RECEIVED
Jan 06 2025
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
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2023-001454
CIVIL ACTION NO. 2020-CP-00356

Ron Christmas,

APPELLANT,

versus

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

RESPONDENTS.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

Carmen V. Ganjehsani
(S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Lisa. A. Thomas
(S.C. Bar No. 66458)
RICHARDSON, PLOWDEN & ROBINSON, PA
2103 Farlow Street
Myrtle Beach SC 29577
(843) 448-1008
lthomas@richardsonplowden.com

ATTORNEYS FOR RESPONDENT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Appellant's inverse condemnation claim against the SCDOT arising out of the alleged failure of the SCDOT to maintain the roads and drainage system adjacent to Appellant's Property fails as a matter of law because Appellant did not establish that the SCDOT committed any affirmative, positive, aggressive act.

II. Appellant's negligence claim against the SCDOT is barred by the Tort Claims Act's two-year statute of limitations where the undisputed evidence established Appellant was on notice of issues with flooding on his Property as a result of the SCDOT's alleged failure to maintain the adjacent roads and drainage system more than two years prior to December 7, 2021 when Appellant filed suit against the SCDOT.

III. The SCDOT is not equitably estopped from asserting the statute of limitations as a defense because it did not induce Appellant to delay filing suit.

IV. The maintenance exception of the Tort Claims act does not alter the statute of limitations.

V. Equitable estoppel is an issue for the court to decide; therefore, the Trial Court properly heard Appellant's testimony regarding his communications with SCDOT representatives as to correction of his flooding issues outside the presence of the jury.

VI. Appellant's request for a writ of mandamus was properly refused by the Trial Court where the nature of the act demanded of the SCDOT was not ministerial.

VII. As an additional sustaining ground, the natural conditions exception to the waiver of immunity under the Tort Claims Act bars Appellant's negligence claim against the SCDOT.

VIII. The Trial Court's limitations upon the expert testimony presented by Appellant has no bearing upon whether the SCDOT is entitled to a directed verdict as a matter of law on the claims for inverse condemnation, negligence, and writ of mandamus.

COUNTERSTATEMENT OF THE CASE

This appeal arises from a lawsuit filed by Appellant Ron Christmas ("Christmas") against Respondents County of Georgetown (the "County"), City of Georgetown (the "City") and the South Carolina Department of Transportation ("SCDOT"). Christmas alleges that his property located in the City of Georgetown, South Carolina was damaged because of tidal flooding from the Winyah Bay and stormwater drainage from the East Bay Park.

On April 3, 2020, Christmas initially filed suit in the Court of Common Pleas for Georgetown County against the County, the City, and a construction contractor who was later dismissed and no longer involved in the case. [R.pp. 15-22; Compl.] On December 7, 2021, Christmas filed an Amended Complaint which added the SCDOT to the case for the first time. [Supp. R.pp. 1-10; Am. Compl.] Christmas subsequently filed a Second Amended Complaint on November 30, 2022. [R.pp. 62-70; Second Am. Compl.]

Complaining of excessive flooding and damage to his property due to the County's and the City's renovation of the East Bay Park which, among other things, raised the park above its previous existing grade, and due to the alleged failure of the SCDOT to maintain the roads at and adjacent to the intersection of Greenwich Drive and Front Street near his property, Christmas brought causes of action against the Respondents for (1) negligence/gross negligence; (2) inverse condemnation; (3) injunction and mandamus; and (4) as to the County and City only, a violation of S.C. CODE ANN. § 5-31-450. [R.pp. 62-70; Id.]

On December 9, 2022, the SCDOT filed its Answer to the Second Amended Complaint, denying its material allegations and asserting as affirmative defenses, among

others, (1) the expiration of the applicable statute of limitations; (2) the immunities under the South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-60; (3) the immunity under the Storm Water Management and Sediment Reduction Act, S.C. CODE ANN. § 48-14-160(1); and (4) an Act of God. [R.pp. 71-81; SCDOT Answer.]

The case proceeded to trial before The Honorable B. Alex Hyman on August 14, 2023. [R.p. 156; Tr., p. 1.] At the conclusion of Christmas's case, the Trial Court granted a directed verdict to the SCDOT as to (1) negligence due to the expiration of the applicable statute of limitations; (2) inverse condemnation because Christmas failed to show an affirmative, positive, aggressive act by the SCDOT; and (3) the demand for a writ of mandamus[1] because Christmas failed to show any ministerial act required of the SCDOT. [R.pp. 848, l. 25 – 851, l. 24; Id. at pp. 693, l. 25 – 696, l. 24.] The Trial Court also granted a directed verdict to the County and the City on all causes of action. [R.pp. 851, l. 25 - 854, l. 10; Id. at pp. 696, l. 25 – 699, 1. 10; see also R.pp. 11-13; Form 4 Order filed August 17, 2023.]

Christmas orally moved for a new trial which the Trial Court denied. [R.pp. 854, l. 11 – 855, l. 24; Tr., pp. 699, l. 11 – 700, l. 24.] On September 13, 2023, Christmas filed and served his Notice of Appeal with this Court.

[1] Counsel for Christmas acknowledged before the Trial Court that the causes of action for writ of mandamus and injunction were not two different causes of action, but instead the same cause of action. [R.p. 807, ll. 18-20; Tr., p. 652, ll. 18-20.]

COUNTERSTATEMENT OF FACTS RELATING TO THE SCDOT

Greenwich Drive was originally built in 1955 or 1956 in Georgetown, South Carolina and runs parallel to the Winyah Bay. [R.pp. 382, ll. 9-13; 562, ll. 2-4; 1050; Tr., pp. 227, ll. 9-13; 407, ll. 2-4; P. Ex. 49.] According to Richard Pope, the resident manager of Georgetown County for the SCDOT from 1993 until December 2017, flooding and water coming in from the Winyah Bay had long been an issue on Greenwich Drive. [R.pp. 370, l. 16 – 371, l. 12; 389, ll. 7-17; Tr., pp. 215, l. 16 – 216, l. 12; 234, ll. 7-17.]

Around 2001-2002, Christmas purchased a parcel of land located at 101 Greenwich Drive, Georgetown South Carolina (the "Property") situated on the corner of Greenwich Drive and Front Street. [R.pp. 62; 697, ll. 21-24; Second Am. Compl., ¶¶ 1-2; Tr., p. 542, ll. 21-24.] The Property sits directly across the street from the Winyah Bay and is located in an AE 10 FEMA flood zone which means that the first floor of any building on the property must be eleven feet off the ground. [R.pp. 543, l. 19 – 545, l. 2; Tr., pp. 388, l. 19 – 390, l. 2.] When Christmas purchased the Property, he knew it was located in a flood zone. He was aware of signage across the road from his Property that stated the area was in a nine-foot flood zone. [R.p. 742, ll. 21-25; Id. at p. 587, ll. 21-25.]

