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SC Court of Appeals

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| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | |
| **COUNTY OF RICHLAND** | ) | **CA NO.: 2020-CP-40-04769** |
| In the House, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | **ORDER GRANTING IN PART** |
| -vs- | ) | **RICHLAND COUNTY'S MOTION FOR** |
| | ) | **ELECTION AND DENYING MOTION** |
| Richland County, City of Columbia, | ) | **TO ALTER OR AMEND, MOTION FOR** |
| and the South Carolina Department | ) | **NEW TRIAL AND REMITTITUR** |
| of Transportation, | ) | |
| | ) | |
| Defendant(s). | ) | |

This matter came before me by way of post-trial motions filed by the Richland County and SCDOT on October 9, 2025.[1] Richland County filed motions for election of remedies, to alter or amend this Court's order dated September 29, 2025, for a new trial absolute and remittitur. After carefully considering the motions and supporting briefs, the Court grants the motion for election of remedies in part and denies the other post-trial motions.

The Court tried this case and heard the presentation of evidence over almost eight days of testimony with eighteen (18) witnesses and well over one hundred (100) exhibits. Thereafter, each of the parties submitted lengthy, detailed orders including findings of fact and conclusions of law in support of their respective positions and what they contended was proven at trial. The Court entered judgment for the Plaintiff in a

[1] The court issued a separate order as to SCDOT's motions.

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detailed twenty-nine page order with findings of fact and conclusions of law on September 29, 2025.

**MOTION FOR ELECTION OF REMEDIES**

"Election of remedies involves a choice between different forms of redress afforded by law *for the same injury* or different forms of proceeding on the same cause of action." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152-53 (2010)(*emphasis added*) (*quoting Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996)). "It is the act of choosing between inconsistent remedies allowed by law on the *same set of facts*." *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45. "The basic purpose of election of remedies is to prevent double recovery for a single wrong.

In its return to the Defendants'[2] motions, the Plaintiff acknowledges that it is not entitled to multiple recoveries *for the same injury* and that the Plaintiff is not seeking multiple recoveries *for the same wrong*. The Plaintiff further acknowledged to the extent that its damage overlaps with certain causes of action that it is limited to a single recovery. However, the Court differs from the Defendants as to what must be elected and how overlapping damages should be handled.

The Court agrees that as between the causes of action for trespass, inverse condemnation and negligence, that the Plaintiff should elect as these claims are for the same injury and seek almost the same damages; however, since negligence includes

[2] SCDOT also filed post-trial motions.

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damages for partial paving of the parking lot, which is a distinct injury not included in the other causes of action, then that is not a double recovery so any election other than negligence would leave a claim for negligence in that amount. Order ¶173 (1/3 of paving, $15,546).

The Court concludes that the Plaintiff does not have to elect between its cause of action related to breach of the special provisions in the slope agreement and the other causes of action as this is a different injury and different wrong from the other causes of action discussed above. The Marion quote is a measure of the amount of damage for breach of the special provisions of the contract. It is not an award of the Marion quote itself. However, the Court acknowledges that the Marion quote is included in the damages for the other three causes of action for which an election will be required; therefore to avoid a double recovery, any recovery by the Plaintiff shall apply equally to satisfy the judgments for both the breach of special provisions, inverse condemnation and such other remedy as may be elected by the Plaintiff (except the distinct injury for negligence discussed above.)

**STAY OF EXECUTION**

The Plaintiff stipulated and did not seek enforcement on its judgment during the Court's consideration of these post-trial motions. However, the Court denies the stay of injunctive relief pending resolution of any appeal. As the trial testimony bore out, the adequate functioning of the drain installed on the property to the south of the Plaintiff

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is essential to limiting the flow of water onto the Plaintiff's property. Multiple experts testified to this. Further, the evidence showed that there was no written agreement as to its maintenance and that the property was not in the SCDOT right of way. An appeal, if filed, could last up to two years and this certainly would prejudice the Plaintiff if the drain were not maintained during this period. Neither SCDOT nor Richland County offered any plans or assurance on how this drain would be maintained and the Plaintiff's property protected during the pendency of any appeal.

Therefore, the Court denies this request and orders that the parties comply with the terms of the order.

## COUNTY'S MOTION TO AMEND

1. Inverse Condemnation

The County attempts to recast its actions to try and fit in the mold of a "failure to act" case so it would not be liable for an affirmative, positive, aggressive act. The County first cites *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004); however this case is clearly distinguishable In *Hawkins*, the court found as follows:

In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the ServiceMaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are *merely failures to act*. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by "affirmative, positive, aggressive" acts by the governmental agency. Allegations of mere failure

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to act are insufficient. *Hawkins*, 358 S.C. at 291

Likewise, the limited affirmative acts found by the court in *Hawkins* and noted by the County in their motion are wholly different in the kind and quality of the evidence. The court held, "The only affirmative acts Hawkins cites as forming the basis of his inverse condemnation claim are the replacement of the double-box culvert with the large arched pipe in Laurel Creek in 1994 and the installation of the riprap material along the banks of the creek in 1997. The record contains no evidence that either of these acts caused the flooding of the ServiceMaster property in 1997. Hawkins' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin *Emphasis added.*

This is not a mere failure to act case. The evidence is clear that Richland County for the benefit *and* under the ultimate approval of SCDOT constructed an elevated roadbed that trapped water and channeled it onto Mr Barczak's property. Richland County didn't merely "allow" the berm to be built, they built it.

