THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-6922

Tipperary Sales d/b/a La-Z-Boy Furniture Gallery ..... Appellant,

v.

South Carolina Department of Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, Charleston Water System, and Associated Developers, Inc.... ..... Defendants,

of which South Carolina Department of Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, and Charleston Water System are .... Respondents.

AMENDED NOTICE OF APPEAL

Appellant appeals (1) the Order of the Honorable R. Markley Dennis, Jr., filed February 18, 2014, dismissing the claims against Respondent City of North Charleston; (2) the Order of the Honorable R. Markley Dennis, Jr., filed February 18, 2014, dismissing the claims against Respondent Charleston Water System; (3) the Order of the Honorable R. Markley Dennis, Jr., filed February 18, 2014, granting Summary Judgment in favor of Respondent South Carolina Department of Health and Environmental Control; and (4) the Order of the Honorable R. Markley Dennis, Jr., filed February 18, 2014, granting Summary Judgment in favor of Respondent South Carolina Department of Transportation.

April 2, 2014

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v.

South Carolina Department of Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, Charleston Water System, and Associated Developers, Inc.... ..... Defendants,

of which South Carolina Department of Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, and Charleston Water System are ....Respondents.

PROOF OF SERVICE

I certify that I served the Amended Notice of Appeal on April 2, 2014, on Respondents and Defendants by depositing a copy of it in the United State Mail, postage prepaid, addressed as follows:

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April 2, 2014

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COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

April 2, 2014

VIA US MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Tipperary Sales d/b/a La-Z-Boy Furniture Gallery v. South Carolina Department of Transportation, et al.
Case No.: 2012-CP-10-6922

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Amended Notice of Appeal for filing in the above-referenced case. I would appreciate your returning a file-stamped copy to me in the enclosed self-addressed stamped envelope. By copy of this letter, I am forwarding a copy of this filing to all counsel of record.

Thank you and with best regards, I am

Very truly yours,

LEATH, BOUCH & SEEKINGS, LLP

Caitlin Amick
Paralegal to Yancey A. McLeod, III, Esq.

Enclosures (as stated)

cc: Roy Maybank
Jason Daigle
G. Wade Cooper
Andrew S. Halio
Phillip S. Ferderigos
Jeff Wiseman

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE No.: 12-CP-10-6922

Tipperary Sales d/b/a La-Z-Boy Furniture Gallery,

Plaintiff,

vs.

South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; Charleston Water System; Associated Developers, Inc., Parkhill, LLC,

Defendants.

ORDER GRANTING DHEC'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before me for a hearing on January 7, 2014 on Defendant South Carolina Health and Environmental Control's (DHEC) Motion for Summary Judgment. Present in the courtroom were the Plaintiff's counsel: Yancey A. McLeod, III, Esquire; Defendant Charleston Water System's counsel, G. Wade Cooper, Esquire, and Leslie S. Riley, Esquire; Defendant City of North Charleston's counsel Phillip S. Ferderigos, Esquire; Andrew S. Halio, Esquire, counsel for DHEC; and Jason A. Daigle, Esquire, counsel for South Carolina Department of Transportation.

As to DHEC, Plaintiff alleges two causes of action: negligence/gross negligence and inverse condemnation. These causes of action arise out of DHEC's issuance of various land disturbance permits, which are alleged to have resulted in the flooding of the Plaintiff's property. After reviewing the pleadings, the motion, and the Plaintiff's opposing memorandum, and considering the arguments of counsel, the Court hereby grants DHEC's Motion for Summary Judgment for the reasons set forth below.[1]

1. SOUTH CAROLINA TORT CLAIMS ACT

Under South Carolina law, any tort action against a governmental entity is governed by the South Carolina Tort Claims Act, which is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Among other portions, the Tort Claims Act sets forth:

[1] The various governmental entity Defendants filed separate motions on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders for each Defendant. In support of its motion for summary judgment, DHEC relies on all of the materials generated in the case, including the materials generated in discovery. The Court also notes that DHEC did not move on the basis of the statute of limitations, but had it done so, the result would have been the same as the Court's ruling with respect to the other governmental entities on that issue.

S.C. Code Ann. § 15-78-60. Exceptions to waiver of immunity.

The governmental entity is not liable for a loss resulting from:

(1) legislative, judicial, or quasi-judicial action or inaction;
(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
...
(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
(5) the exercise of discretion or judgment by the 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;
...
(7) a nuisance;
...
(12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner;
(13) 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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

When a governmental entity owes a duty of care to plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in the Tort Claims Act which are asserted by the governmental entity. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit the liability of the State. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). However, the burden of establishing a limitation upon liability or an exception to the state's waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. Id.

The application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental entity's drainage system has been addressed before by South Carolina courts. In Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.[2]

[2] More specifically, in Hawkins, a business owner brought an action against the City alleging that the City's improper and negligent design and maintenance of its drainage system caused his business to flood. The Court of Appeals held that (1) the city's design and maintenance of the drainage system did not constitute inverse

Pump 2

In Hawkins, Louie Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. The Court affirmed the trial court's grant of summary judgment in favor of the City by noting that, among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (5) "the exercise of discretion or judgment by the 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"; or (13) "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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003); Id. at 293, 594 S.E.2d 564.

The Court of Appeals stated that, although South Carolina courts had previously not applied the Tort Claims Act to facts similar to those of the Hawkins case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered to be inherently quasi-judicial, discretionary functions for which a governmental entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The Texas court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

The South Carolina appellate court held that it found that a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the Court found that the City was immune from liability for negligence claims arising out of the design and maintenance of the drainage system at issue in that case. Hawkins, 358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language

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condemnation; (2) city was not liable under Tort Claims Act; (3) city was not liable for trespass; and (4) city was not liable for conversion. Similar to the allegations in the La-Z-Boy Complaint, Hawkins' property was also located in a low-lying area and had been heavily developed with retail businesses and other large commercial developments. In his lawsuit, Hawkins brought his action against the city, alleging causes of action for (1) inverse condemnation, (2) negligence in the city's design and maintenance of its storm water drainage system, (3) violation of S.C. Code § 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. As a whole, Hawkins stands for the proposition that a governmental entity will not be held liable for damages allegedly resulting from the overall design, construction, or maintenance of its systems for handling surface water absent an "affirmative, positive, aggressive act" by the governmental entity and which proximately causes damages to a person's property. The Hawkins decision controls in this case.

affords a governmental entity absolute immunity for design, construction, and maintenance decisions. The rationale of Hawkins is also applicable to DHEC, which is alleged to have negligently reviewed, inspected and approved erroneous drainage plans, failed to mitigate flooding problems, and failed to supervise surface water drainage near the Plaintiff's property, all of which is precluded by the exceptions to waiver of immunity provisions in the Tort Claims Act cited above and by Hawkins. Additionally, S.C. Code § 15-78-60 (12) provides immunity to DHEC for the issuance of the permits, and Plaintiff was unable to provide any evidence that the permits at issue were issued in a grossly negligent manner. For these reasons, Plaintiff's negligence/gross negligence claims against DHEC fail as a matter of law.