The Property also sits at the natural low point for the watershed, meaning all water naturally flows to that area. [R.p. 518, ll. 2-9, 15-25; Id. at p. 363, ll. 2-9, 15-25.] According to the owner of the neighboring lot, Judge Robert H. O'Donnell, the lot Christmas purchased had always had issues with standing water that was consistently a problem. [R.pp. 611, l. 23 – 612, l. 15; 634, l. 20 – 635, l. 3; Id. at pp. 456, l. 23 – 457, l. 15; 479, l. 20 – 480, l. 3.]

In 2005, Christmas built a home on the Property. [R.pp. 698, ll. 11-13; 750, ll. 22-24; Id. at pp. 543, ll. 11-13; 595, ll. 22-24.] In accordance with flood regulations, the home was built on pilings and is over ten feet off the ground. [R.pp. 544, l. 24 – 545, l. 4; 740, ll. 10-17; 752, ll. 4-5; Id. at pp. 389, l. 24 – 390, l. 4; 585, ll. 10-17; 597, ll. 4-5.] The front yard of the Property is primarily concrete, with brick pavers interspersed. One side of the Property is also all concrete, and there is a concrete driveway on the other side. In the backyard is a swimming pool surrounded by brick pavers. Because the outside of the Property is primarily concrete, water cannot be absorbed into the ground. [R.pp. 524, ll. 5-17; 525, l. 3 – 527, l. 7; 535, ll. 7-12; 581, ll. 2-9; Id. at pp. 369, ll. 5-17; 370, l. 3 – 372, l. 7; 380, ll. 7-12; 426, ll. 2-9.]

Richard Pope, as the resident manager of Georgetown County for the SCDOT from 1993 to December 2017, oversaw the maintenance of the primary and secondary routes in Georgetown County, including Greenwich Drive at Front Street in front of Christmas's Property. [R.pp. 371, l. 5 – 372, l. 24; Id. at pp. 216, l.. 5 – 217, l. 24.] The DOT in Georgetown County would inspect secondary routes like Greenwich Drive and Front Street once or twice a year. [R.p. 372, ll. 22-24; Id. at p. 217, ll. 22-24.] Pope testified inspectors were not looking at issues such as water on the road, but rather inspecting the grade and condition of the road, such as heavy potholes and cracking for resurfacing purposes. [R.p. 373, ll. 4-19; Id. at p. 218, ll. 4-19.]

Around 2006, about a year after Christmas moved into his house, Pope began having conversations with Christmas regarding issues with water on Greenwich Drive near Christmas's Property and the flooding of his Property from the water coming across the road. [R.pp. 372, ll. 4-9; 387, ll. 1-12; Id. at pp. 219, ll. 4-9; 232, ll. 1-12.] Greenwich Drive

had settled, and the SCDOT built up the lowest spot in the road near Christmas's Property with six inches of asphalt as a temporary and limited repair in an attempt to remedy the overtopping issues complained of by Christmas. Pope testified that the SCDOT tried to repair as much as it could within its right-of-way. This work had to be done carefully, in several lifts of three to four inches at a time, because otherwise the road would continue to sink if all six inches of asphalt were placed at once. This work was done in 2006. Pope also noted that it was impossible to build up the entire road from a maintenance point of view. [R.pp. 374, l. 4 – 375, l. 25; 376, l. 25 – 378, l. 21; 379, ll. 7-8; 388, ll. 7-22; Id. at pp. 219, l. 4 – 220, l. 25; 221, l. 25 – 223, l. 21; 224, ll. 7-8; 233, ll. 7-22.]

Greenwich Drive was then placed on a resurfacing plan which, typically when a road is placed on a resurfacing plan, it can take two to three years to get the work done because there is not enough funding to resurface all the roads in Georgetown County at one time. The repaving of Greenwich Drive was completed around 2009. During that same time period, the SCDOT also blew out the storm pipes and cleaned the drains. [R.pp. 376, ll. 1-14; 378, l. 25 – 380, l. 11; 718, ll. 15-18; 755, ll. 13-17; Id. at pp. 221, ll. 1-24; 223, l. 25 – 225, l. 11; 563, ll. 15-18; 600, ll. 13-17.] Pope testified that from time to time after high tides, Christmas would contact the SCDOT about drainage and debris, and the SCDOT would make sure the storm pipes were clear and working. Pope stated there was never a time when the SCDOT was unable to clear the pipes. [R.pp. 387, l. 13 – 388, l. 6; Id. at pp. 232, l. 13 – 233, l. 6.]

At trial, there was testimony that Christmas began experiencing additional issues with flooding and with water on the roads adjacent to his Property between 2012 and 2014. [R.pp. 545, ll. 13-19; 762, l. 6 – 763, l. 5; Id. at pp. 390, ll. 13-19 (Christmas advising his

retained expert Robert Castles that he started having flooding problems in 2012); 607, l. 6 – 608, l. 5.] Christmas said he believed these issues started when part of the East Bay Park was filled in and water began coming in through pipes because there was no back-flow valve installed. [R.p. 762, ll. 9-18; Id. at p. 607, ll. 9-18.]

In 2013 or 2014, Christmas said he spoke with representatives of the City and the SCDOT regarding issues with water backing up on the road. [R.pp. 700, l. 23 – 701, l. 6; 702, ll. 18-22; Id. at pp. 545, l. 23 – 546, l. 6; 547, ll. 18-22.] He testified that he understood that they would try to find a solution to the water issues, and a back-flow valve was installed and the drainage was cleaned out. [R.p. 703, ll. 2-23; Id. at p. 548, ll. 2 – 23.]

Christmas testified the water issues only continued to get worse during this time period (pre-2016, before renovations began to the adjacent East Bay Park as discussed below) [R.pp. 703, l. 24; 704, l. 22; Id. at pp. 548, l. 24; 549, l. 22.] With respect to his conversations with the SCDOT, Christmas spoke with Pope who Christmas said discussed putting in a trap or some sort of concrete box and running some pipe to hold the water. [R.p. 705, ll. 10-13; Id. at p. 550, l. 10-13.] Christmas testified he was under the impression that a solution to the water issues on the roads adjacent to his Property was going to implemented. [R.p. 707, ll. 11-24; Id. at p. 552, ll. 11 – 24.]

In 2016-2017, the County and the City undertook improvement and upgrades to the East Bay Park adjacent to his Property, including the construction of six new, raised tennis courts, a new, raised, paved walking path, ball fields, and boat ramp parking. [R.pp. 64-65; Second Am. Compl., ¶¶ 18, 20.] It is undisputed that SCDOT did not participate in the renovations to the park.