Several cases not cited by the County in their motion are more closely, if not directly on point. It has long been recognized in South Carolina that "the casting of water on adjoining premises by some act of the governmental authority in the course of making improvements to a public way constitutes a taking of property in violation of Article I, Section 17, of the Constitution." *Kline v. City of Columbia*, 249 S.C. 532 at 536.

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In *Milhous v. State Highway Department,* the South Carolina Supreme Court held that the landowner had cause of action against the state for damage to his land resulting from the obstruction of natural flow of surface waters caused by the state's raising of the grade of the highway roadbed. *Milhous v. State Highway Dep't,* 8 S.E.2d 852, 856 (1940).

Similarly, in *Spradley v. South Carolina State Highway Department,* the South Carolina Supreme Court found a plaintiff "could recover just compensation for the taking and damaging" of her land "caused by the dumping and spilling of surface water" upon the plaintiff's land as a result of highway improvement. *Spradley v. South Carolina State Highway Dep't,* 256 S.C. 431, 437, 182 S.E.2d 735, 738 (1971). In *Spradley,* the Highway Department failed to provide proper drainage. *Id.*

Moreover, the Court of Appeals upheld a verdict for a property owner who brought an inverse condemnation action against a town for flood damage he sustained during heavy rain following reconstruction of adjoining street. *Newsome v. Town of Surfside Beach,* 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989). The town's reconstruction raised the level of the street approximately seventeen inches. *Id.* During a storm and unusually high tide after the road reconstruction, the road dammed excess water and caused the water to congregate at the lowest piece of land along the road, which was in the plaintiff's house. *Id.* The Court of Appeals held in Newsome that "[f]rom this evidence the jury could have easily concluded that the building up of [the

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street] satisfied the requirement of an overt or positive action by the Town necessary to prove a taking under a cause of action for inverse condemnation." *Id.*

Next, the County cites to *Marlowe v. S.C. Dep't of Transportation*, 446 S.C. 309, 919 S.E.2d 553 (2025), to argue that there is not sufficient evidence of causation to hold the County liable under inverse condemnation. However, both the facts and the proof of causation are materially different between *Marlowe* and this case.

In *Marlowe*, the property at issue flooded two times. As noted by the Supreme Court,

> While the Project was ongoing, the home flooded twice-once in October 2015 and again in October 2016. In October 2015, the greatest four-day precipitation total recorded in the region was 23.35 inches, corresponding to a return interval of greater than 1000 years. Flooding in the area was catastrophic, and the Marlowes were forced to move out and begin extensive repairs with assistance from the Federal Emergency Management Agency and personal loans. At the time of the 2015 flood, the existing two-lane road remained in place, and the new wider and elevated roadbed had been constructed, but the new larger culvert had not been completed.
>
> In October 2016, around eight weeks after the Marlowes were able to move back into their home, Hurricane Matthew passed over the South Carolina coast and brought significant rainfall. The greatest 4-day precipitation total recorded in the region surrounding the Marlowes' home was 13.7 inches, corresponding to a return interval of between 200 to 500 years. The home flooded again, and the Marlowes again had to move out. The installation of the new culvert was not completed at the time Hurricane Matthew flooded the home.

Thus, it was an obvious issue as to whether the flooding was caused by the historic rainfall interval of greater than 1000 years and the hurricane, or the road project by SCDOT. Ironically, Mr. Barczak testified that his property did not flood during this same, 1000-year rainfall interval. The Court further noted that, "there must be evidence

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that would allow the fact finder to determine, without speculating, how much of the flooding was caused by the construction of the new roadway. However, the evidence, even including Gregorie's "substantial contributor" testimony, does not rise above speculation on the causation issue. Gregorie could only testify there was "a possibility" the flooding of the Marlowes' home would not have occurred if the new roadway had not been constructed as it was." *Id.*

This "mere possibility" evidence - trying to separate damages caused by historic flooding and a hurricane- is quite different than the clear evidence provided by Mr Baczak at trial and noted by the court in its order:

On or about November 15, 2018, Jason Patterson, PE (the Resident Construction Engineer with Richland County PDT) had a site visit with Hugh Wilson and others. He commented on the site visit observations that that the build-up on North Main Street blocks approximately 0.10 Acres on Tract 52 (South of The Property); prior to construction, this area would flow into North Main Street to a catch basin. The buildup has blocked this area from reaching North Main Street. Mr. Patterson prepared a graphic exhibit (Exhibit 90) in which he showed this area (colored in blue) immediately South and above The Property with the box callout, "[a]pproximate Area from Richland GIS Contours that is trapped by roadway embankment (Approx. .10 acre)."

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Dan Creed, P.E., the Plaintiff's expert, corroborated Mr. Patterson's testimony. He testified that the elevated road bed trapped the water and based on the topography– it was foreseeable that water would be trapped by the elevated highway and channeled to the Property. He further testified that was the purpose of installing a drain inlet south of the Property.