2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim against DHEC also fails under Hawkins. Hawkins argued that the City was liable for his inverse condemnation claim, contending he was deprived of his full rights to his property without just compensation as a result of the City's design and maintenance of the drainage system. The court summarily rejected Hawkins' claim.

In affirming the dismissal of Hawkins' inverse condemnation claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

> 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 to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). Id. at 562 (Emphasis added).

Similarly, Plaintiff has failed to allege or show any "affirmative, positive, aggressive act" on the part of DHEC in this case. The allegations setting forth the basis for the inverse condemnation claim against DHEC are found in Paragraphs 65 - 70 of the Amended Complaint. The mere allegation that DHEC issued permits without accounting for potential downstream flooding is insufficient to support a claim for inverse condemnation. No proof of an "affirmative, positive, aggressive act" on the part of DHEC has been presented to the Court. As such, Plaintiff's inverse condemnation claim against DHEC fails as a matter of law.

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CONCLUSION

For the reasons stated herein, this Court hereby grants DHEC'S Motion for Summary Judgment.

IT IS SO ORDERED!

R. Markley Dennis, Jr., Judge
Ninth Judicial Circuit

Dated: February 7, 2014
Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Tipperary Sales d/b/a La-Z-Boy Furniture Gallery,	)	C/A No. 12-CP-10-06922
	)	
Plaintiff,	)	
	)	
Versus	)	ORDER GRANTING CHARLESTON WATER SYSTEM'S MOTION TO DISMISS
	)	
South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; Charleston Water System; Associated Developers, Inc.; Parkhill, LLC,	)	
	)	
Defendants.	)	

FILED
2014 FEB 18 P 2:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS MATTER came before me for a hearing January 7, 2014 on Defendant Charleston Water System's (CWS)[1] Motion to Dismiss Pursuant to SCRCP Rule 12(c), or, in the alternative, Motion for Summary Judgment. Present in the court were the Plaintiff's counsel: Yancey A. McLeod, III, Esquire; Defendant Charleston Water System's counsel, G. Wade Cooper, Esquire, and Leslie S. Riley, Esquire; Defendant City of North Charleston's counsel Phillip S. Ferderigos, Esquire; Andrew S. Halio, Esquire, counsel for South Carolina Department of Health and Environmental Control; and Jason A. Daigle, Esquire, counsel for South Carolina Department of Transportation.

As to the CWS, Plaintiff alleges four causes of action:

(1) Inverse Condemnation;
(2) Negligent and grossly negligent design, construction, and maintenance;
(3) Negligent and grossly negligent failure to manage storm water runoff; and,
(4) Trespass.

After reviewing the pleadings, the Motions to Dismiss, the Memoranda in support of the Motions and opposing the Motions, reviewing the pleadings, and considering the arguments of counsel, the Court hereby grants Defendant Charleston Water System's Motion to Dismiss based on the pleadings.[2]

[1] The legal name for CWS is the Commissioners of Public Works of the City of Charleston, which does business as CWS.

[2] The various governmental entity Defendants filed Motions for Dismissal Pursuant to SCRCP Rule 12(c) on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders of Dismissal for each separate Defendant.

PMP 1

I. THE PLAINTIFF'S CLAIMS FOR DAMAGES ARISING OUT OF ANY FLOODING EVENT PRIOR TO APRIL 8, 2008 ARE DISMISSED PURSUANT TO THE STATUTE OF LIMITATIONS.

Initially, based upon the pleadings, the Plaintiff's allegations asserting claims against Defendant Charleston Water System for the March 20, 2003, June 16, 2004 and July 22, 2005 flood events are time-barred pursuant to the statute of limitations. For claims filed under the Tort Claims Act, the statute of limitations is two years after the loss was or should have been discovered. See S.C. Code Ann. § 15-78-110 (2005). Plaintiff's Sixth, Seventh, and Eighth causes of action (negligence and trespass) are governed by the South Carolina Tort Claims Act's two-year statute of limitations period for tort claims brought against a governmental entity.[3] For the Plaintiff's remaining claim for inverse condemnation (Fourth cause of action), a three year statute of limitations applies.

Additionally, under South Carolina law, the discovery rule applies to this action.[4] According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999).[5] Under § 15-3-530 and the South Carolina common law, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333

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[3] The South Carolina Tort Claims Act further provides the limitations period is extended an additional year, for a total of three years, when the claimant files a verified claim within one year of the loss or injury. S.C. Code Ann. §§ 15-78-80, -100(a) (2005). Plaintiff did not allege that it filed a verified claim; therefore, the applicable statute of limitations is two years.

[4] See S.C. Code Ann. § 15-3-530 (2005) (applying the discovery rule to causes of action arising under § 15-3-530); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under § 15-3-530, we apply the 'discovery rule'").

[5] Under South Carolina law, "'[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.' Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941) modified Santee Portland Cement v. Daniel Internat'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston v. Sims, supra"; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3 of 7 (S.C. 1997). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

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S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

Furthermore, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).[6]

Here, pursuant to S.C. Code Ann. § 15-78-110 for claims arising under the Tort Claims Act, Plaintiff was required to commence its action against CWS within two years after Plaintiff knew or should have known it had a claim. Further, for all non-tort claims, a three year statute of limitations applies pursuant to S.C. Code Ann. §15-3-530. It is self evident that the operative date Plaintiff had notice and knew or should have known a cause of action may exist against this Defendant was, at the latest, when each flood occurred in 2003, 2004, 2005, 2008 and 2009. As such, for both the Tort Claims Act and non-Tort Claims Act claims, Plaintiff was required to at least file its Summons and Complaint within three years after each flood event to comply with the statute of limitations. Plaintiff failed to do so, and Plaintiff missed the statute of limitations for the alleged flood events in 2003, 2004 and 2005 by filing his Summons and Complaint on April 8, 2010.

As such, Plaintiff's Summons and Complaint in this action were not filed prior to the three year expiration of the statute of limitations, which, at the latest, expired for the alleged 2003, 2004 and 2005 flood events. As the Plaintiff failed to file its Summons and Complaint until April 8, 2010, well after the statute of limitations had been expired for the 2003, 2004, and 2005 flood events, Plaintiff failed to commence its action within the mandatory time period for the statute of limitations and the statute of limitations bars Plaintiff's claims for such events.

