhealthful.”).

³¹ Restatement (Second) of Torts § 931 (“If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and (b) harm to the subject matter or other harm of which the detention is the legal cause.”).

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PLAINTIFF'S CHARGE NO. 14

(Value of Land and Damages)

I charge you that:

A landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert.³² The right of a landowner to give testimony as to his property arises as a matter of law.³³ This is true even where a landowner had no real knowledge of the value of surrounding properties, and whose opinion as to the land's worth was exactly the same as that of his realtor.³⁴ A landowner may also testify to his land's diminishment in value and to the value of land surrounding his land.³⁵

³² Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 43, 46, 202 S.E.2d 4, 5 (1974); see also Mali v. Odom, 295 S.C. 78, 83, 367 S.E.2d 166, 169 (Ct. App. 1988) (landowner is qualified by the fact of ownership to give his estimate as to the value of property), Hawkins v. Greenwood Development Corp., 328 S.C. 585, 598, 493 S.E.2d 875, 881-82 (Ct. App. 1998) ("The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury.") (internal quotations omitted).

³³ Hawkins, 328 S.C. at 598, 493 S.E.2d at 881.

³⁴ Id. at 598-99, 493 S.E.2d at 882.

³⁵ See e.g. Vick v. S.C. Dep't of Transp., 347 S.C. 470, 475-76 (Ct. App. 2001) (plaintiff allowed testify that his property was worth \$388,437, and the improper installation caused a twenty percent diminution in value, resulting in net damage amount of \$77,687.00); Hawkins, 328 S.C. at 598, 493 S.E.2d at 881-82 (landowner could testify to his land's damages by comparing its worth to that of land at a comparable intersection).

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PLAINTIFF'S CHARGE NO. 15

(Additional Law – Inverse Condemnation)

I charge you that:

The elements of inverse condemnation are: (1) an affirmative, positive, aggressive act on the part of the government agency, (2) a taking, and (3) the taking is for a public use.³⁶

Whether a government entity's actions amount to an affirmative, positive, aggressive act is a question of fact for the jury.³⁷

To prevail in an inverse condemnation action, a plaintiff must prove an affirmative, aggressive, and positive act by the government entity caused the alleged damage to plaintiff's property.³⁸ Whether physical or regulatory, permanency is not required to find a taking has occurred because "the government must compensate for even a temporary taking."³⁹

³⁶ Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1992), overruled on other grounds by Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007); Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005) ("Whether physical or regulatory, this Court has held that there are four elements to inverse condemnation: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 15, 281 S.E.2d 796, 797 & n. 2 (1981). We take this opportunity to modify and clarify that test. First, we remove the element "some degree of permanence," for it conflicts with the principle that the government must compensate for even a temporary taking. See First English, 482 U.S. at 318, 107 S.Ct. at 2388, 96 L.Ed.2d at 266 (stating that temporary takings are "not different in kind from permanent takings, for which the [United States] Constitution clearly requires compensation")").

³⁷ Ray v. City of Rock Hill, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) ("Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law. If a genuine issue of material fact exists as to whether the government entity committed an affirmative, positive, aggressive act causing damage to private property, summary judgment is not proper.").

³⁸ Id. at 47, 862 S.E.2d at 263 ("[T]o prevail in an inverse condemnation action, 'a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property.'").

³⁹ Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

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PLAINTIFF'S CHARGE NO. 16

(Inverse Condemnation Damages)

I charge you that:

In an inverse condemnation case, whether a taking has occurred is a question for the Court; the value lost as a result of the taking is a question for the jury.⁴⁰

A plaintiff may recover damages against a government agency for the amount that the property itself has suffered “some diminution in substance,” or has been “rendered intrinsically less valuable.”⁴¹

South Carolina case law provides that “interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages.”⁴²

⁴⁰ See Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011).

⁴¹ See id. at 170, 714 S.E.2d at 877 (“Not all damages that are suffered by a private property owner at the hands of the governmental agency are compensable. The property itself must suffer some diminution in substance, or it must be rendered intrinsically less valuable.”) (internal citations and quotations omitted).

⁴² Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 392, 752 S.E.2d 269, 277 (Ct. App. 2013) (“South Carolina case law implies that interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages.”).

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PLAINTIFF'S CHARGE NO. 17

(Proximate Cause)

I charge you that:

Proximate cause is a question of fact for you, the jury, to determine. It requires proof of two things: causation in fact and legal cause. Causation in fact is determined by asking whether the damages would have occurred *but for* the defendant's negligence. Legal cause is determined by looking to foreseeability and asking whether the plaintiff's damages were the "natural and probable" consequence of the defendant's negligence. In determining legal cause, it is not necessary that the defendant foresaw the particular event which occurred, only that the event was the natural and probable consequence of defendant's negligence.

