THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Alison Renee Lee, Circuit Court Judge

Case Nos. 2008-CP-17-0376
2008-CP-17-0377

Claude W. Graham, ... Respondent-Appellant,

v.

Town of Latta, South Carolina, ... Appellant-Respondent.

Vickie B. Graham, ... Respondent-Appellant,

v.

Town of Latta, South Carolina, ... Appellant-Respondent.

INITIAL APPELLANT'S BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity?

II. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict and specifically by allowing the Grahams to rely on the doctrine of *res ipsa loquitur* to "prove" that the sewer line running across their property was leaking or compromised in some fashion?

III. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Vickie Graham's claim for damages to the real property? In the alternative, is the Town of Latta entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.

IV. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room? In the alternative, is the Town of Latta entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages?

STATEMENT OF THE CASE

This is an appeal from a negligence action arising from a sewer overflow occurring in the Town of Latta on September 5-6, 2008.

The Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") filed companion civil actions on November 19, 2008. Those actions were later consolidated for discovery and trial.

This litigation involves a residence owned by Vickie Graham in the Town of Latta located at 220 East Rice Street. The home was purchased in 1989 for $60,000.00. (Tr. 118, 277). On the night of September 5, 2008 and the morning of September 6, 2008, Tropical Storm Hanna dumped 7.5 inches of rain on the Town of Latta causing severe flooding throughout the Town. (Tr. 150, 235, 281, 373, 518-519). The Grahams alleged that their property was flooded on those dates. The record reflected that the property is located within a flood plain as determined by the Federal Emergency Management Association (FEMA). In addition, the Grahams maintain that the flood waters included sewage from nearby sewer lines including a manhole that overflowed on East Rice Street. The evidence further reflects that a sewer line crosses the Grahams' property. The Grahams maintain that the sewer line traveled underneath the house, while the

Town contends that the line was not underneath the house but rather ran underground between the house and the Grahams' swimming pool.

In their original complaints, the Grahams alleged that on the night of September 5-6, 2008, the municipal wastewater/sewer system operated by the Appellant-Respondent Town of Latta backed up, overflowed, and flooded their property causing damage to their residence and vehicles. Specifically, Vickie Graham alleged damages to the residence, which was titled in her name alone. Claude Graham also alleged damages to two vehicles which were titled in his name only.

The Grahams additionally alleged that on September 13, 2008, the Town's municipal wastewater/sewer system again backed up, overflowed, and flooded their property again causing damage to the residence. Moreover, the Grahams alleged they became physically ill as a result of these events. No other flooding or overflow events were alleged in the original complaints or any amended complaint.

Claude Graham raised only a claim for negligence in his complaint. Vickie Graham raised a negligence claim and an inverse condemnation claim in her original complaint. She amended her complaint twice during the pendency of this litigation, and in the Second Amended Complaint she added a cause of action for trespass.

After completion of discovery, the consolidated cases were tried beginning on October 8, 2012, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on October 11, 2012. During the trial, Judge Lee granted a directed verdict in favor of the Town of Latta with respect to the trespass and inverse condemnation claims. Additionally, Judge Lee directed a verdict in favor of the Town as to any claims arising out of the events that occurred on September 5-6, 2008. As a result, the only remaining claims that were to be submitted to the jury were the negligence claims related to the events occurring subsequent to September 5-6, 2008. The jury ultimately returned a verdict in favor of Vickie Graham in the amount of $225,000.00 and a verdict in favor of Claude Graham in the amount of $100,000.00.

The Town of Latta timely filed post-trial motions, which included both a motion for a judgment notwithstanding the verdict (JNOV) and a motion for a new trial absolute. Those motions were denied by Judge Lee in her Order filed March 8, 2013.

The Town of Latta thereupon filed this appeal. Subsequently, the Grahams filed a cross-appeal whereby they have appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

ARGUMENTS

I. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity.

The Town of Latta moved for a directed verdict at the close of the Grahams' case-in-chief and at the close of all evidence on the basis of discretionary immunity. Those motions were denied by Judge Alison Renee Lee. After the verdicts were returned, the Town moved on the same basis for a JNOV, which was also denied. On appeal, the Town submits that the Circuit Court erred in failing to rule as a matter of law that discretionary immunity bars the Grahams' remaining negligence claims.