The County and SCDOT seem to suggest that the magic words "to a reasonable degree of engineering certainty" had to be stated. The Court disagrees. In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." *Gamble v. Price*, 289 S.C. 538, 347 S.E.2d 131 (Ct. App. 1986). It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes...." *Norland v. Washington General Hospital*, 461 F.2d 694, 697 (8th Cir.1972) In this case, the Court was judicially impressed by Dan Creed's testimony that the elevated bank from the project was the most likely cause of the flooding of Mr. Barczak's property. Indeed, there was virtually no other alternative evidence presented as to causation. Mr. Barczak testified that prior to construction he had a single water intrusion event, several years prior to the Project, which is why he installed a French drain along the southern border of his building. He testified that, during the 2015 Columbia catastrophic rain event, The Property did not flood; yet after the Project, the first-floor, front area flooded repeatedly. Mr. Barczak offered numerous photographs of

the flooding of his property with mud, silt and the water intrusion onto the first floor of his building. The record is replete with emails from Mr. Barczak notifying the Defendants of this problem and requesting relief.

Ms. Sabrina Odom (then President of the North Main Street Business Association) corroborated Mr. Barczak's testimony. Her office was on the first floor of The Property, and her desk is visible in photographs offered into evidence. Like Mr. Barczak, she testified that prior to the Project, she had no problem with flooding, but that after the Project, she came to the office expecting to use a mop. Further, prior to her departure during rain events, she placed chairs on top of the desks.

On March 15, 2019, Hugh Wilson with LJ, Inc. (the County contractor) submitted RFI No. 13 (Request for Information) to Jason Patterson, the resident construction engineer. Hugh Wilson observed that several tracts in Phase IA2 that previously drained to the roadway were blocked due to the build-up. He further noted that at tract 53 (The Property) no provisions have been made to address the water that is now flowing to, and being trapped, on portions of his property. Based on his review of the cross sections, water at the toe of the proposed slope from portions of tract 205 and all of tract 52, flow down gradient to the Trestle Building property. To further complicate the issue, there are two short walls on the south end of this property that trap water; the water builds up and flows back towards the building. There are no provisions in the



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plans to address these walls (although portions of the walls are within the new right of way) nor are there any provisions in the plans to address water that is being trapped between the new toe of slope and The Property. (Ex. 80). Eventually, the County installed a drop inlet to try and capture this water.

The court denies the motion to amend on these grounds.

Finally, Richland County, despite all the evidence to the contrary tries to minimize its role in the project to avoid its constitutional obligations. However, this court correctly concluded that Richland County was responsible. The County was responsible for managing all aspects of the construction in the North Main Project. The County had oversight of all construction. They had weekly and biweekly meetings with all the stakeholders in the project including SCDOT, the contractor, and the City of Columbia. Richland County hired LJ to construct the North Main Street project in accordance with the design plans and SCDOT specifications. Richland County's contract with LJ provides that at the request of the County, the contractor shall provide other work related to the Project that is not within the scope of work provided for in this Agreement. All work by LJ was subject to inspection and test by the County and SCDOT. Furthermore, LJ had to correct or re-perform without charge any Work found by the County not to conform to the Agreement's requirements. When asked about stormwater drainage cast on adjacent property, Kimberly Toney of Richland County



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testified that while that normally was the contractor's responsibility, "But, of course, we have to oversee that." "We" being Richland County.

Furthermore, as noted in this court's order, numerous courts have held that governmental entities cannot avoid their constitutional duty to pay just compensation by using contractors. (See Order, ¶ 143-150). The court denies the motion to amend on this ground.

**Drain Inlet in Parking Lot**

Richland County contends the Court erred in finding a taking in the installation of a drain inlet on his property without permission. Basically, the County is asking the Court to change its mind about conflicting testimony. As the Court concluded in the order:

"The original design plans called for it to be placed within the right of way in the driveway to the parking lot. Hugh Wilson of LJ testified that it would not be effective at its planned location in the driveway; and that after discussing the issue with Jason Patterson and Mr. Barczak, they decided to move it to the parking space location. Mr. Barczak was adamant that he never wanted or agreed to an inlet in that location and that any discussions with Mr. Wilson or Patterson were misconstrued. Mr. Barczak's version of events is corroborated by other evidence. First, Mr. Link's notes indicate that after a meeting with Mr. Barczak the City could eliminate the drainage permission. Second, when Mr. Barczak saw the heavy equipment digging the hole for the inlet, he immediately objected and asked for the equipment to be removed from his property. There is no written document authorizing the installation of the drainage inlet in that location." Order, ¶59-67

Mr. Barczak and Mr. Link both testified about Mr. Barczak not wanting drainage on his property and that he wanted this eliminated. Mr. Barczak also testified about this incident with the machinery on his property. He did not want the drainage on his

property because of maintenance responsibility as well as aesthetics. The Defendants are quick to argue that the Slope Agreement is a standard SCDOT form that Link used because the City did not have a form. If that is the case, then the boilerplate language at the top right corner of the page, is just that. The court denies reconsideration of this issue.

**Allegations of Insufficient Damages for Inverse Condemnation**

Inexplicably, the County argues that the continuous flooding of Mr. Barczak's property and building, for 15 months is "simply not of constitutional magnitude." This argument is contrary to applicable law and the facts of this case.

