**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**Appeal From Georgetown County**
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2011-195786
Unpublished Opinion No. 2013-UP-479 Heard October 8, 2013 – Filed December 18, 2013

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Richard Izzard, Appellant,

v.

City of Georgetown Building Official, Stephen Stack, and City of Georgetown, Respondents.



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**REQUEST FOR RECONSIDERATION OF UNPUBLISHED OPINION AND REQUEST THAT THE WHOLE PANEL REHEAR THIS CASE**

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Dec 31, 2013

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## REQUEST

I. That the three {3} judge panel reconsider it's ruling in Unpublished Opinion No. 2013-UP-479 and render a decision based on the whole of the record.

II. That the whole panel {full Court} of Judges rehear this case.

## ARGUMENTS

### I. DID THE APPELLANT COURT ERR BY ASSERTING THAT IZZARD'S CLAIMS WERE BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT.

The Appellant sued Steven Stack for acting outside the scope of his official duty which would place the case outside of the South Carolina Tort Claims Act this action was **not [emphases added]** brought pursuant to the South Carolina Tort Claims Act and the Defendant[s] never requested it be placed under the South Carolina Tort Claims Act.

According to case law in cases like **Brown v. Berkley County**, The South Carolina Supreme court has ruled that under South Carolina law, immunity is an affirmative defense that must be proved by the defendant at trial. **Tanner v. Florence City-County Bldg. Comm'n,** 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999). **Frazier v. Badger,** 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004) (stating that immunity under the Tort Claims Act is an affirmative defense that must be proved at trial); **Sanders v. Prince**, 304 S.C. 236, 240, 403 S.E.2d 640, 643 (1991) (stating that when a government employee's conduct constitutes actual malice, he is not entitled to immunity from suit).

### II. DID THE APPELLANT COURT ERR BY ASSERTING THERE WERE NO GENUINE ISSUE OF MATERIAL FACT THAT IZZARD'S PROPERTY WAS TAKEN FOR PUBLIC USE.

There are two separate kinds of condemnations use by governmental entities. The first type is where the governmental entity condemns property for public use. The second type is when a governmental entity condemns a building. This court [The Appellant Court] ruling was clearly based on the first type of condemnation [property] and not the second

type of condemnation [building]. To remove a person from a building it is a six {6} step process.

- First you do an inspection of the property.
- Then you send the building owner a list of life safety issues were found during the inspection.
- You give the owner an opportunity to correct the life safety issues.
- Then the building official can declare the building unsafe.
- The building owner has the right to appeal the decision.
- At this point and only at this point can the building official start the legal proceeding to have the occupants of the building removed and the building secured from public entry.

After all of that takes place, you can start a condemnation process.

The Defendant[s] did not do the first step, and never started any kind of process they merely removed the Appellant from the home. The condemnation of building is not about the taking of the owner's property, it is about removing a person from his home. Based on the ruling on this issue this Court did not understand that distinction or the case before it. On this point, this Court stated:

> *Because we find there is no genuine issue of material fact that Izzard's property was taken for public use,*

It was never alleged by either the Appellant, the Defendant, or the below Court that the Appellant property was taken for public use. What was properly ruled on by the first Court, the Williams Court, [*See* R.O.A] was that the house was **Not [emphasis added]** properly condemned by any process of State Law. The Defendant[s] never files any properly timed motion appealing that decision, and that decision of the Court should not be reviewable by this Court but should merely be used as a finding of fact in favor of the Appellant. The Appellant argued that based on that legally binding conclusion of the Williams Court, that removing him from the house was illegal and outside the scope of the Defendant Stack and the Defendant City of Georgetown official duty. To support this fact, the Appellant relied on the fact that once a complaint was filed with the South Carolina, LLR, Building Codes Council, the Defendant Stack surrendered his licenses to engage in building code enforcement in this state.