A. Overview of Discretionary Immunity

Discretionary immunity has historically protected discretionary decisions made by governmental officials acting in their official capacity. Discretionary immunity actually survived the abrogation of sovereign immunity by the Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1995). The Supreme Court explained that "discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by

public officials." 329 S.E.2d at 742. As a result, the Supreme Court "expressly decline[d] to allow tort liability for these discretionary acts" and specifically acknowledged that "[t]he exercise of discretion includes the right to be wrong." *Id.*

In response to the Supreme Court's partial abrogation of sovereign immunity in *McCall*,[1] the General Assembly enacted the South Carolina Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated. In *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995), the Supreme Court explained as follows:

> In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Citations omitted).

In enacting the Tort Claims Act, the General Assembly codified discretionary immunity. Section 15-78-60(5) exempts governmental entities from liability for losses resulting from "the exercise of discretion or judgment by the

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[1] *McCall* has been described as resulting in the absolute abrogation of sovereign immunity. *See also*, *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) ("[i]n *McCall* we abolished the doctrine of sovereign immunity"). That is not entirely correct because the *McCall* Court did not abolish discretionary immunity as it existed pre-*McCall*. In effect, *McCall* represents only a partial abrogation of sovereign immunity because discretionary immunity was left intact.

governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5). The Supreme Court has interpreted Section 15-78-60(5) as requiring "[p]roof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice." *Foster v. South Carolina Dept. of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31, 35 (1992). In addition, "the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* "It is not enough to say the defect was noted and a decision was made not to repair it." *Id.*

B. Testimony Supports Finding of Discretionary Immunity

At trial, the evidence demonstrated that the Town of Latta exercised discretion in deciding not to perform any work on the sewer pipe that crosses the Grahams' property. The Town had several options including the option not to take any remedial action, which is ultimately the option chosen by the Town per the advice of its engineers. That exercise of discretion was based upon accepted

professional standards as was testified to by the Town's consulting engineer, Mike Hanna.

Mike Hanna is employed by B.P. Barber Company, which is an engineering firm, and has served as the Town's consulting engineer on its water and sewer systems since 1997. (Tr. 536). In response to the Grahams' complaint, Hanna recommended several steps to be taken. First, B.P. Barber under Hanna's direction performed a physical survey of all manholes and then followed that with smoke testing of the entire sewer system, including the areas in the vicinity of the Graham residence. (Tr. 545-548). Hanna explained that in conducting the smoke testing they paid particularly close attention to the area around the Graham residence. (Tr. 549-550). The smoke testing, however, did not reveal any problems with the sewer line on the Grahams' property or any lines near their residence. The engineers prepared a report for the Town and made recommendations. (Tr. 551-552). At trial, Hanna also identified a map that depicted the areas where leaks were found during the study, but he confirmed, as does the map, that no leaks were found at or near the Graham residence. (Tr. 558, 565; Def. Ex. 1).

Hanna testified that there were a number of different options available. When told that the Grahams contended that the sewer line was underneath their house and was leaking sewage, he looked at options to relocate the line. (Tr. 577-578). He testified that he "drew up a couple of scenarios, but there were no good

alternatives there." (Tr. 578). In addition, he testified that there are different methods that can be used to rehabilitate a sewer line including replacement of the line, the placement of a liner in the existing line, or the use of technology called "pipe bursting." (Tr. 572). However, based on the testing that was performed, a decision was made to take no remedial action because it was not needed. Hanna specifically testified that he did not find any evidence that there was a problem with the sewer line running across the Grahams' property, and as a result, in his professional opinion there were no repairs or other remedial action that were needed. (Tr. 572-573).