While renovations to the park were underway, the flooding in the road increased greatly according to Christmas. [R.p. 708, ll. 14-22; Tr., 553, ll. 14-22.] At this time, Christmas again spoke with representatives of the City and the County. He thought Pope of the SCDOT was at those meetings. [R.pp. 708, l. 23 – 709, l. 4; Id. at pp. 553, l. 23 – 554, l. 4.] There was no testimony at trial that any SCDOT representative promised anything to Christmas or made any assurances regarding the issues with water and flooding during these meetings.

After the park renovations were completed, Christmas contended that the County and the City raised the park substantially above the previous existing grade, causing excessive flooding onto his Property. [R.p. 65; Second Am. Compl., ¶ 21.] Furthermore, Christmas alleged that the renovations to the park altered the natural flow of waters, causing increased flooding onto his Property and the adjacent intersection at Greenwich Drive and Front Street. [R.p. 65; Id. at ¶¶ 22-23.]

Christmas additionally alleged that the increased flooding caused the soils underneath Greenwich Drive to consolidate which purportedly caused Greenwich Drive to subside at the intersection with Front Street resulting in additional flooding to his Property. [R.p. 65; Id. at ¶ 25.] As against the SCDOT, Christmas contended the SCDOT failed to maintain the roads at and adjacent to the intersection of Greenwich Drive and Front Street, as well as the drainage system for the management of stormwaters, which, according to Christmas, permitted increased tidal flooding. [R.p. 65; Id. at ¶¶ 26-27.] At trial, Christmas testified he believed the water coming onto the front yard of his Property primarily came from the Winyah Bay across from his Property. [R.pp. 753, l. 25 – 754, l. 6; Tr., pp. 598, l. 25 – 599, l. 6.]

Christmas met with the mayor and other representatives of the City after the park renovations were completed to discuss the flooding onto his Property. Christmas testified that that City representatives informed him they were taking steps to find a solution, including a water diversion and potential building of a retention pond. Christmas said the mayor told him they had received funding to fix some of the problems. [R.pp. 705, l. 23 – 707, l. 1; Id. at pp. 550, l. 23 – 552, l. 1.] Christmas could not recall if anyone from the SCDOT was at these meetings. [R.pp. 705, l. 23 – 706, l. 1; Id. at pp. 550, l. 23 – 551, l. 1.] There was no testimony at trial that anyone from the SCDOT promised Christmas that a water diversion plan and potential building of a retention pond would occur or that anyone from the SCDOT made any assurances to Christmas regarding the flooding issues after the park renovations were completed.

Christmas testified he spoke to Pope on one or two occasions in 2018 after Pope had retired from the SCDOT. Christmas acknowledged that Pope told Christmas that he was retired. Christmas never testified that Pope made any assurances to him during these two alleged conversations. Rather, Christmas said he merely assumed that Pope would pass on information to his successors. [R.p. 709, ll. 5-16; Id. at p. 554, ll. 5-16.]

Christmas conceded that at no time did Pope tell him that the SCDOT could stop water from coming onto his Property. [R.p. 716, ll. 22-25; Id. at p. 561, ll. 22-25.] Christmas also testified that he believed he spoke with someone from the SCDOT after Pope retired, but he could not recall to whom he spoke to or when he spoke to someone other than it was after Pope's retirement. [R.pp. 718, l. 23 – 719, l. 5; Id. at pp. 563, l. 23 – 564, l. 5.] Christmas did not testify that anyone from the SCDOT promised him anything with respect to the flooding issues on his Property after Pope retired.

Christmas moved out of his house in 2019. [R.p. 731, ll. 17-18; Id. at p. 576, ll. 17-18.] Christmas claimed that the flooding damaged the exterior of his Property, including the brick pavers and swimming pool, and hindered his ability to access his Property. [R.pp. 529, ll. 14-20; 67; Id. at p. 374, ll. 14-20; Second Am. Compl., ¶ 41.] At trial, Christmas acknowledged that the interior of his house has never flooded because, as required under flood regulations, the home house was elevated. [R.pp. 578, ll. 11-13; 740, ll. 22-22; Tr., pp. 423, ll. 11-13; 585, ll. 21-22.] Christmas has not taken any measures to mitigate the drainage issues on his Property. [R.pp. 531, l. 14 – 533, l. 3; Id. at pp. 376, l. 14 – 378, l. 3.]

Pope testified at trial and confirmed the SCDOT does not ever build a road for the purpose of holding back water. [R.p. 389, ll. 15-20; Id. at p. 234, ll. 15-20.] His last day with the SCDOT was December 31, 2017, and he said he retired prior to the completion of the renovations to the East Bay Park. [R.pp. 386, ll. 13-15; 390, ll. 13-16; Id. at pp. 231, ll. 13-15; 235, ll. 13-16.] Pope did not recall having any conversations with Christmas after he retired from the SCDOT. [R.p. 386, ll. 10-15; Id. at p. 231, ll. 10-15.] He never promised Christmas that the SCDOT could stop the flooding onto his Property and stated he could only address maintenance issues such as making sure the drainage was clear. Pope also had no authority to commit the SCDOT to stopping the flooding from the Winyah Bay. [R.pp 389, l. 21 – 390, l. 12; Id. at pp. 234, l. 21 – 235, l. 12.]

Robert Castles testified on behalf of Christmas as an expert in civil engineering with a focus on drainage and forensic engineering. [R.p. 462, ll. 2-8; Id. at p. 307, ll. 2-8.] He was retained by Christmas to investigate the flooding issues onto Christmas's Property in September 2019. [R.p. 522, ll. 12-16; Id. at p. 367, ll. 12-16.] In October 2019, he was

investigating issues with the roads adjacent to the Property. [R.pp. 586, ll. 1-5; 590, ll. 15-20; Id. at pp. 431, ll. 1-5; 435, ll. 15-20.]

He opined that he believed Greenwich Drive had subsided 1.7 feet from its initial elevation of 4.08 feet (as indicated in the SCDOT plans for the original construction of the road) at the intersection with Front Street and had subsided 1.54 feet in front of Christmas's Property. [R.pp. 481, l. 5 – 482, l. 4; Id. at pp. 326, l. 5 – 327, l. 4.] But Castles conceded that he based his calculations off of the original elevation of Greenwich Drive and had no idea what the elevation or condition of Greenwich Drive was in 2005, the year Christmas built his home on the Property. [R.pp. 577, l. 15 – 578, l. 6; Id. at pp. 422, l. 15 – 423, l. 6.]