South Carolina law is clear that with regard to inverse condemnation claims, there is no distinction between "taking" and "damaging." See *South Carolina State Highway Dep't v. Wilson*, 254 S.C. 360, 366-67, 175 S.E.2d 391, 395 (1970) (holding, "within the purview of this constitutional provision, there is no distinction between taking and damaging and that the least damage to property constitutes a taking within the purview of the Constitution.") (*Emphasis added*); *see also Spradley v. South Carolina State Highway Dep't*, 256 S.C. 431, 182 S.E.2d 735 (1971) (ruling, "In the construction of this Article of our Constitution, we do not recognize a distinction between 'taking' and 'damaging'. A deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it and is as much a 'taking' as though the property was actually appropriated.").



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"The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment. *Kline vs. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597 (1967) "South Carolina has taken the broadest possible view of 'what is a taking' and has construed the least actual 'damage' to be a 'taking. *Webb v. Greenwood County*, 229 S.C. 267, 92 S.E.2d 688 (S.C. 1956).

As reflected in this Court's order, the continuous flooding of Mr. Barczak's property caused more than a slight inconvenience for Mr. Barczak. The flooding was so frequent that LJ had to put the furniture on blocks. Sabrina Odom testified that she routinely came in after a rain expecting to have to mop up the floor from water and to putting chairs on the desk when she left. Mr. Barczak testified that he could not rent the front part of his building. The mere fact that he could still rent other parts of this building does not make the taking of the rest "not of constitutional magnitude." He also testified to damage to furniture, which was stored there, including his mother's credenza. There was testimony that his French drain was clogged and needed to be replaced. There was also testimony to structural damage to the SE corner of his building.

The Court denies the motion to amend based on the claim that the damages are "simply of not constitutional magnitude."



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## Breach of Contract

Richland County argues that it is not responsible for breach of the special provisions in the Slope Agreement, because there is no privity of contract between Richland County and the Plaintiff. This argument lacks merit for several reasons.

First, both other Defendants in this case, the City of Columbia and SCDOT, argued and offered testimony that Richland County was responsible for fulfilling the special provisions. Second, it is undisputed that Richland County was responsible for managing and oversight of construction. Third, Kimberly Toney, Richland County's witness, testified that it was Richland County's responsibility. Consider the following testimony from her Rule 32(a)(5) Designation which was read into evidence:

- Pg. 69, Lines 2-6 & 13-25
  - **15 ...It is understood and agreed that**
  - **16 the property will be graded to the existing**
  - **17 concrete apron at the entrance building. The**
  - **18 area disturbed will be sodded with Emerald**
  - **19 Zoysia. Further, any landscaping items disturbed**
  - **20 will be replaced and the sprinkler system will be**
  - **21 repaired and returned to as good or better**
  - **22 condition. Construction will tie in, quote,**
  - **23 smoothly with the landscape wall located to the**
  - **24 south of the property and the concrete entry**
  - **25 sidewalks -- the two concrete will be repaired –**

- Pg. 70, Lines 1-2 & 5-18
  - 1 **replaced. I'm sorry. So, whose responsibility**
  - **2 is it to ensure that that's done?**
  - 5 A. We make sure that the, we, as in the County,

- ·6· · · · makes sure that, because we're managing the
- ·7· · · · construction part, we make sure that the
- ·8· · · · contractor addresses these items.
- ·9· ·**Q.· ·So, would that be a punch list item on the thing**
- **10· · · · like we talked before?**
- 11· ·A.· ·Well, this isn't necessarily a punch list item,
- 12· · · · but we just make sure that as they're working,
- 13· · · · getting to this tract, that these items are
- 14· · · · addressed.· If it becomes -- as we're getting
- 15· · · · into landscape or as we're getting to certain
- 16· · · · features on it, that it gets done.
- 17· ·**Q.· ·Okay.· And we, again, Richland County?**
- 18· ·A.· ·Yes.· Sorry.

Finally, to the extent that the County is relying on lack of privity as a defense, our courts have consistently held that doctrine is not favored. "The erosion of the concept of privity has been a legal phenomenon for more than a decade, and this Court has not been reluctant to contribute to its demise. .... ... [L]ack of privity as a defense to a cause of action has been of questionable vitality in South Carolina. Today, we seek to still all whispers of its continued existence." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335 345, 384 S.E.2d 730 (S.C. 1988). While admittedly those cases focused on implied warranties in the sale of a home, the policy is equally applicable, if not more so here: the unequal bargaining power, the lack of knowledge, reality over technicality.

For all these reasons, the Court denies the motion to amend liability for breach of contract.



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Finally, the County argues that Barczak was offered options to complete the work which he rejected. The court already addresses this in the order, where the court held,

There was evidence that Richland County attempted to comply with some of the provisions in the agreement. Exhibit 95 was an email by Jason Patterson to Johnathan Eichelberger by presenting a Tract 53 Plan Sheet which showed various slope ratios of 2:1, 4:1,
and 6:1 onto Mr. Barczak's property along with some stairs and replacement shrubs. Mr. Barczak rejected this proposal.

The problem with this proposal is that the ratios would have resulted in property sloping toward Mr. Barczak's building and Mr. Barczak did not want the drain inlets in his front yard. David Link the right of way agent specifically noted in his field notes that the City could eliminate the drainage permissions.