II. THE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR ITS (1) TORT CLAIM NEGLIGENCE/GROSS NEGLIGENCE, (2) INVERSE CONDEMNATION, AND (3) TRESPASS CAUSES OF ACTION AGAINST CHARLESTON WATER SYSTEM PURSUANT TO THE HAWKINS DECISION AND THE SOUTH CAROLINA TORT CLAIMS ACT.

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[6] The courts of South Carolina apply the "discovery rule" to determine when a cause of action accrues under the Tort Claims Act. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). According to the discovery rule, the statute of limitations begins to run from the date the injury resulting from the wrongful conduct date either is discovered or may have been discovered by the exercise of reasonable diligence. Id. "The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." Id. "One purpose of a statute of limitations is to 'relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting McKinney v CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." Moates, 322 S.C. at 176, 470 S.E.2d at 404.

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1. NEGLIGENCE/GROSS NEGLIGENCE & SOUTH CAROLINA TORT CLAIMS ACT

Under South Carolina law, any tort action against a governmental entity is governed by the South Carolina Tort Claims Act, which is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Among other portions, the Tort Claims Act sets forth:

> S.C. Code Ann. § 15-78-60. Exceptions to waiver of immunity.
>
> The governmental entity is not liable for a loss resulting from:
>
> (1) legislative, judicial, or quasi-judicial action or inaction;
> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
> ...
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
> (5) the exercise of discretion or judgment by the 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;
> ...
> (7) a nuisance;
> ...
> (13) 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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;
>
> Code 1976 § 15-78-60.

When a governmental entity owes a duty of care to plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in the Tort Claims Act which are asserted by the governmental entity. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit the liability of the State. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). However, the burden of establishing a limitation upon liability or an exception to the state's waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. Id.

The application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental entity's drainage system has been addressed before by South Carolina courts. In Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App.

MD 4

2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.[7] In Hawkins, Louie Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. The Court affirmed the trial court's grant of summary judgment in favor of the City by noting that, among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (5) "the exercise of discretion or judgment by the 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"; or (13) "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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003); Id. at 293, 594 S.E.2d 564.

The Court of Appeals stated that, although South Carolina courts had previously not applied the Tort Claims Act to facts similar to those of the Hawkins case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered to be inherently quasi-judicial, discretionary functions for which a governmental entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The Texas court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

The South Carolina appellate court held that it found a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required

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[7] More specifically, in Hawkins, a business owner brought an action against the City alleging that the City's improper and negligent design and maintenance of its drainage system caused his business to flood. The Court of Appeals held that (1) the city's design and maintenance of the drainage system did not constitute inverse condemnation; (2) city was not liable under Tort Claims Act; (3) city was not liable for trespass; and (4) city was not liable for conversion. Similar to the allegations in the La-Z-Boy Complaint, Hawkins' property was also located in a low-lying area and had been heavily developed with retail businesses and other large commercial developments. In his lawsuit, Hawkins brought his action against the city, alleging causes of action for (1) inverse condemnation, (2) negligence in the city's design and maintenance of its storm water drainage system, (3) violation of S.C. Code § 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. As a whole, Hawkins stands for the proposition that a governmental entity will not be held liable for damages allegedly resulting from the overall design, construction, or maintenance of its systems for handling surface water absent an "affirmative, positive, aggressive act" by the governmental entity and which proximately causes damages to a person's property. The Hawkins decision controls in this case.

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to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the Court found that the City was immune from liability for negligence claims arising out of the *design and maintenance of* the drainage system at issue in the case. Hawkins, 358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language affords a governmental entity absolute immunity for design, construction, and maintenance decisions, and the Tort Claims Act immunity provisions (1), (2), (4), (5), (7), and (13) bar Plaintiff's present tort claims against Charleston Water System.

With regard to CWS, there is an additional statutory basis for dismissal on this basis. CWS is a statutorily-created Commissioners of Public Works pursuant to S.C. Code Ann. §5-31-210 *et seq*. Section 5-31-250 sets forth specific powers of any commissioners of public works as follows:

> The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

Given that CWS has only the powers invested in it by the Legislature as set forth above, CWS does not and cannot have control of any design, construction or maintenance of any drainage system, much less a drainage system located outside of the corporate limits of the City of Charleston.

Here, Plaintiff's Amended Complaint Paragraphs 5 - 52 and Fourth, Sixth, Seventh, and Eighth causes of action do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. Specifically, Plaintiff alleges liability due to CWS' "incorrect design, construction, and maintenance" of its drainage system (Am. Comp. ¶ 20); its refusal "to lower the water level of the Goose Creek Reservoir to prevent upstream flooding" (Am. Comp. ¶ 85); its failure "to design, maintain, and operate the drainage system under its control to prevent or mitigate flooding resulting from even moderate rainfall" (Am. Comp. ¶ 98 (a)); its failure "to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding" (Am. Comp. ¶98 (b)); and CWS' "failure or refusal to take appropriate steps to manage storm water runoff through its drainage basin terminating at the Goose Creek Reservoir" (Am. Comp. ¶ 105). As for the allegations regarding "the drainage system under [CWS'] control," it is clear from §5-31-250 that CWS does not have any control over storm water or drainage systems and therefore cannot fail to maintain such. With regard to the remaining allegations, they, at most, are mere "failures to act" which do not constitute "an affirmative, positive, aggressive act" on the part of this Defendant pursuant to the Hawkins decision. As such, Plaintiff's negligence/gross negligence tort claims against Charleston Water System fail as a matter of law.

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2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim against CWS also fails pursuant to the Hawkins decision. Hawkins argued that the City was liable for his inverse condemnation claim, contending he was deprived of his full rights to his property without just compensation as a result of the City's design and maintenance of the drainage system. The court summarily rejected Hawkins' claim.

In affirming the dismissal of Hawkins' inverse condemnation claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

> 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 to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). Id. at 562 (Emphasis added).