The evidence thus reflects that the Town did not ignore the Grahams' complaint. The Town engaged Mike Hanna and B.P. Barber, its consulting engineers, to investigate the complaint, perform testing, and make recommendations. Hanna offered his professional opinions to a reasonable degree of engineering certainty. (Tr. 601). The actions taken by Hanna and the options he considered were consistent with those discussed by the Grahams' engineering expert, Roger Davis. Although he himself performed no testing, Davis agreed that smoke testing could be done to look for infiltration and leaks in a sewer line. (Tr. 359, 369). He further discussed various options including relocation of the line, replacement of the line, or repair of the line in the event a leak was found. (Tr. 350, 369-370). As for repairs, he mentioned several options including the use of

pressure grouting or slip lining the pipe. (Tr. 350). These were the same options considered and deemed no necessary by Mike Hanna.

In sum, the Town presented evidence of several options for relocation, replacement and repair that were considered by the Town engineers, as well as the fourth option which was to take no remedial action. The Town further showed that such options were accepted in the engineering field, and in fact, Roger Davis agreed to the same remedial options. Mike Hanna explained the smoke testing that was performed and the conclusions reached based upon that testing. Davis agreed that the smoke testing was an accepted method for assessing infiltration and leaks in a line. Finally, Hanna explained that no remediation or relocation was deemed necessary based on the results of that testing. Consequently, the Town proved based upon undisputed evidence that discretion was exercised – the Town acting through its engineers weighed its options and concluded in the exercise of professional judgment that no remedial action was needed. Accordingly, the Town is entitled to discretionary immunity from liability.

C. Circuit Court's Rulings on Discretionary Immunity

In denying the Town of Latta's directed verdict motions, Judge Lee stated: "while I believe that there has been some exercise of discretion or judgment, I

think it becomes a jury question to determine whether or not there would have been a breach of duty in failing to take action." (Tr. 672). Judge Lee further ruled:

> The way I view the evidence is that there were basically four competing choices in addition to the underlying dispute as to whether or not there is a leak or not. But if the considerations of the Town would – there would have been four options. The three that were discussed was move the line, put a sleeve in it, or I think put some glue or whatever in it or whatever was the appropriate terminology is or do nothing. While I understand that they weighed those options, I still believe that the jury could make the decision. I understand that they weighed the options, and their option was to do the fourth; that was to do nothing.
>
> And I understand that that was primarily because they did not believe that there was a leak in the line. So I think it becomes a question for the jury to decide, first of all, whether or not there was a leak; and second of all, whether exercising that particular option would have been a breach of the duty. And the duty is to maintain the system and [to] maintain the lines. And so I think that becomes a jury question.

(Tr. 672-673).

That oral ruling denying the directed verdict motion was later echoed by Judge Lee in her written order denying the JNOV motion. In her Order filed March 8, 2013, Judge Lee wrote:

> Defendant claims that the testimony of Mike Hanna established that Defendant considered and weighed competing alternatives, and then used accepted professional standards in deciding that there was nothing needed to be done regarding the portion of its sanitary sewer and drainage system at issue. Testimony was

> given at trial that Defendant was presented with several choices to remedy the drainage problem: move the pipe on Plaintiffs' residence, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing. Testimony was also presented that Defendant conducted smoke tests to determine whether there was a defect, and attempted to snake a camera through the line, then made a decision not to repair the pipe.

(R. ___). Judge Lee then viewed the issue as one of duty rather than immunity. She concluded:

> Whether Defendant breached its duty to maintain its drainage system by failing to exercise one of the options available to fix the flooding at Plaintiffs' residence was a question for the jury. *See Steinke v. South Carolina Dept. of Labor, Licensing and Regulation,* 336 S.C. 373, 520 S.E.2d 142 (1999). The jury considered the evidence of whether Defendant's inaction constituted maintenance and rejected the discretionary immunity provision of the Tort Claims Act. Because there is evidence to support the jury's verdict, Defendant's Motion for JNOV on the grounds that Plaintiffs' negligence claim is barred by application of the South Carolina Tort Claims Act is DENIED.

(R. ___).

D. Errors in the Circuit Court's Rulings on Discretional Immunity

In denying discretionary immunity to the Town of Latta, Judge Lee committed several errors of law.