(Order, ¶186-187)

Not only would the greater slope ratios slope toward the building, but they would also occupy a significant portion of the front yard, which was functional, useable space before. Mr. Barczak was not forced to simply take whatever interpretation of alleged compliance was offered. Furthermore, there was little evidence of additional negotiation or attempts to satisfy these conditions.

As the Court found in the order, "The sidewalks and certain landscaping items have not been replaced, nor has the sprinkler system been repaired and returned to as good or better condition. The construction is not tied in smoothly with the landscape wall and the property

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is not properly graded to the concrete apron. Mr. Barczak provided photographs showing his previous sidewalks ending in the side of the embankment and people during a public event on North Main Street helping each other climb up the hill of the embankment in leaving the property." (Order, ¶39-41).

The County also argues that the Plaintiff's claim is barred by the statute of frauds as being a contract that was not performed within one year. This is a back door effort to reinstate the concept of privity because there is a writing, but it is not signed by Richland County. The court also concludes that the contract was capable of being performed within one year, therefore the statute does not apply. If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract. *Roberts v. Gaskins,* 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct.App.1997).

**Declaratory Judgment**

The County's argument artificially limits the court's power to declare affirmative relief among the parties and the liberal policy of the declaratory judgment act. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree. S.C. Code § 15-53-20. The Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15–53–130 (2005).

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The Plaintiff specifically requested in its Second Amended Complaint for the court to declare "the responsibility for the maintenance of the drain installed to the South of the Property." ¶40(e). There is no question that through a change order, Richland County had no qualms in dealing with the third-party landowner to install the drain inlet on Tract 52 to the South of Mr. Barczak's property. All the experts in the case testified it was essential that this drain is properly maintained to limit the water channeled on to Mr. Barczak's property.

Kim Toney testified in her deposition and through the Rule 32(a)(5) testimony that there was an agreement, but she was not sure if it was written. (Toney, pg. 47, lines 22-25) No such agreement was ever produced to the Plaintiff or offered in evidence at trial. SCDOT testified that the outlet did not appear to be within the SCDOT right of way. Thus, there is a clear uncertainty regarding who will maintain the drain that is essential in minimized the flooding on Mr. Barczak's property.

Mr. Barczak testified that the drain was not being maintained and that the weeds and shrubs were so overgrown that it would be difficult to even find the drain. So any agreement to maintain by the Defendants was clearly ineffectual. Thus, the Court was well within its judicial declaratory powers to declare affirmative relief requiring Richland County (who has already dealt with this landowner) and SCDOT to secure an access easement allow Mr. Barczak to maintain this drain to protect his property.

**Just Compensation Damages**

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The Court's order sets forth the determination of the various damages in detail and how they were calculated. See Order ¶ 77-106; 151-159, therefore, the Court will not simply repeat them here.

The County is fixated on establishing a fixed taking date when the evidence shows that the flooding was continuous and occurred over time. Ms. Tripp, who is a highly qualified MAI appraiser testified that she did not think picking an arbitrary 2018 valuation date was appropriate given the ongoing nature of the flooding and impact on the property. She testified that she had performed hundreds of condemnation appraisals including many for the SCDOT.

As for the lost rental calculations, Ms. Tripp did a thorough rental analysis based on comparable properties and provided a basis for her opinion. Ms. Tripp's expert opinion sets the rental value at 11.00sf or $4,583 month. Mr. Barczak testified that it was approximately $6,100 per month and contrary to the County's assertion he was competent to testify. He was licensed residential real estate appraiser, and while this was commercial property, he owned and rented it. Thus, Ms. Tripp's rental value is well within the range of the evidence submitted to the court, and substantially lower than the owner's testimony. There is no evidence that winding back the clock two years would have made a substantial difference. The Defendants offered no evidence to contradict the lost rental value, other than the Plaintiff's responses to Requests for

Admission which only reflect actual rental income and not what was lost or could have been earned.

As for the length of time for the lost rent, this was thoroughly covered by the Court in its order. "The evidence presented provides some reliable markers. In his Rule 32(a)(5) testimony, Mr. Barczak states that "we are going into month number 9 in June 2019" (Pg. 177 (13-17)). He stated that "There are also photos showing flooding in the office on June 9, 2019" (Exhibit 68a). The record also reflects that Mr. Wilson, with LJ, submitted a proposed change order for the drop inlet on May 10. 2019. In November and December 2019, Mr. Barczak continued damage mitigation from flooding by the Project; he installed a trench around the corner of his building and waterproofed the area. (Exhibits 71 and 72). He also emailed Kimberly Toney (January 9, 2020) stating, "I had to start because I couldn't secure a tenant until I had dry space." (Exhibit 70) Finally, Mr. Barczak testified that the front space remained mostly dry by this point. Thus, the Court finds that from October 2018 until December 27, 2019, Mr. Barczak was unable to rent his building due to flooding caused by the Project. (See Order, ¶95-97)

The evidence for stigma damage is fully supported by Ms. Tripp's and Mr. Barczak's testimony. Ms. Tripp specifically rejected the argument that if the property were repaired, there would be no stigma because it is based on risk perception. Further Mr. Barczak testified about the permanent impact on his property. He pointed out that his property was now in a hole and not as visible, that he could not erect an advertising



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sign, lack of ADA accessibility and loss of functional utility of front yard space. As owner of the property he was competent to testify to value. (See Order, ¶ 103-106)

The Court did not err by awarding David Marion's quote. Mr. Marion was highly qualified expert in drainage and outdoor landscaping. Mr. Marion's statement was itemized reflecting the work to be done and its costs. The County offers no evidence how the Marion quote includes costs unrelated to any taking or breach of contract. There is no reason for Mr. Marion to date the repair costs back to 2018-2019 as the relevant figure is what it costs today. The Plaintiff should not be penalized with increased costs because the Defendants dragged the matter out this long. Mr. Barczak did not have the funds to repair back in 2018-2019 which is why he specifically asked for help from the Defendants but received none.