This Court quoted:

> *Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011) ("The elements of an action for an inverse condemnation are: (1)*

*affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use."); S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970) ("[J]ust compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power."); Carolina Convenience Stores, Inc. v. City of Spartanburg, 398 S.C. 27, 32, 727 S.E.2d 28, 30 (Ct. App. 2012) ("A detriment to private property that results from a legitimate exercise of police power does not constitute a taking of private property for public use.").*

While none of the case law quoted was directly on point or even had anything to do with the condemnation process found in State Law as it relates to building or in the International Building Code as it relates to building, this Court correctly ruled that the building was **not [emphases added]** condemned and that the property was **not [emphases added]** taken for public use. The Appellant was simply removed from his home without due process of law.

The first Court, the Williams Court was convened to determine if the Defendant[s] acted properly in the removal of the Appellant from his home. The Williams Court ruled that the home had not been condemned which affirm Izzard's improper takings and improper police power claims.

The first circuit Court, the Williams Court determine that the Defendant[s] actions were **not [emphases added]** in concert with the International Building Code. The second circuit Court, the Culbertson Court took judicial notice of the Williams Court ruling but never determine that the Defendant[s] actions were in concert with the International Building Code. [*See* the final order of the Williams Court and the Order Granting Summary Judgment from the Culbertson Court, both in the R.O.A.] In the **PER CURIAM** when the Appellant Court stated:

*(10) determining Respondents' actions were in concert with the International Building Code. We affirm.*

This Court affirmed as a matter of law, something that never happened as a matter of law. The Appellant Court committed reversible err. The Williams Court based on a trial of the facts, and the South Carolina LLR, Building Codes Council based on an investigation of the facts determined that the Defendant[s] actions were not in concert with the International Building Code, and because of that the Defendant Steven Stack turned in his license to engage in building code enforcement in South Carolina.

a. Did this Court err by affirming as a matter of law that the Respondents' actions were in concert with the International Building Code?

b. Based on the improper application of the correct decision, did this court err by not reaching a decision on the doctrines of res judicata and collateral estoppel?

c. Based on the ruling from the Williams Court that the home had not been condemned, and that ruling was not appealed by the Defendant's, did that make the ruling by the Culbertson Court on the issue of improper takings and improper police power non-reviewable by the Culbertson Court.

d. Based on the ruling from the Williams Court should the doctrines of res judicata and collateral estoppel apply to the Culbertson Court on the issue of improper takings and improper police power?

e. Any time a house is not taken by a governmental entity for public use, but a person is removed from their home without a condemnation process isn't that an improper takings and improper use of its police power?

## III. DID THE APPELLANT COURT ERR BY ASSERTING THERE WERE NO GENUINE ISSUE OF MATERIAL FACT UNDER RULE 56 (C) SCRCivP

It is clear that the Court below did not make a Rule 12(b)(6) SCRCivP motion hearing based solely on the face of the complaint. Because a Rule 12(b)(6) SCRCivP can be done **before [emphasis added]** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if it shows that the complaint is defective on it's face. It is also clear that this Court determine that this was a Rule 56(c), SCRCivP motion hearing which is a summery judgement.

> *See Rule 56(c), SCRCP (providing summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law");*

It is well settled by the court with case law that a summary judgment action can only commence **after [emphasis added]** "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" The below Court actions were done before this process had been completed and were not in concert with Rule 56(c), SCRCivP.

In the May 23, 2011 **response [emphases added]** to the Motion In Motion For Summary Judgment found in the [R.O.A.] a month and a half before the Culbertson Court heard the motion, the Appellant wrote:

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Etheredge v. Richland Sch. Dist. 1, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998); Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). When determining whether any triable issue of fact exists, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998), cert. granted, Mar. 3, 1999.
>
> Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002).
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> There have been no depositions, answers to interrogatories, admission on file, or affidavits at this point. Any Summary Judgment" at this point would be improper.

a. Did this Court make a proper ruling based on the Culbertson Courts improper motion hearing under Rule 56(c), SCRCivP when the process to conduct such a hearing was not completed to determine if there were genuine issues? The Culbertson Court was put on notice that the process had not been completed. This information must have been un-internally overlooked by this Court, but now that it has been bout to the attention of this Court would not allowing the decision to stand be considered reversible err?