First and foremost, Judge Lee failed to recognize that discretionary immunity does not require that the discretion be exercised without error. Consequently, she confused the distinct concepts of duty and immunity. In *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), this Court explained that "[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability." 374 S.E.2d at 916. Therefore, the assertion of any immunity defense, including discretionary immunity, assumes a breach of the duty of care but nonetheless serves as a bar to liability. If a defendant is entitled to immunity, the court need not determine whether there was a breach of a duty – it is assumed. For that reason, it is a fundamental error to tie any entitlement to immunity to whether there is a breach of a duty of care. They are mutually exclusive concepts. If there is no breach of duty, the issue of immunity need not be reached. Conversely, to properly consider a defendant's entitlement to discretionary immunity, the court should assume negligence. In order words, the existence or non-existence of negligence does not preclude a governmental entity's entitlement to discretionary immunity.

As has been recognized by our Supreme Court, "the exercise of such discretion includes the right to be wrong." *See*, *Giannini v. South Carolina Dept. of Transportation*, 378 S.C. 573, 664 S.E.2d 450, 454, n.1 (2008). *See also*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 742 (1985) ("[t]he exercise of

discretion includes the right to be wrong").[2] The discretionary immunity defense, therefore, does not require a showing that discretion was exercised without error, or that a correct decision was actually made as a result of the exercise of discretion. If that were what is required, there would obviously be no need for an immunity defense. *See, Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196, 198 (2002) ("[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something"). The governmental entity does not need immunity where it acted reasonably or made a correct decision – in that instance, the entity was not negligent and would not be liable irregardless of immunity. Instead, a governmental entity is entitled to discretionary immunity *especially* in those instances where it is alleged that errors were made in the exercise of discretion, or where it is alleged that an incorrect decision was ultimately made.

Importantly, in the case at bar, Judge Lee found all of the elements of discretionary immunity present. Both at trial and in her post-trial order, Judge Lee found that the Town was presented with four choices, one of which was to take no remedial action. She further found that the Town weighed those options and consciously chose to do nothing because, based on the smoke testing and the exercise of professional judgment, the Town's engineer concluded that the sewer line was not

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[2] *See also, Jensen v. Anderson County Dept. of Social Services*, 304 S.C. 195, 403 S.E.2d 615, 619 (1991) ("[g]enerally, a government official may not be held liable for the negligent performance of a discretionary duty").

leaking at the Grahams' property. Judge Lee, in fact, stated on the record that the Town "weighed the options, and their option was to do the fourth [--] that was to do nothing." (Tr. 673).

Therefore, the discretionary immunity test has been met as a matter of law, and Judge Lee's analysis should have ended there. Instead, she looked at whether the Town breached its duty of care by failing to choose one of the three repair options. She decided that was an issue of fact for the jury. However, to reiterate, that confuses the breach of duty issue with the immunity issue. Contrary to Judge Lee's reasoning, the Town cannot lose its discretionary immunity by selecting what may arguably have been the wrong option. The Town decided to take no remedial action based on the smoke testing that showed no leak in the sewer line on the Grahams' property. Whether that decision was correct or not is not determinative. The Town had the right to make that decision based on the testing that was done and the professional judgment of its engineer. If that decision was correct, there is no negligence. But, if that decision was incorrect, the Town is entitled to discretionary immunity for its erroneous exercise of judgment. Thus, there was no jury question that precluded a ruling on discretionary immunity.

Judge Lee also erred in her reliance on *Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), which she found supported her decision to send the defense of discretionary immunity to the

jury. In *Steinke*, however, the Supreme Court did not address in its decision whether the elements of discretionary immunity were demonstrated by the evidence. To the contrary, the Court noted that "[t]he record contains scant evidence Department officials exercised their discretion." 520 S.E.2d at 154. In contrast, in the present case, Judge Lee found that the elements of discretionary immunity were shown. In addition, in *Steinke*, the Supreme Court held that discretionary immunity needed to be read in conjunction with a gross negligence exception because other immunity provisions, including one with a gross negligence exception, had been raised as a defense. The issue of gross negligence thus made discretionary immunity one for the jury. In contrast, in the present case, the Town did not allege a Tort Claims Act immunity provision that includes a gross negligence exception, and as a result, discretionary immunity could not be defeated by proof of gross negligence.[3] Discretionary immunity was not properly a jury question. Instead, the defense should have been decided as a question of law at directed verdict.