The court did not ignore Ross Travis estimate but it fails to properly compensate the Plaintiff for his loss and to adequately implement the special provisions of the contract. The Travis quote implements two drains on Mr. Barczak's property which he does not want and has already rejected. It also fails to adequately tie in to the existing walls. This is not mere aesthetics as the Marion quote uses cheaper concrete and not block or tile and the trenches and retaining wall allow more use of the front yard of the Trestle Building. Under the Travis quote, the slope would just be a drain field.



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The additional estimates for the French drain and landscaping are not unrelated to the project and are supported by the preponderance of the evidence. Again the quotes for repair should not be historically based.

The Cantey foundation estimate is proper and supported by the evidence. The Defendant had this quote since October 25, 2023 as well as Mr. Wilson's contact information. The Court incorporates by reference the Plaintiff's response to the Defendants' motion in limine.

The excavation invoices were clearly efforts at mitigation, Its ironic that the County asserts a defense of failure to mitigate damages, and then argues about the invoices for mitigation when presented. There is ample evidence that the furniture was damaged due to the flooding caused by the construction project. There is the direct testimony of Mr. Barczak. There is the numerous pictures. There is the contractor placing the furniture on blocks to try to mitigate damage.

The evidence shows that both the County and SCDOT are responsible for the taking. (See Order, ¶128-150). The court is not required to apportion liability between the government entities, only that each entity is responsible for acts which satisfy the elements of a taking. The the Court has done this in the order.

The case of *S.C. Dep't of Transp. v. Powell,* 424 S.C. 206, 818 S.E.2d 433 (2018) is applicable. That case holds that once a taking is established, then damages are not limited to the property taken but must consider the project as whole. While *Powell* did



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involve a direct condemnation, the principal applies equally to inverse condemnation (once a taking is established).

**Trespass**

The County contests its liability for trespass primarily based on the allegations that there was simply no evidence that the County *intentionally* caused the intrusion of water onto Plaintiff's property. However, as set forth in this court's order, "Intent in the context of trespass does not require malice or a specific purpose to harm. It is sufficient that the defendant intended the act that caused the invasion, even if they did not intend the resulting damage. *Snow v. City of Columbia,* 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App 1991). In other words, "intent is proved by showing that the defendant acted voluntarily or that he knew or should have known the result will follow from his act." Id. (*citing Snakenberg v. Hartford Casualty Insurance Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct.App.1989). Defendants committed an intentional affirmative act and acted voluntarily in erecting the embankment which trapped the water causing water to flow onto Mr. Barczak's property. Furthermore, the Plaintiff's expert, Dan Creed, testified that this flooding was foreseeable based on the topography.

The County contends that while this was foreseeable by an expert, it was not foreseeable by the County; however, the evidence shows that Jason Patterson prepared an exhibit (Exhibit 90) and sent an email (Exhibit 91) on November 16, 2018 to numerous people including officials with Richland County which clearly shows this



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impact and yet the property continued to flood for another year. The Court denies the motion to amend as to trespass.

**Negligence**

The County seeks to avoid liability for negligence by pointing its fingers at the other Defendants, one of whom the Court has dismissed as not being liable. The County claims that "there is no evidence that Richland County was negligent" in the management and oversight of the construction which led to the damages claimed by the Plaintiff. However, the evidence shows that it was foreseeable that the elevation of the roadway would trap the surface water and channel it on to Mr. Barczak's property. See testimony of Dan Creed. As discussed previously with trespass, Jason Patterson with the Richland County PDT (which under the County's contract with LJ is also defined as Richland County) specifically advised County officials about this water being trapped in an email (Ex. 91) and graphic exhibit (Exhibit 90) yet did nothing for over a year while the Trestle Building repeatedly flooded.

The County also throws in that it should have the same design immunity. This will be discussed under the next argument where the County argues about its alleged immunities under the South Carolia Tort Claims Act. (SCTCA).

**South Carolina Tort Claims Act**

The County argues that it has immunity to the causes of action for trespass and negligence under various sections of the SCTCA. The Court notes "[t]he burden of



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establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) The Plaintiff will address each of these alleged exceptions to immunity claimed under S.C. Code Ann. §15-78-60 in turn.