Similarly, here, Plaintiff fails to allege any "affirmative, positive, aggressive act" on the part of the Charleston Water System. Complaint Paragraphs 5 - 52, and 7-88 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. The allegations of the CWS' mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the CWS giving rise to Plaintiff's inverse condemnation claim is practically the same as the City of Greenville's conduct (or lack thereof) absolved by the court in Hawkins. La-Z-Boy repeatedly alleges in its Complaint that the CWS' failure to mitigate upstream flooding by lowering the level of the downstream Goose Creek Reservoir proximately caused flooding on its premises. (Am. Comp. ¶¶ 85, 97, 98, 99, 101, 103, 105). However, pursuant to the Hawkins' court's ruling, the failure to act or to remedy the drainage defects, do not constitute the type of "'affirmative, positive, aggressive' acts by [a] governmental agency" to render it liable for inverse condemnation. At most, the CWS' actions amount to a "mere failure to act," which Hawkins holds is an insufficient basis to render a municipality liable for inverse condemnation. *Id.*; *see also*, Kiriakides v. School District of Greenville County, 675 S.E.2d 439, 443 (S.C. 2009) ("regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land.") (affirming Master-in-Equity's dismissal of inverse condemnation claim).

MD7

3. TRESPASS

As addressed in Hawkins, the essential elements of a trespass cause of action are that (1) "the act must be affirmative, (2) the invasion of the land must be intentional, and (3) the harm caused by the invasion of the land must be the direct result of that invasion." Trespass does not lie for nonfeasance or failure to perform a duty. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. In South Carolina, to maintain a trespass action, an action in trespass will lie if the defendant intentionally entered the property. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means of entry, or the extent of damage. The entry itself is the wrong. See Anderson S.C. Requests to Charge – Civil § 31-13; 4-41; Cedar Cove Homeowners Association, Inc. vs. DiPietro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2007).

Here, for the same reasons outlined in the Hawkins decision and pursuant to the Tort Claims Act, the trespass claim allegations (¶¶ 108-111) in this case fail to set forth sufficient facts to constitute a claim for relief against this Defendant.

CONCLUSION

For the reasons stated herein, this Court hereby grants Defendant Charleston Water System's Motion to Dismiss Pursuant to SCRCP Rule 12(c) based on the South Carolina Tort Claims Act and the Hawkins decision.

IT IS SO ORDERED!

R. Markley Dennis, Jr., Judge
Ninth Judicial Circuit

Dated: February 7, 2014
Charleston, South Carolina

PMD 8

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Tipperary Sales d/b/a La-Z-Boy Furniture Gallery,	)	C/A No. 12-CP-10-06922
	)	
Plaintiff,	)	
	)	
Versus	)	ORDER GRANTING SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT
	)	
South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; Charleston Water System; Associated Developers, Inc.; Parkhill, LLC,	)	
	)	
Defendants.	)	

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS MATTER came before me for a hearing January 7, 2014 on Defendant South Carolina Department of Transportation's (SCDOT) Motion for Summary Judgment pursuant to SCRCP Rule 12(b)(6), 12(c), and 56. Present in the court were the Plaintiff's counsel: Yancey A. McLeod, III, Esquire; Defendant Charleston Water System's counsel, G. Wade Cooper, Esquire, and Leslie S. Riley, Esquire; Defendant City of North Charleston's counsel Phillip S. Ferderigos, Esquire; Andrew S. Halio, Esquire, counsel for South Carolina Department of Health and Environmental Control; and Jason A. Daigle, Esquire, counsel for South Carolina Department of Transportation.

As to SCDOT, Plaintiff alleges three causes of action:

(1) Inverse Condemnation;
(2) Trespass; and,
(2) Negligence/Gross Negligence.

After reviewing the pleadings, the Motion for Summary Judgment, the Memoranda in support of the Motions and opposing the Motions, reviewing the pleadings, and considering the arguments of counsel, the Court hereby grants Defendant South Carolina Department of Transportation's Motion for Summary Judgment based on the pleadings.[1]

[1] The various governmental entity Defendants filed Motions for Dismissal Pursuant to SCRCP Rule 12(c) on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders of Dismissal for each separate Defendant.

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I. THE PLAINTIFF'S CLAIMS FOR DAMAGES ARISING OUT OF ANY FLOODING EVENT PRIOR TO APRIL 8, 2008 ARE DISMISSED PURSUANT TO THE STATUTE OF LIMITATIONS.

Initially, based upon the pleadings, the Plaintiff's allegations asserting claims against the SCDOT for the March 20, 2003, June 16, 2004 and July 22, 2005 flood events are time-barred pursuant to the statute of limitations. For claims filed under the Tort Claims Act, the statute of limitations is two years after the loss was or should have been discovered. See S.C. Code Ann. § 15-78-110 (2005). Plaintiff's Eighth and Fourteenth causes of action (trespass and negligence/gross negligence) are governed by the South Carolina Tort Claims Act's two-year statute of limitations period for tort claims brought against a governmental entity.[2] For the Plaintiff's remaining claim for inverse condemnation (First cause of action), a three year statute of limitations applies.

Additionally, under South Carolina law, the discovery rule applies to this action.[3] According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999).[4] Under § 15-3-530 and the South Carolina common law, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333

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[2] The South Carolina Tort Claims Act further provides the limitations period is extended an additional year, for a total of three years, when the claimant files a verified claim within one year of the loss or injury. S.C. Code Ann. §§ 15-78-80, -100(a) (2005). Plaintiff did not allege that it filed a verified claim; therefore, the applicable statute of limitations is two years.

[3] See S.C. Code Ann. § 15-3-530 (2005) (applying the discovery rule to causes of action arising under § 15-3-530); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under § 15-3-530, we apply the 'discovery rule'").

[4] Under South Carolina law, "'[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.' Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941) modified Santee Portland Cement v. Daniel Internat'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston v. Sims, supra"; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3 of 7 (S.C. 1997). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

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S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

Furthermore, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).[5]

Here, pursuant to S.C. Code Ann. § 15-78-110 for claims arising under the Tort Claims Act, Plaintiff was required to commence its action against the SCDOT within two years after Plaintiff knew or should have known it had a claim. Further, for all non-tort claims, a three year statute of limitations applies pursuant to S.C. Code Ann. §15-3-530. It is self evident that the operative date Plaintiff had notice and knew or should have known a cause of action may exist against this Defendant was, at the latest, when each flood occurred in 2003, 2004, 2005, 2008 and 2009. As such, for both the Tort Claims Act and non-Tort Claims Act claims, Plaintiff was required to at least file its Summons and Complaint within three years after each flood event to comply with the statute of limitations. Plaintiff failed to do so, and Plaintiff missed the statute of limitations for the alleged flood events in 2003, 2004 and 2005 by filing his Summons and Complaint on April 8, 2010.

