

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Alison Renee Lee, Circuit Court Judge

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

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MAY 13 2014

SC Court of Appeals

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

v.

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

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

v.

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

**REPLY BRIEF
OF APPELLANT-RESPONDENT**

Andrew F. Lindemann
Michael B. Wren
Daniel C. Plyler
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Appellant-Respondent
Town of Latta*

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ARGUMENTS

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

The Appellant-Respondent Town of Latta contends that Circuit Court Judge Alison Renee Lee erred in denying the Town's directed verdict and JNOV motions on the basis of discretionary immunity. In reply, the Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") offer several arguments, each of which lacks merit.

First, the Grahams argue that there is no evidence that the Town "considered" the various options including the options for relocation, replacement and repair that were considered by the Town engineer, as well as the fourth option which was to take no remedial action. The Grahams do not dispute that Mike Hanna, acting in his capacity as the Town engineer who investigated the Grahams' complaint, considered and weighed those options. Yet, they contend that the governing authority for the Town was required to consider those options. The Grahams have not shown, however, that this was a legislative issue to be decided by Town Council. The defense of discretionary immunity does not require the exercise of discretion by Town Council; the exercise of discretion by the Town engineer is sufficient to trigger the immunity. In fact, many decisions regarding

repair of roads, public utilities and the like are executive decisions, not legislative ones, and many such decisions are made by engineers. By way of example, decisions regarding state road designs or repairs are not decisions made by the General Assembly.

Nonetheless, the Grahams' argument is immaterial given Judge Lee's findings, which were not appealed by the Grahams. In her Order filed March 8, 2013, Judge Lee wrote:

Defendant claims that the testimony of Mike Hanna established that Defendant considered and weighed competing alternatives, and then used accepted professional standards in deciding that there was nothing needed to be done regarding the portion of its sanitary sewer and drainage system at issue. Testimony was given at trial that Defendant was presented with several choices to remedy the drainage problem: move the pipe on Plaintiffs' residence, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing. Testimony was also presented that Defendant conducted smoke tests to determine whether there was a defect, and attempted to snake a camera through the line, then made a decision not to repair the pipe.

(R. 12). Judge Lee found that the Defendant (i.e., the Town) was presented with the various choices and made the decision to take no action. The Grahams did not seek to reconsider that finding, nor did they appeal that finding.¹ See, *Arcadian Shores Single Family Homeowners Association, Inc. v. Cromer*, 373 S.C. 292, 644

¹ The Grahams only appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

S.E.2d 778, 781 (Ct. App. 2007) (recognizing an unappealed finding of the court, right or wrong, is the law of the case and should not be reconsidered on appeal). Thus, the Grahams cannot disregard nor attempt to overturn that finding at this stage of the case. In short, Judge Lee found that the elements of discretionary immunity were shown. However, as discussed in detail in the Town's opening brief, Judge Lee subsequently erred in finding that discretionary immunity presented a jury question because she confused the breach of duty issue with the immunity issue.

The Grahams also take the position that the Town is not entitled to discretionary immunity because the Town's duty was merely a ministerial duty and no discretion or judgment was needed. The Grahams cite to the case of *Jensen v. Anderson County Department of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991), wherein the Supreme Court explained that a "duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." 403 S.E.2d at 619, *citing Long v. Seabrook*, 260 S.C. 562, 197 S.E.2d 659 (1979). Within the context of a child abuse investigation, the Supreme Court concluded that the duty to conduct an investigation was ministerial given a mandate by statute; however, "[t]he manner in which the investigation is conducted is one of discretion" and "the decision to

classify a report of abuse as 'unfounded' and close the file is a discretionary act." 403 S.E.2d at 620.

In their brief, the Grahams write: "Latta had a duty to conduct a thorough investigation and utilize accepted professional standards before deciding what to do." *See*, Grahams' Respondent's Brief, p. 8. Assuming that to be true (although no statute is cited mandating the duty to investigate), the investigation may be ministerial, but the "deciding what to do" is clearly not. As in *Jensen* where the decision to close the investigation after concluding the report of abuse was unfounded was discretionary, here the Town's ultimate decision that the sewer line was not leaking based on the smoke testing and that no remedial action was needed is an exercise of discretion and *not* a ministerial act. Clearly, given the Supreme Court's guidance in *Jensen*, there is no question that the Town's conduct was discretionary and thus supported a finding of discretionary immunity.