**Design Immunity 15-78-60(15)**

The Court notes that the County goes to great lengths to argue that it was not responsible for the design, therefore it should not now be able to claim design immunity. Second, even if the County could claim design immunity, the damage caused to the Plaintiff was the result of trapped water off the roads and highways and design immunity does not apply. This section applies to highways, roads, streets, causeways, bridges, or other public ways. Finally, the law is clear that design immunity does not apply after notice of the problem. "Although Department of Transportation (DOT) has design immunity under Tort Claims Act (TCA), such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition.". *Wright v. South Carolina Department of Transportation* (App. 2022) 2022 WL 2444703. *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) As noted above, the County was on notice as early as November 16, 2018, by the email and graphic exhibit about the trapped water problem being channeled on to Mr. Barczak's property. Hugh Wilson raised the same

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issue specifically with Kim Toney and Jason Patterson in RFI No. 13 (Exhibit 80) to which the County never answered.

The County also cites to *Marlowe v. S.C. Dep't of Transportation*, 441 S.C. 319, 332, 893 S.E.2d 21, 28 (Ct. App. 2023), abrogated on other grounds, No. 2023-001808, 2025 WL 909152 (S.C. Mar. 26, 2025), reh'g denied (Sept. 10, 2025) (*citing to Hawkins*, 358 S.C. 280) as to discretionary immunity. However, that only applies when there is evidence the County weighed competing choices and alternatives and made a choice. There is no evidence of that here.

**Inspection S.C. Code Ann. §15-78-60(13)**

Under that section, a governmental entity is not liable for a loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies or violates any law, regulation, code, or ordinance or contains a hazard to health and safety." The County presented no evidence of a *regulatory inspection* to determine whether the property complies or violates any law, regulation, code, or ordinance or contains a hazard to health and safety. Furthermore, there was an inspection by Jason Patterson and others which revealed the problem. There is no allegation by the Plaintiff that Richland County was negligent or trespassed because of a failed inspection. This exception does not apply and it did, the County failed in its burden of proof.

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**Other than an employee S.C. Code Ann. §15-78-60(20)**

Finally, the County claims it's not responsible for the actions of its Contractor Hugh Wilson or L-J, Inc. First, the Plaintiff argued that the County had an independent duty from its contractor due to its overall management and oversight responsibilities not to concentrate and discharge water on to the Plaintiff's property and then to take action after notice of the problem. Ms. Toney recognized this duty when she testified,

- **Q.· ·Well, who's responsible on this project for**
- **·5· · · stormwater runoff issues?**
- ·6· · · · · ·MR. WREN:· Object to form.· You can answer.
- ·7· ·A.· ·That would be, during construction, it would
- ·8· · · probably be, more than likely, the -- it's kind
- ·9· · · of tricky because during construction, we
- 10· · · typically say that it's the under the -- it's
- 11· · · under the ownership, so to speak, of the
- 12· · · contractor.· And it's the contractor's
- 13· · · responsibility is what we tend to think.· But, of
- 14· · · course, we have to oversee that.· But we
- 15· · · typically say the contractor is the one that
- 16· · · maintains that.
- 17· ·Q.· ·**And you say we have to oversee that, --**
- 18· ·A.· ·I'm sorry.
- 19· ·**Q.· ·-- you mean Richland County?**
- 20· ·A.· ·Yes.· I'm sorry.· I have to keep remembering
- 21· · · that.

The County itself has a common law duty not to concentrate and discharge surface water on the Trestle building property. This issue came up in the case of *Madison ex rel. Bryant v. Babcock Center*, 634 S.E.2d 275 (S.C. 2006). In that case, the Court held,

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"Department asserts it is not liable for the torts of its independent contractor, Babcock Center, pursuant to S.C .Code Ann. § 15-78-60(20) (2005), which provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." … "We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty. If both Department and Babcock Center independently owe a duty of care to Appellant — even if Department's primary role is ensuring that its contractors manage and operate programs properly and provide appropriate care to clients — either may be held liable for negligence without regard to the other."

Furthermore, the record shows Hugh Wilson and L-J, Inc. tried to help Mr. Barczak and specifically requested help from the County (RFI No. 13) which was not answered. Finally, as noted by the Court in its order, the County exercised a greater degree of control over LJ than a typical contractor. (Order, ¶141).

The Court denies the motion to amend on this ground and concludes that the County failed to prove its affirmative defenses of immunity under S.C. Code Ann. §15-78-60.

**Waiver/Estoppel/Unclean Hands**

The County argues that Mr. Barczak is estopped from asserting the causes of action raised in the complaint based on executing a Slope Permission agreement over two years before construction began near his property. This claim lacks merit. There is no evidence of any false representation or concealment of material facts by Mr. Barczak, or that he intended that the County or other Defendants rely on such facts. Mr. Barczak did not have actual or constructive knowledge that the County would trap water and

repeatedly flood his property. The County certainly had and did acquire knowledge of the true facts when Jason Patterson notified it that the road embankment trapped water and channeled it onto Mr. Barczak's property. Nothing in the Slope Agreement gives the County the reasonable reliance it could flood Mr. Baczak's property based on the Agreement. Mr. Barczak fulfilled all his obligations under the Slope Agreement, the County and SCDOT did not. If anyone was prejudiced, it was Mr. Barczak.

As for laches, the record is replete from the onset of the flooding with Mr. Barczak notifying the County and seeking its help in resolving the problem. It was only after it was clear that the County would not help that Mr. Barczak was forced to file this suit. This is not unreasonable delay or sleeping on rights.