## IV. DID THE APPELLANT COURT ERR BY ASSERTING THAT IZZARD'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATION.

This Court stated:

> *We find no error in the circuit court granting summary judgment for Respondents on Izzard's negligence, gross negligence and conversion claims because Izzard's claims were barred by the statute of limitations.*

S.C. Code Ann. § 15-78-110 (2005) (providing any action brought pursuant to the South Carolina Tort Claims Act "is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered"); Holmes v. Nat'l Serv. Indus., Inc., 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011) ("[T]he statute of limitations begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists."); Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) ("The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury 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.").

This is the same wording used by this Court and stated word for word. Now let's apply this to the case at bar. This action was **not [emphases added]** brought pursuant to the South Carolina Tort Claims Act because it alleged that the Defendant[s] were acting outside the scope of their official duty. The Defendant[s] put the Appellant out of his home and the Appellant asked the question if it was wrong to do so. It took the Williams Court until July 1, 2009 to answer that question definitively. On July 9, 2009 the Appellant knew that the Defendant[s] actions were wrong because the Court told the Appellant that was the case. Nine months later in April of 2010 the Appellant filed suit. The two year clock started running in July 2009 when the William Court ruled that the Appellant home had **not [emphases added]** been condemned.

There was no physical lost per se, the Appellant was removed from his home, and within days the Appellant appealed that decision to the City of Georgetown Construction Board of Appeals, and once that decision was up-held the Appellant filed an appeal of that decision to the circuit court within 30 day. The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury 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. The Appellant bought suit within two years after the date the Court told him that it was an actual lost and his rights were violated. *"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."* **State v. Sweat**, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). *"When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant."* **Town of Mt. Pleasant v. Roberts**, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). *The court should look to the plain language of the statute.* **Binney v. State**, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009). *If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning.* **State v. Gaines**, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). *In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.* **Harris v. Anderson Cnty. Sheriff's Office**, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

*However, if a statute is ambiguous, courts must construe the terms of the statute.* **Roberts,** 393 S.C. at 342, 713 S.E.2d at 283. *"A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."* **Sloan v. S.C. Bd. of Physical Therapy Exam'rs,** 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). *The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose.* **Roberts,** 393 S.C. at 342, 713 S.E.2d at 283. *"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Id. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.*

To determine whether the clock started running when the Appellant was actually put out of his home or when the court ruled, we look at the plain language of the statute. It does not say that the clock started running from the actual date of the loss.

December 2012 the Defendant City of Georgetown demolished the Appellant home without taking any other actions or a condemnation process. That is a separate action from the case before the court today. The actual demolition of the Appellant's home is not a continuation of this case. The Appellant has two years to file suite for the Defendant City of Georgetown acting outside the scope of their official duty. At some point the law should be fair.

This case was not brought pursuant to the South Carolina Tort Claims Act and the Defendant[s] never requested it be placed under the South Carolina Tort Claims Act. All actions are torts but not all actions fall under the Tort Claims Act. The Appellant met the requirements of filing the action within three {3} years.

a. Did this Court make a proper ruling based on S.C. Code Ann. § 15-78-110 (2005) *(providing any action brought pursuant to the South Carolina Tort Claims Act "is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered");* This Court concluded that based on the whole of the record that this action was bought pursuant to the South Carolina Tort Claims Act which does not allow individual defendants, or actions outside the scope of official duty and also by concluding that the two year time started the day the Appellant was removed from his home and not from the date the Williams Court determine that the Appellant had a cause of action?

## V. DID THE APPELLANT COURT ERR BY ASSERTING THAT IZZARD'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATION BY USING RULE 220(C), SCACR.