Finally, Judge Lee disregarded the one dispositive case. The present case is remarkably similar to the case of *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), in which this Court affirmed summary judgment for a

[3] As further evidence of this distinguishing point, Judge Lee never charged the jury on the concept of "gross negligence." Moreover, her charge on discretionary immunity did not include an explanation of any gross negligence exception to Section 15-78-60(5). (Tr. 751-752).

municipality on causes of action for negligence and trespass arising out of allegations that the municipality failed to properly design and maintain its stormwater drainage system which resulted in flooding of the plaintiff's building. Similar to the case at bar, the facts in *Hawkins* show multiple flooding events and include the allegation that the City failed to take the appropriate remedial action to address the increased water flow through the existing drainage pipes. Citing discretionary immunity under the Tort Claims Act, this Court found that "a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgment required to build and maintain an adequate municipal sewer and drainage system in Greenville." 594 S.E.2d at 564. This Court further concluded that "the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." *Id.*

This case is no different from *Hawkins*, which surprisingly was not even discussed – let alone distinguished – by Judge Lee. The Grahams allege that the Town of Latta was negligent in failing "to properly construct, operate, and maintain its municipal wastewater/sewer system." (R. __). The Grahams also allege that that the Town failed to take remedial measures to prevent flooding at their residence after a prior flooding event. Those allegations are no different than those in *Hawkins*. This Court in *Hawkins* found as a matter of law that

discretionary immunity barred liability. That should likewise have been the ruling in this case.

For each of the reasons discussed above, the Town of Latta respectfully submits that it is entitled to discretionary immunity for its decision not to perform any remedial work to the sewer line across the Grahams' property. The Circuit Court therefore erred in failing to grant a directed verdict or JNOV on the remaining negligence claims.

II. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict and specifically by allowing the Grahams to rely on the doctrine of *res ipsa loquitur* to "prove" that the sewer line running across their property was leaking or compromised in some fashion.

The Grahams' negligence claims are premised on their allegation that a sewer pipe is located beneath their house and has leaked sewage on several occasions since September 6, 2008.[4] The Grahams, however, presented no evidence establishing that the sewer line on their property is cracked or otherwise compromised such that sewage has been discharged from the pipe they allege to be beneath the house. The Grahams, in fact, made to effort to present any such

[4] Judge Lee granted a directed verdict for the Grahams' negligence claims arising from the September 5-6, 2008 flooding event. The Grahams have not appealed from that ruling, and it is the law of the case. *See*, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986); *Eagles v. South Carolina National Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990).

evidence. Instead, they rely on the doctrine of *res ipsa loquitur* as a substitute for proof of any actual defect in the sewer line.

It is well settled that South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 803, n.7 (Ct. App. 1991). As a result, a plaintiff's burden of proving each element of negligence "cannot be met by relying on the theory that the things speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." *Snow*, 409 S.E.2d at 803. "No inference of negligence arises from the mere fact of injury." *Id.*

As indicated, the Grahams have presented no evidence that the sewer line on their property is leaking. Claude Graham testified that the sewer line is under the crawl space to his knowledge, but he also conceded that he has taken no steps to determine whether the pipe was leaking. (Tr. 128-129). The Grahams' engineering expert, Roger Davis, admitted that he has never seen the sewer line underneath the house. (Tr. 343-344). He opined that it was under the house only because Claude Graham told him that it was there. (Tr. 344). Davis likewise never performed any testing on the sewer line to determine whether it was leaking. He agreed that one could determine the condition of the pipe by using a camera or by performing a smoke test, among other options. (Tr. 358-359). But Davis did no such testing. (Tr. 359). He further conceded that he never observed any leaks nor any sewage in

the crawl space. (Tr. 375). Davis contends that he reviewed DHEC records, but those records showed only that the Town was experiencing infiltration in their lines as a general issue and not that there was any such issue in the line at the Grahams' property. Davis could not and did not opine to a reasonable degree of engineering certainty that most probably the line underneath the Grahams' home was leaking.