Additionally, proximate cause is not to be confused with sole cause. A defendant's negligence does not have to be the sole cause of plaintiff's injuries for that negligence to be the proximate cause. Instead, there can be multiple wells of negligence, each of which might be a proximate cause of the plaintiff's damages. When there are multiple forms of negligence that cause damage, then it is sufficient for purposes of proximate cause to show that the defendant's negligence was a concurring or contributing proximate cause.⁴³

⁴³ J.T. Baggerly v. CSX Transportation, Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006).

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PLAINTIFF'S CHARGE NO. 18

(Concurring Causes)

I charge you that:

Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against either or all of the responsible persons, although one of them was more responsible and the duty owed by them to the injured person is not the same.⁴⁴

Negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient to show that the negligence is a proximate concurring cause.⁴⁵

⁴⁴ Sanders v. Western Auto Supply Co., 256 S.C. 490, 496, 188 S.E.2d 321, 324 (1971); Culbertson v. Johnson Motor Lines, Inc., 226 S.C. 13, 23, 83 S.E.2d 338, 343 (1954).

⁴⁵ Zorn v. Crawford, 252 S.C. 127, 132, 165 S.E.2d 640, 643 (1969).

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PLAINTIFF'S CHARGE NO. 19

(Joint Tortfeasors)

I charge you that:

If the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to the plaintiff, and it is impossible to determine in what proportion each contributed to the injury, all are said to be responsible for the whole injury, even though one person's act alone might not have caused the entire injury or the same damage might have resulted from the act of the other tortfeasors.⁴⁶

⁴⁶ US v. Monsanto Co., 858 F.2d 160, 172-73 (4th Cir. 1988); Boyd v. Maxwell, 190 S.C. 103, 2 S.E.2d 395, 397-98 (1939).

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PLAINTIFF'S CHARGE NO. 20

(Entitlement to Full Recovery from Joint Tortfeasors)

I charge you that:

If you find plaintiff proved its right to recover on multiple causes of action, then plaintiff is entitled to receive a full set of damages on each individual cause of action so proven. The trial judge will ensure plaintiff does not receive a double recovery. In other words, although plaintiff is entitled to receive a full set of damages for each individual claim, the Court will ensure that plaintiff will not recover twice for the same injury.⁴⁷

⁴⁷ Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 56, 691 S.E.2d 35, 153 (2010) (“When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both” (quoting Save Charleston Foundation v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60,64 (Ct. App. 1985))); see also Cowart v. Poore, 337 S.C. 359, 364, 523 S.E.2d 182, 185 (Ct. App. 1999).

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PLAINTIFF'S CHARGE NO. 21

(Damages – Generally)

I charge you that:

The term “compensatory damages” or “actual damages” means that amount of money in damages as will compensate the Plaintiff justly and fairly for all the injuries and losses that he has sustained as a result of the complained of act of the Defendants.⁴⁸

Actual damages include “consequential damages”.⁴⁹ Consequential damages are indirect damages proximately caused by an injurious act.⁵⁰

⁴⁸ 22 Am. Jur. 2d Damages §§ 24, 25, 27 (2019); Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 353, 803 S.E.2d 288, 306 (2017) (“The purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained. The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.”) (quoting Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)).

⁴⁹ See, e.g., Taylor v. Medenica, 324 S.C. 200, 219, 479 S.E.2d 35, 45 (1996) (“Actual damages include special or consequential damages which are the natural and proximate result of the deceptive conduct.”).

⁵⁰ Black's Law Dictionary (10th ed. 2014) (defining consequential damages as “[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.”).

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PLAINTIFF'S CHARGE NO. 22

(Mitigation of Damages)

I charge you that:

A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages.⁵¹

The reasonableness of actions to mitigate damages is ordinarily a question for the jury.⁵²

The burden for proving a lack of due diligence in minimizing damages is on the party claiming a failure to mitigate.⁵³

⁵¹ Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985) (“As a general rule, one who is injured by the acts of another is required to do those things an ordinary prudent person would do under similar circumstances to avoid damages which are reasonably avoidable. However, the law does not require him to unreasonably exert himself or to incur substantial expense to avoid damages.”).

⁵² See, e.g., Bannon v. Knauss, 282 S.C. 589, 594, 320 S.E.2d 470, 473 (Ct. App. 1984) (finding evidence of the plaintiffs’ actions in mitigating their damages was properly submitted to the jury since there was evidence on which the jury could have concluded that the property resold at full market value after the plaintiff-seller relisted it and refused a lower offer).

⁵³ Adams v. Orr, 260 S.C. 92, 98, 194 S.E.2d 232, 235 (1973).