Castles admitted that SCDOT had done nothing to cause the subsidence or settlement of Greenwich Drive. [R.p. 577, ll. 9-11; Id. at 422, ll. 9-11.] He also acknowledged that at least 90% of the water impacting Christmas' Property comes from the Winyah Bay. [R.pp. 552, ll. 3-7; Id. at 397, ll. 3-7.] Castles prepared a tidal chart to show the number of tides over various road elevations in the years 2015, 2018, and 2021 which showed that a significant number of tides occurred at elevation levels between 3.15 and 4.00 feet, and high tides even still occurred at elevations over 4.00 feet:

Elevation	Number of Tides Over Elevation		
	2015	2018	2021
3.15	137	95	114
3.50	73	49	55
3.75	47	27	24
4.00	28	11	17
4.50	11	3	6
5.00	3	1	2

3.15 is at Intersection of Front St. & Greenwich Dr.
All Elevations are based on NAVD 88

[R.pp. 1167-1171; 508, l. 21 – 509, l. 25 P. Ex. 166; Tr., pp. 353, l. 21 – 354, l. 25.]

Castles further admitted he never investigated the drainage system and could not opine as to whether there was any defect with the drainage system. [R.pp. 578, l. 22 – 579, l. 7; Tr., pp. 423, l. 22 – 424, l. 7.]

While Christmas filed suit against the County and the City on April 3, 2020 arising out of the flooding and damage to his Property, he did not file any suit against the SCDOT until December 7, 2021.

STANDARD OF REVIEW

In an appeal from the grant of a directed verdict, the appellate court must, like the trial court, view the evidence in a light most favorable to the non-movant. Miller v. FerrellGas, L.P., 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011). See McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) ("In ruling on motions for directed verdict . . ., the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." Id. "Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. at 319–20, 656 S.E.2d at 388.

The court must determine whether any evidence existed on each element of the cause of action. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). "If the evidence as a whole is susceptible of more than one reasonable inference, a

jury issue is created and the motion should be denied." Martasin v. Hilton Head Health Sys., 364 S.C. 430, 437, 613 S.E.2d 795, 799 (Ct. App. 2005). However, "[a] directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). A directed verdict is warranted "when there is no evidence on any one element of the alleged cause of action." Id.

ARGUMENT

I. Appellant's inverse condemnation claim against the SCDOT arising out of the alleged failure of the SCDOT to maintain the roads and drainage system adjacent to Appellant's Property fails as a matter of law because Appellant did not establish that the SCDOT committed any affirmative, positive, aggressive act.

The Trial Court properly directed a verdict in favor of the SCDOT on Christmas's cause of action for inverse condemnation because there was no evidence presented at trial showing that any alleged conduct of the SCDOT amounted to an affirmative, positive, aggressive act which is required to establish a claim for inverse condemnation.

"Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "To establish an inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.'" Id. (quoting Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002)).

"[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request." Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) (internal citation omitted); see also Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005).

"[T]o prevail in an inverse condemnation action, 'a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property.'" Ray v. City of Rock Hill, 434 S.C. 39, 47, 862 S.E.2d 259, 263 (2021) (quoting WRB Ltd. P'ship v. Cnty. of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006)). An "affirmative act" only amounts to an "affirmative, positive, aggressive act" when it has been proven to have caused or precipitated the damage in question. See Ray. 434 S.C. at 47–48, 862 S.E.2d at 264. Also, "[a]llegations of mere failure[s] to act are insufficient" to establish an affirmative, positive, aggressive act. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563.

As an initial matter, it does not appear that Christmas has challenged the Trial Court's ruling that the SCDOT engaged in no conduct which equaled an affirmative, positive, aggressive act. In his appeal, Christmas only argues that the renovation of East Bay Park constitutes an affirmative act. It is not disputed, however, that the SCDOT had no involvement with any renovations to the park. Therefore, Christmas has not preserved any issue for appeal with respect to any alleged conduct of the SCDOT for purposes of the inverse condemnation claim, and the Trial Court's ruling that the SCDOT did not commit any affirmative, positive, aggressive act is law of the case. See State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (concluding the appellant's failure to challenge

the circuit court's ruling in his appellate brief rendered the unchallenged ruling the law of the case).

Nevertheless, the Trial Court correctly directed a verdict on the inverse condemnation claim as to the SCDOT. In Hawkins, the plaintiff brought an action against the City of Greenville claiming it improperly and negligently designed and maintained its municipal drainage system which caused his property to flood after a rainstorm. The plaintiff asserted, among others, a cause of action for inverse condemnation. 358 S.C. at 285-88, 594 S.E.2d at 560-61. The trial court granted summary judgment to the city on the plaintiff's inverse condemnation claim, and the plaintiff appealed to this Court. Id. at 288, 594 S.E.2d at 561.

This Court held that the plaintiff failed to allege any affirmative acts by the city which damaged the plaintiff's property or otherwise diminished his rights in the property. This Court observed that most of the city's "acts" the plaintiff averred supported his inverse condemnation claim were "merely failures to act." Specifically, the plaintiff alleged that the city improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the drainage pipes beyond their capacity and then failed to replace the pipes. Id. at 291, 594 S.E.2d at 562-63. The failure by the city to replace the pipes to increase drainage capacity did not establish an affirmative, positive, aggressive act as required for an inverse condemnation claim.

This Court also noted that the only affirmative acts the plaintiff cited to as forming the basis of his inverse condemnation claim were the replacement of a double-box culvert with a large arched pipe and the installation of the riprap material along the banks of the creek. This Court found, however, that the record contained no evidence that either of these

acts caused the flooding of the plaintiff's property. Id. at 291, 564 S.E.2d at 563. Based on the lack of any evidence showing an affirmative, positive, aggressive act on the part of the city which proved the city's actions caused or precipitated the flooding of the plaintiff's property, this Court affirmed the trial court's grant of summary judgment on the plaintiff's inverse condemnation claim. Id. at 291-92, 564 S.E.2d at 563.

As in the Hawkins case, Christmas has not alleged an affirmative, positive, aggressive act on the part of SCDOT which caused any flooding to his Property. The evidence at trial showed that Greenwich Drive was built in 1955 and later built up with six inches of asphalt in front of Christmas's Property in 2006 and then repaved in 2009. Christmas does not allege that either of these acts caused any flooding to his Property.

Rather, Christmas contends that the alleged failure of the SCDOT to maintain the intersection of Greenwich Drive and Front Street near the Property, as well as its purported failure to maintain the drainage system, increased the tidal flooding onto the Property. [R.p. 65; Second Am. Compl., p. 4.] The alleged failure to maintain the roads and drainage system is, by its very nature, not an affirmative, positive, aggressive act as required for an inverse condemnation claim. This case is no different than Hawkins which held that mere failures to act cannot support an inverse condemnation cause of action. Christmas does not point to any overt act of the SCDOT which caused any flooding to his Property. Accordingly, the Trial Court's directed verdict in favor of the SCDOT on the inverse condemnation claim should be affirmed.