In contrast, Mike Hanna, the consulting engineer for the Town, did have smoke testing performed under his direction by employees of B.P Barber. Those smoke tests did not reveal any leaks in the line running across the Grahams' property.

In sum, the Grahams did not meet their burden of proving that the sewer line running underneath or near their house was leaking or compromised in any respect. The Grahams' expert conceded that such evidence could have been obtained through camera or smoke testing, but so testing was pursued. Instead, the Grahams seek to rely on the injury – Claude Graham's self-serving testimony of sewage in the crawl space – as evidence that the sewer pipe is leaking. That is a classic application of the doctrine of *res ipsa loquitur* where the proof of injury is used to provide "proof" of a breach of care. Here, the Grahams have not established any breach of care by the Town that proximately resulted in sewage underneath their house at any point after September 6, 2008. "Proof" based on the doctrine of *res*

ipsa loquitur must be rejected. Consequently, the Grahams failed to prove an issue with the sewer line underneath or near their house and likewise failed to show that the Town was negligent in failing to take any remedial action to repair the line. For this additional reason, the Town is entitled to judgment as a matter of law.

III. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Vickie Graham's claim for damages to the real property. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.

Judge Lee also erred in several rulings with respect to the actual damages claimed by Vickie Graham for the damage to the real property. Over objection, Judge Lee allowed the Grahams to present the expert testimony of John Benton, who is former contractor. Benton offered his opinion as to the cost of rebuilding the exact house at a different location. Benton admitted that he was not qualified or prepared to offer any opinions on the condition of the Grahams' home or that it could not be repaired or that it needed to be razed. (Tr. 390). The error in allowing Benton's testimony was two-fold.

First, Judge Lee allowed the jury to consider the replacement cost of the house as an evidence of damages when there was no expert testimony that the

Grahams' residence was totally and permanently damaged and/or needed to be razed. It is well settled that "[t]o recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765, 781 (Ct. App. 2011). "The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation." *Id. See also*, *Billups v. Leliuga*, 303 S.C. 36, 398 S.E.2d 75, 77 (Ct. App. 1990) (in the absence of expert testimony, evidence of proximate cause must "rise above mere speculation or conjecture"). Yet, in this case, the jury had no basis upon which to conclude that the Grahams' house could not be repaired or remediated but needed to be razed. Therefore, there was no evidentiary basis for Vickie Graham's claim that the house was permanently and totally damaged.[5]

Second, Judge Lee allowed the jury to consider evidence of the wrong measure of damages for either temporary or permanent injury to real property. In *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468 (2013), the Supreme Court addressed the appropriate measure of damages for both temporary and permanent damage to real property. The Supreme Court recognized that "lost

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[5] To the contrary, Danielle Watson with the South Carolina Department of Health and Environmental Control (DHEC) testified that sewage overflows as she observed at the Grahams' house are not uncommon and can be cleaned. (Tr. 240-241). In fact, DHEC provides an information sheet to homeowners with recommendations on clean-up procedures. (Tr. 243-247, Def. Ex. 14).

rental value of property is the proper measure of damages for a temporary harm to real property." 747 S.E.2d at 475. Moreover, "the measure of damages for permanent injury to real property ... is the diminution in the market value of the property." *Id.*, *citing Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 443 (1971).

In the present case, Judge Lee properly charged the jury that "[w]here real estate has been damaged, the measure of damages is the difference between the value of the entire premises before and after the injury." (Tr. 754). She further charged as follows: "If repairing the building would put it in as good a condition as before the damage, then the measure of damages would be the cost of the repair plus any amount by which the building has been decreased due to the damages." (Tr. 754).

Despite properly charging the measure of damages, Judge Lee erred in allowing the Grahams to present evidence of a different measure. Specifically, she allowed the jury to consider the monetary figure of $478,280 as the cost to *rebuild* the exact same house at a different location. That figure represents neither the diminution of fair market value before and after the injury nor the cost of *repair*. John Benton offered no opinions regarding the repair of the existing house, the scope of any such repair, or the costs of such repairs. Instead, at best, his estimate

can be characterized as a replacement value, which is not the appropriate measure of damages under Judge Lee's charge or applicable case law.