This Court stated:

We find no error in the circuit court granting summary judgment for Respondents on Izzard's negligence, gross negligence and conversion claims because Izzard's claims were barred by the statute of limitations. See Rule 220(c), SCACR (providing an appellate court may affirm for any reason appearing in the record);

While there is very little case law as it relates to Rule 220(c), SCACR outside of unpublished opinions. This Court has longed held that an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review. *See* **Elam v. S.C. Dep't of Transp.,** 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (noting an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review). The issue of the statute of limitation was never argued by the court at the motion hearing, it was only presented in the order for the first time. The Appellant Court substituted it's opinion on the issues because that fact was not heard by the trial court [*See* Transcript of the hearing R.O.A.]

This Court used a SCACR Rule to supersede South Carolina Case Law.

The Culbertson Court ordered attorney Michael W. Battle to prepare a formal order, and he placed information in the order that was never heard by the trial court, and never argued by the trial court and never ruled on by the trial court. With a lot of the information in the order clearly being errs of law and this court does not want to rule on things that are clearly wrong.

Rule 220(b), SCACR Decision by the Court. *In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.* Rule 220(b), SCACR should have been the rule use to determine the case.

Rule 220(b)(1)(a), SCACR that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous. There were a lot of conclusions of the Culbertson Court that were clearly erroneous.

a. Did this Court make a proper ruling based using a SCACR Rule to supersede and contradict South Carolina Case Law.

## VI. DID THE APPELLANT COURT ERR BY ASSERTING THAT IZZARD'S REMAINING ISSUES ON APPEAL ARE UNPRESERVED FOR APPELLATE REVIEW?

You are correct not hearing issues preserved for appellate review by the lower Court. The Culbertson Court ordered attorney Michael W. Battle to prepare a formal order, and he only placed information in the order that **he [emphasis added]** wanted preserved for appellant review that is as unfair and bias as one can get. Consider this! In the May 23, 2011 response to the Motion In Motion For Summary Judgment found in the [R.O.A.] the Appellant wrote:

> **Conclusion:** Defendants request for summary judgment as a matter of law should be dismissed at this time.
>
> **Preserving issues for appeal:** I am a pro se plaintiff and I'm not sure where to put this, but if the court rules in favor of the defendant, I would like to preserve every issue raised for the certain appeal to the South Carolina Court of Appeals and complaint to the Commission On Judicial Conduct.

I preserve every issue raised by me. I am a pro se Defendant and as a pro se Defendant I may not fully present arguments that are "sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial judge." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). I would like for the court to take that into consideration when reading this motion and also understand that the Supreme Court has already ruled that "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." **State v. Dunbar**, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); see also **State v. Russell**, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (explaining that even though exact words are not used to argue an issue, if it is clear from the argument presented in the record that the motion was made on a particular ground, the argument will be considered raised to the trial court and will be preserved for review).

## CONCLUSION

For the reasons stated, it is respectfully submitted that the issues are ripe for review and asking the Court to address them, by having the three {3} judge panel reconsider it's ruling in this case and render a decision based on the whole of the record. Secondly, it is also respectfully requested that the whole panel of Judges rehear this case.

Respectfully submitted,

Dec 31, 2013

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**PROOF OF SERVICE**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**PROOF OF SERVICE**

**REQUEST FOR RECONSIDERATION OF UNPUBLISHED OPINION AND REQUEST THAT THE WHOLE PANEL REHEAR THIS CASE**

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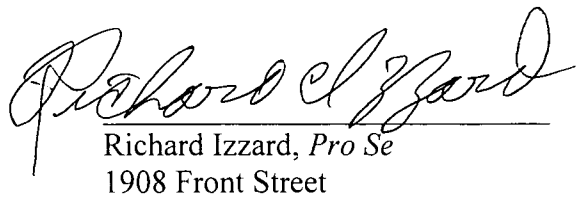
I certify that I have served the Request for Reconsideration of Unpublished Opinion and Request that the whole panel rehear this case on City of Georgetown Building Official Stephen Stack, and City of Georgetown by depositing a copy of it in the United States Mail, postage prepaid, on December 31, 2013, addressed to their attorney of record, Michael W. Battle, Battle & Vaught, PA, P.O. Box530, Conway SC 29526

Dec 31, 2013



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