II. Appellant's negligence claim against the SCDOT is barred by the Tort Claims Act's two-year statute of limitations where the undisputed evidence established Appellant was on notice of issues with flooding on his Property as a result of the SCDOT's alleged failure to maintain the adjacent roads and drainage system more than two years prior to December 7, 2021 when Appellant filed suit against the SCDOT.

The Trial Court properly granted a directed verdict to the SCDOT on Christmas's negligence cause of action due to the expiration of the applicable statute of limitations.

The Tort Claims Act is a limited waiver of governmental immunity which applies to Christmas's negligence claim against the SCDOT, and it sets forth a two-year statute of limitations in which negligence actions may be brought against the State, unless a verified claim has been file in which case the statute of limitations is extended to three years. S.C. CODE ANN. § 15–78–110 ("Except as provided for in Section 15–3–40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.").

Christmas did not file a verified claim; therefore, the applicable statute of limitations for his negligence action against the SCDOT is two years. The discovery rule applies to actions brought under the Tort Claims Act. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000). Under the discovery rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. See Gillman v. City of Beaufort, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006);

Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371–72, 597 S.E.2d 27, 29 (Ct. App. 2004).

The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Thus, "whether the particular plaintiff actually knew he had a claim is not the test." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (internal citation omitted). Rather, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist. Cline, 359 S.C. at 371, 597 S.E.2d at 29. The statute of limitations begins to run when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery. Joubert, 341 S.C. at 190, 534 S.E.2d at 8. Furthermore, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations. Cline, 359 S.C. at 371, 597 S.E.2d at 29.

Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson v. Bank of Am., N.A., 383 S.C. 399, 406-07, 680 S.E.2d 778, 782 (Ct. App. 2009).

Christmas filed his action against the SCDOT on December 7, 2021. If Christmas was on notice that some claim against the SCDOT might exist prior to December 7, 2019, his claim is time barred under the two-year statute of limitations set forth in the Tort Claims Act. There is no dispute in the trial court record that Christmas was certainly well aware of flooding issues at the intersection of Greenwich Drive and Front Street and flooding onto his Property well before December 7, 2019.

In 2006, a year after Christmas moved into the house he built on the Property, he began having conversations with Pope of the SCDOT regarding the issues with water on Greenwich Drive, after which the SCDOT made some temporary repairs in 2006 and repaved the road in 2009. Thereafter, Christmas began experiencing additional issues with flooding and water on the roads adjacent to this Property between 2012 and 2014. At this time, he did speak with representatives from the City and the SCDOT regarding water backing up on the road, and Christmas understood at this time that these representatives would attempt to find a solution to the water issues after which a back-flow value was installed and the drainage cleaned out. See supra pp. 6-7.

Christmas testified that the water issues only continued to get worse during the time period from 2014 to 2016, and Christmas said Pope discussed putting in some sort of trap and piping to hold water. Christmas testified he was under the impression that a solution to the water issues on the roads adjacent to his Property was going to be implemented. See supra p. 7.

Then, in 2016-2017, the County and the City undertook improvements to the East Bay Park. While the park renovations were underway, Christmas claimed the flooding in the road increased greatly. During the park renovations, Christmas spoke again with representatives of the County and the City about the water issues, and he thought Pope was at those meetings as well. Christmas did not testify that any SCDOT representative promised anything to Christmas or made any assurances regarding the issues with water and flooding during these meetings. See supra pp. 7-8.

Once the park renovations were completed, Christmas alleged the park was raised substantially above the previous existing grade, causing excessive flooding and damage to

his Property. In conjunction, Christmas alleged that the increased flooding from the raised park caused the soils underneath Greenwich Drive to subside at the intersection with Front Street, resulting in additional flooding onto his Property. See supra p. 8.

Christmas met with the mayor and other representatives of the City after the park renovations were completed to discuss the continued issues with flooding, and allegedly, these City representatives informed him that there were taking steps to find a solution, including a water diversion and potential building of a retention pond, and had further advised him that the City had received funding to fix some of the problems. He was not even sure if anyone from the SCDOT was at these meetings. See supra pp. 8-9.

Christmas testified that he spoke with Pope on one or two occasions in 2018 after Pope had retired from the SCDOT. Christmas was informed at this time by Pope that Pope was retired. He did not testify that Pope made any promises or assurances to him during these purported 2018 meetings. Instead, Christmas only assumed that Pope would pass along any information to his successors. Christmas was never told by Pope that the SCDOT could stop water from coming onto this Property. See supra p. 9.

Christmas also thought he spoke with someone at the SCDOT after Pope retired, but he could not recall to whom he spoke to or when that occurred other than that it was after Pope's retirement. Again, Christmas did not testify that anyone from the SCDOT made any promises or assurances to him with respect to the water issues at Greenwich Drive and Front Street after Pope retired. See supra p. 9.

In September 2019, Christmas retained expert Robert Castles to provide a consultation and expert opinion regarding the flooding issues and damages to Christmas's Property. [R.p. 522, ll. 12-16; Tr., p. 367, ll. 12-16.] Castles was specifically investigating

issues with the roads adjacent to the Property on October 1, 2019. [R.pp. 585, l. 19 – 586, l. 5; 590, ll. 15-20; Id. at pp. 430, l. 19 – 431, l. 5; 435, ll. 15-20.]

The evidence presented at trial indisputably shows that by October 1, 2019, the facts and circumstances of the flooding of the Property and adjacent roads to the Property put Christmas on notice that some claim against the SCDOT might exist. Christmas had already retained an expert who was investigating issues with the roads and the damage to his Property on October 1, 2019. Using October 1, 2019 as the latest possible date for which Christmas was on notice of a claim against the SCDOT, Christmas had two years under the Tort Claims Act, or until October 1, 2021, to file an action against the SCDOT. The complaint Christmas filed on December 7, 2021 against the SCDOT was accordingly untimely, and Christmas's negligence action against the SCDOT is time barred as a matter of law.

III. The SCDOT is not equitably estopped from asserting the statute of limitations as a defense because it did not induce Appellant to delay filing suit.

Because it is clear that the two-year statute of limitations expired as to Christmas's negligence claim against the SCDOT, Christmas argues that the SCDOT is equitably estopped from asserting the statute of limitations. Christmas bases his argument on his allegations that the SCDOT made representations that the flooding issues would be corrected and thus he believed the SCDOT was working on a solution and there was no reason for him to bring suit. Christmas's argument is wholly unsupported by the facts in the record.

Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Black v. Lexington Sch. Dist. No. 2, 327

S.C. 55, 61, 488 S.E.2d 327, 330 (1997) (internal citations omitted). For a defendant to be estopped from claiming the statute of limitations as a defense, there must be some conduct or representation by the defendant that has induced the plaintiff to delay in filing suit. Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001).

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. Application of equitable estoppel does not require an intentional misrepresentation, and it is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. Id. at 360, 559 S.E.2d at 338-39. "One's assurances to an injured party that defects can be corrected *coupled with his attempts to correct them* is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation." Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds, Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (citations and quotation marks omitted) (emphasis added).