Furthermore, Judge Lee erred in failing to grant a directed verdict or JNOV based on Vickie Graham's failure to present competent evidence of actual damages to the real property. In any negligence action, damages are an element of the cause of action on which the plaintiff has the burden of proof. The failure to prove damages is fatal to the claim. The Town was entitled to judgment as a matter of law based on (1) Vickie Graham's failure to present proof that the real property was permanently injured and could not be repaired and (2) her failure to present proof of the diminution of the fair market value of the property. Similarly, Vickie Graham failed to present evidence that the property could be repaired and what the reasonable repair costs would be. In sum, the Town was entitled to judgment as a matter of law on these damages issues or in the alternative a new trial absolute.[6]

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[6] The new trial must include both issues of liability and damages. *See*, S.C. Code Ann. § 15-33-125. The Grahams did not move for nor were they entitled to a directed verdict on liability.

IV. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

As discussed above, Judge Lee granted a directed verdict on the Grahams' negligence claims related to the events of September 5-6, 2008. That ruling is now the law of the case. Therefore, the Town cannot be liable for any damages to real or personal property occurring on those dates. Claude Graham, however, pled in his complaint that he sustained damages to two motor vehicles on September 5-6. (R. ___). He does not allege in his complaint any damage or injury to personal property since that date.

At trial, Claude Graham testified to the loss of hand tools, golf equipment, two lawnmowers, and other equipment that was located in a storage room on the property. (Tr. 100-101). He never testified, however, that those items of personal property were damaged subsequent to the flooding of the yard that occurred on September 5-6, 2008. Moreover, he never offered testimony that those items were undamaged in the September 5-6, 2008 event.

There was, in fact, no evidence by which the jury could have even inferred that the damage to the personal property resulted from any events occurring after September 5-6, 2008. Claude Graham testified to subsequent events where he

observed sewage underneath the house, but on each occasion, he testified that there was little or no flooding or sewage in the yard. (Tr. 76-77, 84-87). On each occasion, he only described flooding or sewage underneath the house and never described it being in the storage room. There is no evidence even as to the location of the storage room relative to the house or the condition of the storage room after the alleged subsequent events. Given that the personal property was located in a storage room, which was never described as underneath the house, Claude Graham never offered competent evidence that he was entitled to recover the value of the personal property because of damage incurred after September 5-6, 2008.

On that basis, Judge Lee erred in denying a directed verdict and later a JNOV with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

As an related point, a new trial absolute is also warranted because Judge Lee never instructed the jury that it could not consider any damages occurring on September 5-6, 2008, because she had directed a verdict on all claims, including the negligence claims, related to those dates. In her post-trial order, Judge Lee explains that "[t]he Court provided an instruction to the jury on the September 5-6

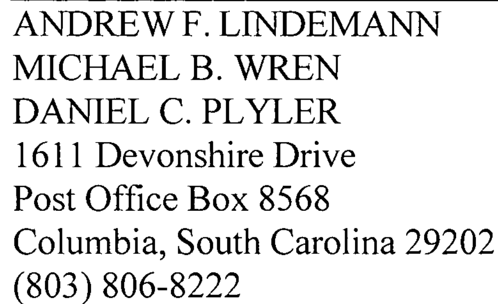
events as it deemed appropriate." (R. ___). But, Judge Lees does not specifically point to any such "appropriate" instruction in the record nor could she – because there is none. After the court directed the verdict, her explanation of her rulings at directed verdict made no mention that the events of September 5-6, 2008 were no longer at issue. (Tr. 516). This issue was addressed during the charge conference, but Judge Lee nonetheless did not give any further explanation to the jury nor include any limiting instruction regarding the lack of liability for damages proximately resulting from the events of September 5-6, 2008. (Tr. 703-709).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Latta respectfully requests that this Court reverse the orders of Circuit Court Judge Alison Renee Lee denying the Town's motion for JNOV and motions for directed verdict on the negligence cause of action. In the alternative, the Town of Latta requests that the Court remand for a new trial absolute on the negligence claims.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.



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