As such, Plaintiff's Summons and Complaint in this action were not filed prior to the three year expiration of the statute of limitations, which, at the latest, expired for the alleged 2003, 2004 and 2005 flood events. As the Plaintiff failed to file its Summons and Complaint until April 8, 2010, well after the statute of limitations had been expired for the 2003, 2004, and 2005 flood events, Plaintiff failed to commence its action within the mandatory time period for the statute of limitations and the statute of limitations bars Plaintiff's claims for such events.

II. THE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR ITS (1) TORT CLAIM NEGLIGENCE/GROSS NEGLIGENCE, (2) INVERSE CONDEMNATION, AND (3) TRESPASS CAUSES OF ACTION AGAINST THE SCDOT PURSUANT TO THE HAWKINS DECISION AND THE SOUTH CAROLINA TORT CLAIMS ACT.

1. NEGLIGENCE/GROSS NEGLIGENCE & SOUTH CAROLINA TORT CLAIMS ACT

[5] The courts of South Carolina apply the "discovery rule" to determine when a cause of action accrues under the Tort Claims Act. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). According to the discovery rule, the statute of limitations begins to run from the date the injury resulting from the wrongful conduct date either is discovered or may have been discovered by the exercise of reasonable diligence. Id. "The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." Id. "One purpose of a statute of limitations is to 'relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting McKinney v CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." Moates, 322 S.C. at 176, 470 S.E.2d at 404.

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Under South Carolina law, any tort action against a governmental entity is governed by the South Carolina Tort Claims Act, which is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Among other portions, the Tort Claims Act sets forth:

> S.C. Code Ann. § 15-78-60. Exceptions to waiver of immunity.
>
> The governmental entity is not liable for a loss resulting from:
>
> (1) legislative, judicial, or quasi-judicial action or inaction;
> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
> ...
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
> (5) the exercise of discretion or judgment by the 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;
> ...
> (7) a nuisance;
> ...
> (13) 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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;
>
> Code 1976 § 15-78-60.

When a governmental entity owes a duty of care to plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in the Tort Claims Act which are asserted by the governmental entity. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit the liability of the State. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). However, the burden of establishing a limitation upon liability or an exception to the state's waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. Id.

The application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental entity's drainage system has been addressed before by South Carolina courts. In Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.[6]

[6] More specifically, in Hawkins, a business owner brought an action against the City alleging that the City's improper and negligent design and maintenance of its drainage system caused his business to flood. The Court of Appeals held that (1) the city's design and maintenance of the drainage system did not constitute inverse

In Hawkins, Louie Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. The Court affirmed the trial court's grant of summary judgment in favor of the City by noting that, among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (5) "the exercise of discretion or judgment by the 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"; or (13) "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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003); Id. at 293, 594 S.E.2d 564.

The Court of Appeals stated that, although South Carolina courts had previously not applied the Tort Claims Act to facts similar to those of the Hawkins case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered to be inherently quasi-judicial, discretionary functions for which a governmental entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The Texas court in City of Tyler opined:

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The South Carolina appellate court held that it found a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required *to build and maintain* an adequate municipal sewer and drainage system in Greenville. Accordingly, the Court found that the City was immune from liability for negligence claims arising out of the *design and maintenance of* the drainage system at issue in the case. Hawkins,

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condemnation; (2) city was not liable under Tort Claims Act; (3) city was not liable for trespass; and (4) city was not liable for conversion. Similar to the allegations in the La-Z-Boy Complaint, Hawkins' property was also located in a low-lying area and had been heavily developed with retail businesses and other large commercial developments. In his lawsuit, Hawkins brought his action against the city, alleging causes of action for (1) inverse condemnation, (2) negligence in the city's design and maintenance of its storm water drainage system, (3) violation of S.C. Code § 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. As a whole, Hawkins stands for the proposition that a governmental entity will not be held liable for damages allegedly resulting from the overall design, construction, or maintenance of its systems for handling surface water absent an "affirmative, positive, aggressive act" by the governmental entity and which proximately causes damages to a person's property. The Hawkins decision controls in this case.

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358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language affords a governmental entity absolute immunity for design, construction, and maintenance decisions, and the Tort Claims Act immunity provisions (1), (2), (4), (5), (7), and (13) bar Plaintiff's present tort claims against the SCDOT.

Here, Plaintiff's Amended Complaint Paragraphs 2 - 52 and First, Eighth and Fourteenth causes of action do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. Specifically, Plaintiff alleges liability due to SCDOT's "refusing to ensure adequate and appropriate drainage" (Am. Comp. ¶ 126 (a)), "in refusing to take any steps to remedy and correct the inadequate drainage" (Am. Comp. ¶ 126 (b)), "in failing and refusing to ensure adequate drainage for implementation of a storm water system" (Am. Comp. ¶ 126 (c)), "in designing, constructing and maintaining the Highway 52 Connector improvements without providing for sufficient drainage of surface water from the highway" (Am. Comp. ¶ 126 (d)), "in refusing to take substantive steps tomitigate or prevent future flooding" (Am. Comp. ¶ 126 (e)), and "in failing to properly supervise the surface water drainage system in the Northwoods Mall and Northwoods Pointe Shopping Center area" (Am. Comp. ¶ 126(f)) are mere "failures to act" which do not constitute "an affirmative, positive, aggressive act" on the part of this Defendant pursuant to the Hawkins decision. As such, Plaintiff's negligence/gross negligence tort claim fails as a matter of law.

2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim against the SCDOT also fails pursuant to the Hawkins decision. Hawkins argued that the City was liable for his inverse condemnation claim, contending he was deprived of his full rights to his property without just compensation as a result of the City's design and maintenance of the drainage system. The court summarily rejected Hawkins' claim.

In affirming the dismissal of Hawkins' inverse condemnation claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

> 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 to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149,

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427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). Id. at 562 (Emphasis added).

Similarly, here, Plaintiff fails to allege any "affirmative, positive, aggressive act" on the part of the SCDOT. Complaint Paragraphs 2 – 63 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. The allegations of the SCDOT's mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the SCDOT giving rise to Plaintiff's inverse condemnation claim is practically the same as the City of Greenville's conduct (or lack thereof) absolved by the court in Hawkins. La-Z-Boy repeatedly alleges in its Complaint that the SCDOT's construction and installation of developments upstream from its location at Northwoods Pointe, along with its failure to remedy certain drainage defects, proximately caused flooding on its premises. (Am. Comp. ¶¶ 9 - 12, 16, 24, 29 – 34, 60). However, pursuant to the Hawkins' court's ruling, the failure to act or to remedy the drainage defects, do not constitute the type of "'affirmative, positive, aggressive' acts by [a] governmental agency" to render it liable for inverse condemnation. At most, the SCDOT's actions amount to a "mere failure to act," which Hawkins holds is an insufficient basis to render a municipality liable for inverse condemnation. *Id.*; *see also*, Kiriakides v. School District of Greenville County, 675 S.E.2d 439, 443 (S.C. 2009) ("regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land.") (affirming Master-in-Equity's dismissal of inverse condemnation claim).