The Supreme Court has held that equitable estoppel is an equitable issue to be determined by the judge rather than the jury. Black, 327 S.C. at 63 n.1, 488 S.E.2d at 330 n.1. In Black, the Supreme Court overruled Dillon and similar cases to the extent they held that equitable estoppel is a question for the jury. Id. Judgment as a matter of law in favor of the defendant is proper where there is no evidence of conduct on the defendant's part warranting estoppel. Hedgepath, 348 S.C. at 361, 559 S.E.2d at 339.

The evidence presented by Christmas at the trial does not support his contention that the SCDOT is equitably estopped from asserting the statute of limitations. In his appeal, Christmas overly distorts the actual record and improperly imputes the actions of others to the SCDOT.

After Christmas had conversations with Richard Pope, the resident manager of Georgetown for the SCDOT, in 2006, the SCDOT completed a temporary repair of Greenwich Drive by building it up with six inches of asphalt and then repaved the road in 2009. Between 2012 and 2014, Christmas began experiencing issues with flooding and water in the road again, and in 2013 or 2014, Christmas met with SCDOT representatives, as well representatives from the City. [R.pp. 700, l. 23 – 701, l. 6; 702, l. 18 – 703, l. 5; Tr., pp. 545, l. 23 – 546, l. 6; 547, l. 18 – 548, l. 5.] Christmas said he understood after these conversations that they would try to find a solution to the water issues, and a back-flow valve was installed and drainage was cleaned out. [R.p. 703, ll. 6-23; Id. at p. 548, ll. 6-23.]

After that, Christmas testified that the issues with the water continued to worsen. [R.pp. 703, l. 24; 704, l. 22; Id. at pp. 548, l, 24; 549, l. 22.] During this time (2016, pre-park renovations), Christmas said Pope discussed installing some sort of trap and piping to hold the water, and Christmas was under the impression that a solution to the water issues on the water was going to be implemented. [R.pp. 705, ll. 10-13; 707, ll. 11-24; Id. at 550, ll. 10-13; 552, ll. 11 – 24.] Notably, Christmas did not testify that any of this work was ever done.

When the park renovations began and the flooding "increased greatly," Christmas said he spoke to the mayor and other City representatives, and he thought Pope was at those

meetings. [R.pp. 708, l. 14 – 709, l. 4; Id. at pp. 553, l. 14 – 554, l. 4.] Christmas did not testify that Pope or any other representative of the SCDOT made any promises or assurances to him regarding the issues with water and flooding while the park renovations were underway.

After the park renovations were complete, Christmas met with the mayor and City representatives again. As to whether anyone from the SCDOT was at these meetings, Christmas testified, "I'm not sure if it was somebody from the State. I thought they were getting somebody to come from the State, but I don't know." [R.pp. 705, l. 23 – 706, l. 1; Id. at pp. 550, l. 23 – 551, l. 1.]

At these post-park renovation meetings, Christmas testified that City representatives informed him that they were taking steps to find a solution to his flooding issues, including a water diversion plan and potential building of a retention pond. He also said the mayor informed him they had received funding to fix some of the problems. [R.pp. 706, l. 15 – 707, l. 1; Id. at pp. 551, l. 15 – 552, l. 1.]

In his appellate brief, Christmas states that the SCDOT made these representations of a water diversion plan and funding, but there is no evidence in the record that supports this conclusion when Christmas could not even recall if anyone from the SCDOT was at those meetings. There is also no evidence that any of these solutions were ever begun to be implemented by anyone.

While Christmas met with Pope on one or two occasions in 2018 after Pope had retired from the SCDOT, nothing occurred at these meetings which could have led Christmas to think that the SCDOT was doing anything to fix his flooding issues. Pope informed Christmas that he was retired. Pope did not have any authority to bind the

SCDOT. Christmas also never testified that Pope made any promises or assurances to him during these purported meetings; rather, Christmas merely assumed Pope might pass information along to his successors. [R.p. 709, ll. 5-16; Id. at p. 554, ll. 5-16.] Christmas also acknowledged that at no time did Pope tell him that the SCDOT could stop water from coming onto his Property. [R.p. 716, ll. 22-25; Id. at p. 561, ll. 22-25.]

Likewise, even though Christmas testified he spoke with someone from the SCDOT after Pope retired, he could not remember when or to whom he spoke. [R.pp. 718, l. 23 – 719, l. 5; Id. at pp. 563, l. 23- 564, l. 5.] Again, Christmas did not testify that this person promised anything to him with respect to his flooding issues.

This testimony and Christmas's mere assumptions about what the SCDOT might do hardly supports his claim that the SCDOT is equitably estopped from asserting the statute of limitations defense. The last time anyone from the SCDOT discussed any potential solution to the water issues was around 2016, before the park renovations begun, when Pope discussed potentially installing a trap and piping to hold water.

After 2016, there is absolutely no testimony or evidence in the record that anyone from the SCDOT made any promises, assurances, or representations to Christmas. Additionally, the law is that a defendant's assurances to a plaintiff that defects can be corrected *"coupled with [the defendant's] attempts to correct them*" is conduct that can equitably estop a defendant from asserting the statute of limitations. Dillon, 286 S.C. at 218-19, 332 S.E.2d at 561. There is no evidence that either immediately before the park renovations, during the park renovations, or after the completion of the park renovations, the SCDOT undertook any attempts to correct any alleged issues with the roads adjacent

to Christmas's Property which may have led Christmas to believe that the flooding of the roads and his Property was going to be resolved.

It is unreasonable as a matter of law for Christmas to have believed that the SCDOT was going to correct the flooding of his Property. The SCDOT did not engage in any conduct which would have led Christmas to believe he did not need to file his lawsuit, and the SCDOT did not do anything to have prevented Christmas from filing suit. Christmas, in fact, did file suit against the County and the City, even though he alleged that the City made numerous representations to him regarding solutions to his flooding problem. There was likewise nothing preventing Christmas from timely filing suit against the SCDOT. The Trial Court correctly found that the SCDOT was not equitably estopped from raising the statute of limitations as a defense.[2]

IV. The maintenance exception of the Tort Claims act does not alter the statute of limitations.

Christmas additionally argues that the Tort Claims Act maintenance exception, S.C. CODE ANN. § 15-78-60(15), alters the application of the statute of limitations. Christmas did not raise this argument to the Trial Court, and it is not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that

[2] It is unclear if Christmas relies only upon the doctrine of equitable estoppel or also upon the doctrine of equitable tolling as to the statute of limitations. Even if Christmas were relying upon the doctrine of equitable tolling, it would not apply to toll the statute of limitations in this case. Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his control, where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim, or where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his claim. The plaintiff may be entitled to equitable tolling if the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 116, 687 S.E.2d 29, 32-33 (2009). As explained herein, Christmas has not shown the existence of any extraordinary circumstance preventing his filing of a lawsuit within the two-year statute of limitations.

an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Nevertheless, this argument had no merit. This provision of the Tort Claims Act does not set forth a statute of limitations period. Rather, it designates when a governmental entity may be held liable for defects in a roadway. More specifically, a governmental entity is not liable for a defect in a roadway unless after actual or constructive notice it did not correct the defect within a reasonable time. § 15-78-60(15). The statute of limitations still runs from the date a loss arises from the defect. See Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001) (observing statute of limitations under the Tort Claims Act accrues from date of loss arising from the defect in roadway). The question as to whether the governmental entity had notice and did not correct the defect within a reasonable time only addresses the entity's liability and immunity and has no bearing upon when the statute of limitations for a loss begins to accrue.