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PLAINTIFF'S CHARGE NO. 23

(Speculative Damages)

I charge you that:

For damages to be recoverable, the evidence should enable the court or jury to determine the amount with reasonable certainty or accuracy.⁵⁴ “While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.”⁵⁵ It has been established that “a property owner, who is familiar with his property and its value, may give his estimate as to its value or the damage inflicted upon it even though he is not otherwise an expert.”⁵⁶

⁵⁴ Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)

⁵⁵ Id. (citing Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968); Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971)).

⁵⁶ Id. (citing South Carolina State Highway Department v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970)).

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PLAINTIFF'S CHARGE NO. 24

(Prejudgment Interest)

I charge you that:

In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.⁵⁷

⁵⁷ S.C. Code Ann. § 34-31-20(A).

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PLAINTIFF'S CHARGE NO. 25

(Discovery Doctrine / Statute of Limitations)

I charge you that:

Under the discovery rule, the applicable statute of limitations begins to run on the date the plaintiff either knew or should have known of an underlying injury.⁵⁸ Thus, the statute of limitations “starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.”⁵⁹ This determination is objective, rather than subjective.⁶⁰ As such, the question is not whether the particular plaintiff in this case actually knew she had a claim. Instead, the jury must decide “whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.”⁶¹

I charge you further that the burden of establishing a statute of limitations bar lies with the party asserting it, and in this case it is the defendants, and when the testimony is conflicting on the question, it becomes an issue for the jury to decide. There is often “more than one reasonable inference” as to when one “knows or should have known” that he or she has a claim.

⁵⁸ Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004).

⁵⁹ Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004) (citing Bayle v. S.C. Dep't. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001)).

⁶⁰ Id.

⁶¹ Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004) (citations omitted).

Although there may be evidence to support an injured party's filing a claim at an earlier date, the limitations period does not begin to run until the injury rises to a level substantial enough to put the injured party on notice that they are being wronged.⁶²

⁶² Id.

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PLAINTIFF'S CHARGE NO. 26

(Estoppel)

I charge you that:

A defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit.⁶³ “An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary.”⁶⁴ An intentional misrepresentation is not required for the application of equitable estoppel.⁶⁵ “It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire.”⁶⁶ Whether the defendant's actions lulled the plaintiff into a false sense of security is usually a question of fact.⁶⁷

The elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.⁶⁸ Estoppel may apply against a government agency, but “the party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position.”⁶⁹

⁶³ Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001).

⁶⁴ Id.

⁶⁵ Id. at 361, 559 S.E.2d at 339.

⁶⁶ Id.

⁶⁷ Id. at 361, 559 S.E.2d at 339.

⁶⁸ Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001).

⁶⁹ Am. Legion Post 15 v. Horry County, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009).

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PLAINTIFF'S CHARGE NO. 27

(Act of God Defense)

I charge you that:

There is no liability for damages proximately caused by act of God or public enemy.⁷⁰

However, “[a]n ‘act of God’ is a valid defense only when it is the sole cause of the injury.”⁷¹

⁷⁰ Correll v. City of Spartanburg, 169 S.C. 403, 169 S.E. 84, 86 (1933).

⁷¹ 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)).

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PLAINTIFF'S CHARGE NO. 28

(Public Duty Rule – Generally)

I charge you that:

Public officials typically enjoy immunity from a private cause of action under the public duty rule. However, public officials can be held liable for their actions when there is a duty owed specifically to the Plaintiff rather than to the public as a whole.⁷²

⁷² Wells, 331 S.C. at 307, 501 S.E.2d at 752 (This rule limits public officials' liability to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than an individual. Thus, when the duty is owed to the public in general, the official is not liable to an individual who may have been incidentally injured by the failure to perform the duty. An exception to the general rule against liability exists when a duty is owed to specific individuals rather than the public at large).

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PLAINTIFF'S CHARGE NO. 29

(Public Duty Rule – Special Duty Exception)

I charge you that:

A plaintiff may prevail in a negligence action against a public body if the statute concerns the duties of a public office and has the essential purpose of protecting specific people from a particular kind of harm.⁷³ In such cases, the statute creates a special duty which may give rise to a negligence suit against a public entity for failure to perform its duties properly.⁷⁴ To determine whether the statute creates a special duty, one must consider if:

- (1) the essential purpose of the statute is to protect against a specific kind of harm;
- (2) public officer has a duty to prevent that kind of specific harm;
- (3) the class of people the statute is intended to protect is known before the fact;
- (4) the Plaintiff is within that class of people;
- (5) the public officer knows or should know of the likelihood of harm to the protected people if he does not perform his duty; and
- (6) the public officer has the authority to act or undertakes the act within the scope of his position.⁷⁵

⁷³ Arthurs v. Aiken County, 338 S.C. 253, 265, 525 S.E.2d 542, 547-48 (Ct. App. 1999).

⁷⁴ Id.

⁷⁵ Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 106, 374 S.E.2d 910, 916 (Ct. App. 1988).