3. TRESPASS

As addressed in Hawkins, the essential elements of a trespass cause of action are that (1) "the act must be affirmative, (2) the invasion of the land must be intentional, and (3) the harm caused by the invasion of the land must be the direct result of that invasion." Trespass does not lie for nonfeasance or failure to perform a duty. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. In South Carolina, to maintain a trespass action, an action in trespass will lie if the defendant intentionally entered the property. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means of entry, or the extent of damage. The entry itself is the wrong. See Anderson S.C. Requests to Charge – Civil § 31-13; 4-41; Cedar Cove Homeowners Association, Inc. vs. DiPietro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2007).

Here, for the same reasons outlined in the Hawkins decision and pursuant to the Tort Claims Act, the trespass claim allegations (¶¶ 108-111) in this case fail to set forth sufficient facts to constitute a claim for relief against this Defendant.

CONCLUSION

For the reasons stated herein, this Court hereby grants Defendant South Caolina Department of Transportation's Motion for Summary Judgment pursuant to SCRCP Rule 12(b)(6), 12(c), and 56 based on the South Carolina Tort Claims Act and the Hawkins decision.

rmo 9/12

IT IS SO ORDERED!

R. Markley Dennis, Jr., Judge
Ninth Judicial Circuit

Dated: February 7, 2014
Charleston, South Carolina

RMD 7/8

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE No.: 12-CP-10-6922

Tipperary Sales d/b/a La-Z-Boy Furniture Gallery,

Plaintiff,

vs.

South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; Charleston Water System; Associated Developers, Inc., Parkhill, LLC,

Defendants.

ORDER GRANTING CITY OF NORTH CHARLESTON'S MOTION TO DISMISS

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS MATTER came before me for a hearing on January 7, 2014 on Defendant City of North Charleston's Motion to Dismiss Pursuant to SCRCP Rule 12(c). Present in the court were the Plaintiff's counsel Yancey A. McLeod, III, Esquire, Defendant City of North Charleston's counsel Phillip S. Ferderigos, Esquire, G. Wade Cooper, Esquire counsel for Charleston Water System, Andrew S. Halio, Esquire counsel for South Carolina Department of Health and Environmental Control, and Jason A. Daigle, Esquire counsel for South Carolina Department of Transportation.

After reviewing the pleadings, the Motions to Dismiss, the Memoranda in support of the Motions and opposing the Motions, reviewing the pleadings, and considering the arguments of counsel, the Court hereby grants Defendant City of North Charleston's Motion to Dismiss based on the pleadings.[1]

I. THE PLAINTIFF'S CLAIMS FOR DAMAGES ARISING OUT OF ANY FLOODING EVENT PRIOR TO APRIL 8, 2008 ARE DISMISSED PURSUANT TO THE STATUTE OF LIMITATIONS.

Initially, based upon the pleadings, the Plaintiff's allegations asserting claims against Defendant City of North Charleston for the March 20, 2003, June 16, 2004 and July 22, 2005 flood events are time-barred pursuant to the statute of limitations. For claims filed under the Tort Claims Act, the statute of limitations is two years after the loss was or should have been discovered. See S.C. Code Ann. § 15-78-110 (2005). Plaintiff's Fifth, Eighth, and Twelfth

[1] The various governmental entity Defendants filed Motions for Dismissal Pursuant to SCRCP Rule 12(c) on similar grounds; however, as the factual allegations against each Defendant governmental entity are somewhat distinct, the Court has adopted separate Orders of Dismissal for each separate Defendant.

claims are governed by the South Carolina Tort Claims Act's two-year statute of limitations period for tort claims brought against a governmental entity.[2] For the Plaintiff's remaining Third claim for inverse condemnation, a three year statute of limitations applies.

Additionally, under South Carolina law, the discovery rule applies to this action.[3] According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999).[4] Under § 15-3-530 and the South Carolina common law, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

Furthermore, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).[5]

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[2] The South Carolina Tort Claims Act further provides the limitations period is extended an additional year, for a total of three years, when the claimant files a verified claim within one year of the loss or injury. S.C. Code Ann. §§ 15-78-80, -100(a) (2005). Plaintiff did not allege that it filed a verified claim; therefore, the applicable statute of limitations is two years.

[3] See S.C. Code Ann. § 15-3-530 (2005) (applying the discovery rule to causes of action arising under § 15-3-530); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under § 15-3-530, we apply the 'discovery rule'").

[4] Under South Carolina law, "'[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.' Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941) modified Santee Portland Cement v. Daniel Internat'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston v. Sims, supra"; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3 of 7 (S.C. 1997). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

[5] The courts of South Carolina apply the "discovery rule" to determine when a cause of action accrues under the Tort Claims Act. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). According to the discovery rule, the statute of limitations begins to run from the date the injury resulting from the wrongful conduct date either is discovered or may have been discovered by the exercise of reasonable diligence. Id.

Here, pursuant to S.C. Code Ann. § 15-78-110 for claims arising under the Tort Claims Act, Plaintiff was required to commence its action against Defendant within two years after Plaintiff knew or should have known it had a claim. Further, pursuant to S.C. Code Ann. § 15-3-530 for all non-tort claims, a three year statute of limitations applies. It is self evident that the operative date Plaintiff had notice and knew or should have known a cause of action may exist against this Defendant was, at the latest, when each flood occurred in 2003, 2004, 2005, 2008 and 2009. As such, for both the Tort Claims Act and non-Tort Claims Act claims, Plaintiff was required to at least file its Summons and Complaint within three years after each flood event to comply with the statute of limitations. Plaintiff failed to do so, and Plaintiff missed the statute of limitations for the alleged flood events in 2003, 2004 and 2005 by filing his Summons and Complaint on April 8, 2010.

As such, Plaintiff's Summons and Complaint in this action were not filed prior to the three year expiration of the statute of limitations, which, at the latest, expired for the alleged 2003, 2004 and 2005 flood events. As the Plaintiff failed to file its Summons and Complaint until April 8, 2010, well after the statute of limitations had been expired for the 2003 – 2005 flood events, Plaintiff failed to commence its action within the mandatory time period for the statute of limitations and the statute of limitations bars Plaintiff's claims for such events.