Even if somehow this provision of the Tort Claims Act could be construed to effect the statute of limitations, such an argument has no merit under the facts of this case. Christmas has known the roads adjacent to his Property have been prone to flooding since 2006. When the flooding and water issues increased in 2012, Christmas, by his own testimony, met with the SCDOT in 2013 or 2014 and put them on notice with any issues regarding the adjacent roads. Christmas testified he continued to meet with representatives from the SCDOT during the park renovations (2016-2017 time period) and after completion of the renovations (2018). According to his evidence, he put the SCDOT on notice of any purported defects long before he filed suit in December 2021. Therefore, to

the extent the maintenance exception of the Tort Claims Act alters the statute of limitations in any way, Christmas nonetheless did not timely file his action against the SCDOT.

V. Equitable estoppel is an issue for the court to decide; therefore, the Trial Court properly heard Appellant's testimony regarding his communications with SCDOT representatives as to correction of his flooding issues outside the presence of the jury.

Finally, the Trial Court did not improperly limit testimony regarding Christmas's conversations with SCDOT representatives. Christmas fully testified as to his meetings and conversations with SCDOT representatives before the Trial Court outside of the presence of the jury. [R.pp. 702, l. 17 – 719, l. 5; Tr., pp. 547, l. 17 – 564, l. 5.] This was proper because whether a defendant is equitably estopped from asserting the statute of limitations is required to be tried by the court as an equitable issue. The Supreme Court has mandated this is not a jury issue. See Gaymon v. Richland Mem'l Hosp., 327 S.C. 66, 488 S.E.2d 332 (1997); see also Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 63 n.1, 488 S.E.2d 327, 330 n.1 (1997).

Furthermore, counsel for Christmas did not object to the Trial Court taking this testimony outside of the presence of the jury:

> We - - plaintiff recognizes that in the first instance, equitable estoppel is an equitable decision that can be for the Court. A lot of times the Court has chosen to keep those two issues together. *I'm fine either way*. I just assumed in this case that it would be - - it would all just go to the jury with a special - - around the statute of limitations.
>
> If, in fact, the Court is going to maintain that the ruling applied to the last witness on the next witness, then we would need to do it proper outside of the hearing of the jury as to the equitable estoppel testimony after the other evidence is presented to the jury.

[R.p. 667, ll. 15-25; Tr., p. 512, ll. 15-25 (emphasis added).] Counsel was "fine" with however the Court wanted to take the testimony. Christmas cannot now complain on appeal.

In addition, because the statute of limitations bars Christmas's negligence claim against the SCDOT, whether this testimony had any bearing on any alleged duties of the SCDOT is irrelevant. Because Christmas is time barred from asserting a negligence claim against the SCDOT, he suffered no prejudice from the Trial Court's hearing of testimony regarding communications with the SCDOT outside of the jury's presence.

VI. Appellant's request for a writ of mandamus was properly refused by the Trial Court where the nature of the act demanded of the SCDOT was not ministerial.

The Trial Court properly refused Christmas's demand for the court to issue a writ of mandamus requiring the SCOT to repair the roads and drainage at Greenwich Drive and Front Street to correct the flooding of his property. [See R.pp. 69; Second Am. Compl., ¶¶ 55-57.] Christmas did not satisfy the elements required before a court can issue a writ of mandamus.

"Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." City of Rock Hill v. Thompson, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). It is "a coercive writ that orders a public official to perform a ministerial duty." A mandamus is only issued to compel a public official to perform a mandatory legal duty. "When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued." Id. at 200, 563 S.E.2d at 102.

"Whether to issue . . . a writ of mandamus . . . lies within the sound discretion of the trial court, and an appellate court will only overturn that decision upon an abuse of discretion. . . . An abuse of discretion occurs when the trial court's decision is based upon an error of law." Knight v. Austin, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012).

"To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy." Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 494, 685 S.E.2d 600, 606, opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009).

A writ of mandamus cannot be issued unless the act to be performed is ministerial. "The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial). The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." Redmond v. Lexington Cnty. Sch. Dist. No. Four, 314 S.C. 431, 437-38, 445 S.E.2d 441, 445 (1994).

Christmas asked the Trial Court to issue a writ of mandamus to require the SCDOT to repair the roads and drainage adjacent to his Property to stop the flooding onto his Property. The nature of the acts Christmas requests the Trial Court to order are quintessentially discretionary acts.

In Redmond, the plaintiffs contended they should be issued a writ of mandamus to compel a school board to repair existing schools in the district and open an intermediate school. The Supreme Court found, that while certain duties were statutorily and regulatory required, the duties were nevertheless not ministerial. The board still had to exercise discretion in selecting which repairs would be completed based on priorities of need and funds available. The Supreme Court held a "writ of mandamus is not appropriate for this discretionary authority as it would place the Court in the position of deciding where repairs are most needed, which is a function of the local Board." Id. at 438, 445 S.E.2d at 445.

As in Redmond, even if statutorily required, the act of repairing the roads and drainage is not ministerial. Ministerial means nothing is left to discretion. Repairing roads and drainage, especially to completely prevent tidal flooding from the Winyah Bay, as Christmas demands from the SCDOT, involves a number of discretionary judgments, such as what type of design and repair could be done to prevent the bay waters from crossing the road onto Christmas's Property, how to fund such construction, and whether other road projects throughout the State have a more immediate need.

At trial, Christmas did not offer any evidence of a repair that would leave absolutely nothing to discretion to correct his flooding problems. In his appellate brief, Christmas does not inform this Court as to what type of non-discretionary repair can be made by the SCDOT to completely prevent tidal water from reaching his Property.