**MOTION FOR NEW TRIAL ABSOLUTE**

The Court did not err in permitting Mr. Barczak to testify regarding the market and rental value of the property and this is not the basis for a new trial. As the property owner, Mr. Barczak is qualified to provide such testimony. South Carolina courts have consistently held that property owners are competent to testify about the value of their property. In *Austin v. Stokes-Craven Holding Corp.*, the Supreme Court of South Carolina stated, "ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (citing *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct.



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App. 1992). Unless the owner's lack of qualification is so complete that their testimony is entirely worthless, it is for the jury to assess the weight of the testimony. *Id.* Additionally, "a property owner is competent to estimate their property's value as a matter of law." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 561, 671 S.E.2d 79, 87 (Ct. App. 2008); *see also Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984) (in an inverse condemnation proceeding, a property owner's testimony that she was knowledgeable about real property in her neighborhood and believed her property to be 75,000 dollars was admissible).

Lastly, challenges to a property owner's qualifications to testify about the value of their property go to the weight of the testimony, not its admissibility. (*See previous cited cases.)*

The County tries to penalize Mr. Barczak simply because he has appraisal knowledge and skills as a property owner.

It was not error to allow Mr. Barczak to testify about his personal observations of how the surface water behaved on and around his own property both before and after the North Main Street Project. opinion testimony from a lay witness is admissible if it is: (a) rationally based on the perception of the witness, (b) helpful to the determination of a fact in issue, and (c) does not require special knowledge, skill, experience, or training. Rule 701, SCRE. Here Mr. Barczak, as the owner and developer of the property, personally observed the surface water on the front lot drain into the street before the project and be trapped by the road embankment after the project. Likewise,



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he observed that the water from the land to his South also drained into the street before the project, but after the project drained down hill dragging mud and silt with it. He also could testify based on his own personal experience and knowledge that the property only flooded once before the project even during the 1000-year flood interval but repeatedly flooded after the project. Mr. Barczak's testimony was consistent with the other testimony of Jason Patterson and Dan Creed.

There was no error in allowing Dan Creed to testify as to causation. He was designated as an expert prior to trial; the Defendants subpoenaed his file which included the Baxter Survey and topography map. They took his deposition which included Plaintiff's Exhibit 97 as an Exhibit to the deposition which contains Mr. Creed's site observation that "The drop inlet constructed on the property to the south very near the common property line and road right of way appears to have been added to the scope of the roadway improvement project in order to divert runoff forced to travel along the right of way into the roadway drainage system before it is discharged onto the subject parcel. There was no surprise or prejudice to his opinion and it was corroborated by the County's own witness Jason Patters. See Exhibits 90 and 91.

There was no error in permitting Mr. Cantey with Cantey Foundation to testify as an expert witness. The Court incorporates by reference the Plaintiff's response to the Defendants' motion in limine. In short, the Plaintiff identified a foundation specialist (Mount Valley) as an expert witness early in the litigation. Subsequently, the Plaintiff

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deciding to use a different foundation expert but he retired, leading to Michael Wilson, Cantey Foundation Specialist. The Defendants had this quote from a 4th supplemental document production since October 25, 2023 which includes Mr. Wilson's name, email address and phone number and a detailed description of the proposed work. There is no prejudice or surprise.

**MOTION FOR NEW TRIAL REMITTITUR**

There is no reason or basis for the Court to reduce the judgment awarded the Plaintiff. It is not unduly liberal and is fully supported by the evidence presented at trial. The order is based on quotes from qualified experts witnesses and is necessary to restore the Plaintiff to as good a position as he was prior to the taking and to give Mr. the Barczak the benefit of his bargain when he agreed to allow the government to use his property. The Ross Travis quote is insufficient. As Mr. Creed testified to in his deposition, he would not be comfortable with a grading only solution. Also, as discussed at trial it included two drains which Mr. Barczak did not want and the proposed solution would turn his front yard into a drain field. The Marion quote in his contract meets the criteria of the Special Provisions, provides less intrusive drainage solutions, and preserves the front yard for use by Mr. Barczak.

**THEREFORE, IT IS HEREBY ORDERED:**

The motion for election is granted in part and as to Richland County, the Plaintiff shall elect between the remedies of inverse condemnation, trespass and negligence

within ten (10) days of entry of this order. The Plaintiff shall retain a negligence judgment against Richland County for 1/3 of the paving costs, as this is a distinct injury not included in the other causes of action, and not a double recovery so any election other than negligence would leave a judgment for negligence in that amount. Order ¶173 (1/3 of paving, $15,546).

The Plaintiff does not have to elect between these causes of action and breach of the special provisions in the permission agreement as this is a different injury and different wrong from the other causes of action discussed above; however, to avoid a double recovery, any recovery by the Plaintiff shall apply equally to satisfy the judgments for both the breach of special provisions, inverse condemnation and such other remedy as may be elected by the Plaintiff (except the distinct injury for negligence discussed above.)

Richland County's motion to amend, motion for a new trial absolute and for remittitur, are denied.

**IT IS SO ORDERED.**

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Richland Common Pleas

**Case Caption:** In The House Llc vs City Of Columbia , defendant, et al

**Case Number:** 2020CP4004769

**Type:** Order/Other

So Ordered

s/ Daniel Coble, 2774