II. THE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR ITS (1) TORT CLAIM NEGLIGENCE/GROSS NEGLIGENCE, (2) INVERSE CONDEMNATION, (3) S.C. CODE ANN. § 5-31-450 VIOLATION, AND (4) TRESPASS CAUSES OF ACTION AGAINST DEFENDANT CITY OF NORTH CHARLESTON PURSUANT TO THE HAWKINS DECISION

1. SOUTH CAROLINA TORT CLAIMS ACT

Under South Carolina law, any tort action against a government is governed by the South Carolina Tort Claims Act. The Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Among other portions, the Tort Claims Act sets forth:

S.C. Code Ann. § 15-78-60. Exceptions to waiver of immunity.

The governmental entity is not liable for a loss resulting from:

(1) legislative, judicial, or quasi-judicial action or inaction;
(2) administrative action or inaction of a legislative, judicial, or quasi-judicial

"The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." Id. "One purpose of a statute of limitations is to 'relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting McKinney v CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." Moates, 322 S.C. at 176, 470 S.E.2d at 404.

nature;

(3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

(5) the exercise of discretion or judgment by the 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;

...

(7) a nuisance;

...

(9) entry upon any property where entry is expressly or impliedly authorized by law;

...

(13) 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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

(20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons.

Code 1976 § 15-78-60

When a governmental entity owes a duty of care to plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in the Tort Claims Act which are asserted by the governmental entity. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). When a governmental entity asserts various exceptions to the waiver of immunity under the state Tort Claims Act, the correct approach is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999). However, the burden of establishing a limitation upon liability or an exception to the state's waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999).

The application of the Tort Claims Act to allegations arising out of design and/or maintenance of a city's drainage system has been addressed before by South Carolina courts. In Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), the Court of Appeals held that the Tort Claims Act immunity provisions bar such claims.[6] In Hawkins, Louie

[6] More specifically, in Hawkins, a business owner brought an action against the city alleging that the city's improper and negligent design and maintenance of its drainage system caused his business to flood. The Court of Appeals held that (1) the city's design and maintenance of the drainage system did not constitute inverse condemnation; (2)

Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. The Court affirmed the trial court's grant of summary judgment in favor of the City by noting that, among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (5) "the exercise of discretion or judgment by the 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"; or (13) "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 with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003); Id. at 293, 594 S.E.2d 564.

The Court of Appeals stated that, although South Carolina courts had previously not applied the Tort Claims Act to facts similar to those of the Hawkins case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for which a government entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The Texas court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

The South Carolina appellate court held that it found a comparable degree of discretion was granted to the City in the Hawkins case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the Court found that the City was immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin. Hawkins, 358 S.C. at 293-94, 594 S.E.2d at 564. The Hawkins decision's broad language affords

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city was not liable under Tort Claims Act; (3) city was not liable for trespass; and (4) city was not liable for conversion. Similar to the allegations in the La-Z-Boy Complaint, Hawkins' property was also located in a low-lying area and had been heavily developed with retail businesses and other large commercial developments. In his lawsuit, Hawkins brought his action against the city, alleging causes of action for (1) inverse condemnation, (2) negligence in the city's design and maintenance of its storm water drainage system, (3) violation of S.C. Code § 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. As a whole, Hawkins stands for the proposition that a municipality will not be held liable for damages allegedly resulting from the overall design or maintenance of its systems for handling surface water absent an "affirmative, positive, aggressive act" by a governmental agency which proximately causes damages to a person's property. The Hawkins decision controls in this case.

a governmental entity, such as a city, absolute immunity for design and maintenance decisions, and the Tort Claims Act immunity provisions (1), (2), (3-5), (7), (9), (13), and (20) bar Plaintiff's present tort claim.

Here, Amended Complaint Paragraphs 4 - 52 and 118 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. Specifically, Plaintiff's allegations that the City of North Charleston's "failing and refusing to ensure adequate and appropriate drainage" (Am. Comp. ¶ 118 (a)), "in failing and refusing to take steps to remedy and correct the inadequate drainage" (Am. Comp. ¶ 118 (b)), "in failing and refusing to ensure adequate drainage for implementation of a stormwater system" (Am. Comp. ¶ 118 (c)), "in negligently reviewing, inspecting, and approving ill conceived and factually erroneous drainage plans for construction upstream from the designated well-known flood areas" (Am. Comp. ¶ 118 (d)), "in failing to provide for sufficient drainage for surface water from Ashley Phosphate Road and down Northwoods Blvd." (Am. Comp. ¶ 118 (e)), "in failing and refusing to take any substantive steps to mitigate or prevent future flooding" (Am. Comp. ¶ 118 (f)), "in failing to design and maintain a reasonably adequate surface water drainage system in the Northwoods Mall and Northwoods Pointe shopping center area" (Am. Comp. ¶ 118 (g)), and "in failing to properly supervise the surface water drainage system in the Northwoods Mall and Northwoods Pointe Shopping Center area" (Am. Comp. ¶ 118 (h)) are mere "failures to act" which do not constitute "an affirmative, positive, aggressive act" on the part of this Defendant pursuant to the Hawkins decision. As such, Plaintiff's negligence/gross negligence tort claim fails as a matter of law.

2. INVERSE CONDEMNATION

Plaintiff's inverse condemnation claim also fails pursuant to the Hawkins decision. Hawkins argued that the city was liable for his inverse condemnation claim, contending he was deprived of his full rights to his property without just compensation as a result of the city's design and maintenance of the drainage system. The court summarily rejected Hawkins' claim.

In affirming the dismissal of Hawkins' inverse condemnation claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

> 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 to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency");

Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). Id. at 562 (Emphasis added).

Similarly, here, Plaintiff fails to allege any "affirmative, positive, aggressive act" on the part of the City of North Charleston. Complaint Paragraphs 4 - 52, and 72-74 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. The allegations of the City's mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the City of North Charleston giving rise to Plaintiff's inverse condemnation claim is practically the same as the City of Greenville's conduct absolved by the court in Hawkins. La-Z-Boy repeatedly alleges in its Complaint that the City's permitting of developments upstream from its location at Northwoods Pointe, along with its failure to remedy certain drainage defects, proximately caused flooding on its premises. (Am. Comp. ¶¶ 9, 10, 24, 30, 42-47). However, pursuant to the Hawkins' court's ruling, the City's actions in "allow[ing] the development of neighboring parcels of commercial property" which allegedly "added strain" to the existing upstream watershed, as well as its alleged failure to remedy the drainage defects, do not constitute the type of "'affirmative, positive, aggressive' acts by [a] governmental agency" to render it liable for inverse condemnation. At most, the City's actions amount to a "mere failure to act," which Hawkins holds is an insufficient basis to render a municipality liable for inverse condemnation. Id.; see also, Kiriakides v. School District of Greenville County, 675 S.E.2d 439, 443 (S.C. 2009) ("regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land.") (affirming Master-in-Equity's dismissal of inverse condemnation claim).