During the trial, Christmas suggested that all that was needed was six inches of asphalt added to Greenwich Drive at its low points near the intersection with Front Street as was done in the 2006 temporary repair. But Christmas presented evidence at trial through his expert Robert Castles which showed that this type of repair would not prevent the tidal

flooding that exists today and moreover demonstrated that even if Greenwich Drive were raised to its original elevation, tidal flooding would still occur. Castles testified the original elevation of Greenwich Drive was around 4.08 feet. [R.p. 481, ll. 17-18; Tr., p. 326, ll. 17-18.] During his testimony, Castles presented a chart of high tides which showed that the low points near the Property were now 2.7 feet and 2.38 feet. [R.pp. 508, l. 21 – 509, l. 25; 1167-1171; Id. at pp. 353, l. 21 – 354, l. 25; P. Ex. 166.]

As stated above, Christmas proposed at trial adding 6 inches to the low points of Greenwich Drive to correct the flooding issues. Adding six inches would raise the road to 3.2 feet and 2.88 feet at its low points.

The chart of high tides presented by Castles showed the number of tides over elevation at various levels of elevation for the years 2015, 2018, and 2021. This chart, inserted below, shows that at 3.15 feet, there were still a significant number of tides over that elevation:

Summation of Tides

Elevation	Number of Tides Over Elevation		
	2015	2018	2021
3.15	137	95	114
3.50	73	49	55
3.75	47	27	24
4.00	28	11	17
4.50	11	3	6
5.00	3	1	2

3.15 is at Intersection of Front St. & Greenwich Dr.
All Elevations are based on NAVD 88

[R.pp. 1167-1171; P. Ex. 166.]

If one of the low points of Greenwich Drive was only raised to 2.88 feet, this chart shows there would likely still be over 100 tides above elevation each year. This chart

shows that even if the other low point was raised to 3.2 feet, there would still be a significant number of tides each year above 3.5 feet. Even if Greenwich Drive was raised to its original elevation, tidal flooding could not be prevented as tides over elevation still occurred at 4.0 feet, 4.5 feet, and even 5.0 feet.

Under Christmas's own expert's testimony, it is apparent that tidal flooding from Winyah Bay cannot be prevented. As Richard Pope testified at trial, the SCDOT does not construct a road for the purpose of holding back water. [R.p. 389, ll. 15-20; Tr., p. 234, ll. 15-20.] Accordingly, the Trial Court properly acted within its discretion in refusing Christmas's demand for the issuance of a writ of mandamus requiring the SCDOT to repair the roads and drainage adjacent to his Property to stop the flooding of his Property.

VII. As an additional sustaining ground, the natural conditions exception to the waiver of immunity under the Tort Claims Act bars Appellant's negligence claim against the SCDOT.

The Trial Court granted a directed verdict to the City and County based upon, among other things, the exception to the waiver of immunity set forth in S.C. CODE ANN. § 15-78-60(8) which provides a governmental entity is not liable for loss resulting from: "snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee."

While the Trial Court did not reach this ground as to the SCDOT because it determined any negligence claim by Christmas against the SCDOT was time-barred, as an additional sustaining ground pursuant to Rule 220(c), SCACR, the SCDOT submits that the Trial Court's directed verdict to the SCDOT on the negligence claim can also be affirmed on this exception to the waiver of immunity.

The evidence presented at trial shows that the flooding Christmas alleges occurred on his Property was the result of natural conditions on the roadways adjacent to his Property due to tidal flooding from the Winyah Bay. Christmas's expert admitted that 90% of the water impacting the Property came from the Winyah Bay. [R.p. 552, ll. 3-7; Tr., p. 397, ll. 3-7.] He also admitted that the SCDOT did nothing to cause the settlement of Greenwich Drive. [R.p. 577, ll. 9-11; Id. at p. 422, ll. 9-11.] Castles' tidal chart, referenced above in Section VI., shows that tidal flooding would occur even if the road was raised to its original elevation. The evidence presented by Christmas at trial established the SCDOT did nothing to cause the flooding to this Property, but that instead, the flooding was caused by the tidal flooding from the Winyah Bay which crossed over the road. It is not the SCDOT's duty to build a road which holds back water from the bay. [R.p. 389, ll. 15-20; Id. at p. 234, ll. 15-20.] Under S.C. CODE ANN. § 15-78-60(8), the SCDOT is not liable for any loss resulting from the natural condition of tidal flooding, and the Trial Court's grant of directed verdict to the SCDOT on the negligence claim can be affirmed on this ground as well.

VIII. The Trial Court's limitations upon the expert testimony presented by Appellant has no bearing upon whether the SCDOT is entitled to a directed verdict as a matter of law on the claims for inverse condemnation, negligence, and writ of mandamus.

Pursuant to Rule 208(b)(6), SCACR, the SCDOT adopts by reference the arguments of the City and the County to the extent such arguments are applicable to the SCDOT. Specifically, the SCDOT adopts the arguments regarding the limitations of Robert Castles' testimony. The SCDOT further states that as to the limitation of Castles' testimony, the limitation does not prejudice Christmas as to his appeal against the SCDOT because the SCDOT was entitled to a directed verdict as a matter of law on the inverse

condemnation, negligence, and writ of mandamus claims without any regard to the excluded testimony of Castles.

CONCLUSION

For the reasons set forth herein, the South Carolina Department of Transportation respectfully request this Court to affirm the Trial Court's directed verdict as to the causes of action for inverse condemnation, negligence, and writ of mandamus.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Lisa. A. Thomas (S.C. Bar No. 66458)
RICHARDSON, PLOWDEN & ROBINSON, PA
2103 Farlow Street
Myrtle Beach SC 29577
(843) 448-1008
lthomas@richardsonplowden.com
ATTORNEYS FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

January 6, 2025.

RECEIVED
Jan 06 2025
SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Lisa. A. Thomas (S.C. Bar No. 66458)
RICHARDSON, PLOWDEN & ROBINSON, PA
2103 Farlow Street
Myrtle Beach SC 29577
(843) 448-1008
lthomas@richardsonplowden.com
ATTORNEYS FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

January 6, 2025.

RECEIVED
Jan 06 2025
SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, South Carolina Department of Transportation, do hereby certify that I have this date served the foregoing Final Respondent's Brief, dated January 6, 2025, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Amended Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

Justin O'Toole Lucey
Joshua Fletcher Evans
Sohayla R. Townes
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mt. Pleasant, SC 29464
jlucey@lucey-law.com
jevans@lucey-law.com
stownes@lucey-law.com
Attorneys for Appellant

Michael Kirk Battle
Michael Warner Battle
BATTLE LAW FIRM, LLC
1121 Third Ave
PO Box 530
Conway, SC 29528
kbattle@battlelawsc.com
mbattle@battlelawsc.com
Attorneys for County of Georgetown

Andrew F. Lindemann
LINDEMANN LAW FIRM, P.A.
PO Box 6923
Columbia, SC 29260
andrew@ldlawsc.com
Attorney for City of Georgetown

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

Dated: January 6, 2025.