3. S.C. CODE § 5-31-450

S.C. Code Ann. § 5-31-450 reads in full:

"Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person."

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In applying S.C. Code § 5-31-450, the Hawkins court held that liability does not exist under such section absent some affirmative act by the municipality which alters the course or increases the amount of storm water runoff onto private property:

> Applying this statute, our courts have held that liability does not obtain under section 5-31-450 absent some affirmative act by the municipality which alters the course or increases the amount of storm water runoff onto private property. See Brown v. Sch. Dist. of Greenville County, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968) (holding that unless the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is no cause of action under the statute). "The statute does not purport to make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover. By the same token, a municipality may not absolve itself from liability by diverting the surface water from its streets into a natural watercourse too small to carry it off." Hall v. City of Greenville, 227 S.C. 375, 386, 88 S.E.2d 246, 251 (1955). "The statute does not make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover. Therefore, unless the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is no cause of action under the statute." Taleff v. City of Greer, 284 S.C. 510, 512, 327 S.E.2d 363, 364 (Ct. App. 1985) (citations omitted). "Under this statute proof of negligence, in the usual sense of the word, in the design or construction of the drainage facilities installed by a municipality for the purpose of carrying off surface water along a street or other public thoroughfare is not an essential ingredient of the cause of action in favor of an adjacent landowner whose property has been damaged by surface water cast upon it as the result of such construction." Hall, 227 S.C. 386, 88 S.E.2d 251. This section apodictically contemplates positive action by a municipality to render it liable for damages. Brown, 251 S.C. 225, 161 S.E.2d 817. (Emphasis added).

Initially, S.C. Code Ann. §5-31-450 requires a "demand from the owner of such private lands," not the tenant of the property owner. Here, the pleadings are deficient in alleging a cause of action pursuant to the statute because the Plaintiff does not allege that the land owner of the property (as opposed to the tenant) demanded the City of North Charleston to take any action. In addition, S.C. Code Ann. §5-31-450 creates a cause of action in favor of a landowner, not a tenant, and requires that a landowner plead and prove an overt act against a municipality. As S.C. Code Ann. §5-31-450 does not create a cause of action in favor of a tenant and otherwise requires a "demand from the owner of such private lands," Plaintiff's Complaint fails to allege facts to sufficiently set forth a cause of action against this Defendant pursuant to S.C. Code Ann. §5-31-450. Accordingly, the Plaintiff's §5-31-450 claim, as pled, does not set forth a claim for relief and such claim is dismissed.

As an alternate sustaining ground, however, similar to Hawkins, Plaintiff has failed to factually allege any "affirmative, positive, aggressive acts" of any damage resulting from the

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municipality's works.[7] Complaint Paragraphs 4 – 52 and 90 do not factually allege any "affirmative, positive, aggressive act" on the part of this Defendant. Based on Hawkins, the City of North Charleston's act in approving permits is not the type of "positive action" or "overt act" contemplated by the statute to render it liable. The allowance of construction upstream from an affected area or a municipality's failure to take steps to alleviate downstream flooding, as alleged by La-Z-Boy and by Hawkins in their Complaints, is not the type of acts which give rise to liability under § 5-31-450 or the other causes of actions alleged against the City of North Charleston.

Further, Plaintiff's allegations that the City of North Charleston's "failing and refusing to ensure adequate and appropriate drainage" (Am. Comp. ¶ 90 (a)), "in failing and refusing to take steps to remedy and correct the inadequate drainage" (Am. Comp. ¶ 90 (b)), "in failing and refusing to ensure adequate drainage for implementation of a stormwater system" (Am. Comp. ¶ 90 (c)), "in reviewing, inspecting, and approving ill conceived and factually erroneous drainage plans for construction upstream from the designated well-known flood areas" (Am. Comp. ¶ 90 (d)), "in failing to provide for sufficient drainage for surface water from Ashley Phosphate Road and down Northwoods Blvd." (Am. Comp. ¶ 90 (e)), "in failing and refusing to take any substantive steps to mitigate or prevent future flooding" (Am. Comp. ¶ 90 (f)), "in failing to design and maintain a reasonably adequate surface water drainage system in the Northwoods Mall and Northwoods Pointe shopping center area" (Am. Comp. ¶ 90 (g)), and "in failing to properly supervise the surface water drainage system in the Northwoods Mall and Northwoods Pointe Shopping Center area" (Am. Comp. ¶ 90 (h)) are mere "failures to act" which do not constitute "an affirmative, positive, aggressive act" on the part of this Defendant pursuant to the Hawkins decision. As such, Plaintiff's § 5-13-450 claim fails as a matter of law.

4. TRESPASS

As addressed in Hawkins, the essential elements of a trespass cause of action are that (1) "the act must be affirmative, (2) the invasion of the land must be intentional, and (3) the harm caused by the invasion of the land must be the direct result of that invasion." Trespass does not lie for nonfeasance or failure to perform a duty. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. In South Carolina, to maintain a trespass action, an action in trespass will lie if the defendant intentionally entered the property. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means of entry, or the extent of damage. The entry itself is the wrong. See Anderson S.C. Requests to Charge – Civil § 31-13; 4-41; Cedar Coye Homeowners Association, Inc. vs. DiPietro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2007).

Here, for the same reasons outlined in the Hawkins decision and pursuant to the Tort Claims Act, the trespass claim allegations (¶¶ 108-111) in this case fail to set forth sufficient

[7] The Hawkins court summarily dismissed that a city "improperly" allowing the development of neighboring parcels of commercial property which alters the elevation of an area and adds strain to the drainage pipes beyond their capacity amounts to an affirmative act. Similar to the analysis it applied to affirming the dismissal of Hawkins' inverse condemnation claim, the South Carolina Court of Appeals affirmed the trial court's dismissal of Hawkins' claim that the City violated § 5-31-450 on such grounds.

facts to constitute a claim for relief against this Defendant.

CONCLUSION

For the reasons stated herein, this Court hereby grants Defendant City of North Charleston's Motion to Dismiss Pursuant to SCRCP Rule 12(c) based on the South Carolina Tort Claims Act, S.C. Code Ann. ¶ 5-31-450, and the Hawkins decision.

IT IS SO ORDERED!

R. Markley Dennis, Jr., Judge
Ninth Judicial Circuit

Dated: February 7, 2014
Charleston, South Carolina

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