Finally, as a new argument presented for the first time on appeal, the Grahams argue that "the performance of discretionary duties does not give rise to immunity if the governmental entity acted in a grossly negligent manner." *See*, Grahams' Respondent's Brief, p. 8. There are several flaws with that argument. First, Judge Lee never charged the jury that discretionary immunity was subject to a gross negligence exception. (R. 696). The jury was never charged even with the concept of "gross negligence." Second, there was no reason for the jury to be

charged that discretionary immunity was subject to a gross negligence exception, because it is not. Section 15-78-60(5) does not include a gross negligence exception, and the Town never pled an immunity defense under Section 15-78-60 containing a gross negligence exception.² In short, this new argument lacks merit. The Town's defense of discretionary immunity is not subject to a gross negligence exception, and the jury's verdict cannot be construed as finding gross negligence when the jury was never even charged with that concept.

In sum, based on Judge Lee's own findings (which the Grahams have not appealed), the discretionary immunity test has been met as a matter of law. The Town is entitled to discretionary immunity for its decision not to perform any remedial work to the sewer line across the Grahams' property. The Circuit Court therefore erred in failing to grant a directed verdict or JNOV on the remaining negligence claims.

² The Supreme Court has held that "[w]hen a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 904 (2010). In *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), the Supreme Court explained that a governmental defendant may select which immunity provisions to plead, and if no gross negligence exception is included, then there is no basis for limiting the immunity to acts of simple negligence. The *Steinke* Court further explained that "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." 520 S.E.2d at 154. In *Jones*, the Supreme Court found that Section 15-78-60(21) was not subject to a gross negligence exception "because [defendant] did not plead a section containing a gross negligence standard." *Jones*, 692 S.E.2d at 905. The same is true in the present case. The Town asserted discretionary immunity under Section 15-78-60(5) and never pled nor relied on any other immunity provision within Section 15-78-60 containing a gross negligence exception.

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

The Town of Latta contends that the Grahams relied on the doctrine of *res ipsa loquitur* as a substitute for proof of any actual defect in the sewer line. The Grahams never presented any evidence establishing that the sewer line on their property is cracked or otherwise compromised such that sewage has been discharged from the pipe they allege to be beneath the house. The Grahams, in fact, made no effort to present any such evidence.

In response, the Grahams claim that they never directly stated that they were relying on the doctrine of *res ipsa loquitur* and that they never sought a jury charge based on the doctrine. Well, of course not. The doctrine is rejected in South Carolina. No plaintiff in his right mind would admit he was relying on a doctrine that is clearly contrary to accepted law. Nor would a plaintiff ask that a rejected doctrine be charged. That does not mean that the doctrine is still not the basis of the Grahams' proof. The Grahams relied on the doctrine of *res ipsa loquitur*, despite their protestations to the contrary, because they quite frankly relied on the presence of sewage to claim a breach of duty. Despite the concession of their own expert that the line could have been tested, the Grahams did not test the line to establish that it was leaking. The only testing incidentally was the smoke testing

performed by the Town, but that testing did not reveal any leaks in the line running across the Grahams' property.

As the Town has explained, this case represents a classic application of the doctrine of *res ipsa loquitur* where the proof of injury is used to provide "proof" of a breach of care. Here, the Grahams have not established any breach of care by the Town that proximately resulted in sewage underneath their house at any point after September 6, 2008. "Proof" based on the doctrine of *res ipsa loquitur* must be rejected. Consequently, the Grahams failed to prove an issue with the sewer line underneath or near their house and likewise failed to show that the Town was negligent in failing to take any remedial action to repair the line. Thus, the Town is entitled to judgment as a matter of law.³

³ Strangely, the Grahams try to change the issue and focus on the jury charge. The Town does not challenge the charge. Judge Lee did not charge the doctrine of *res ipsa loquitur* nor could she. Instead of challenging the charge, the Town challenges the sufficiency of the evidence. The lack of proof of a leaking pipe required the Grahams to rely on the injury – Claude Graham's self-serving testimony of sewage in the crawl space – as a substitute for actual evidence that the sewer pipe is leaking. Evidence of an injury, however, is not evidence of a breach of duty.

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

The Town of Latta further contends on appeal that Judge Lee erred in allowing the Grahams to present the expert testimony of John Benton, who offered his opinion as to the cost of rebuilding the exact house at a different location. More specifically, Judge Lee erred in allowing the jury to consider the replacement cost of the house as evidence of damages when there was no expert testimony that the Grahams' residence was totally and permanently damaged and/or needed to be razed. Further, Judge Lee erred in allowing the jury to consider evidence of the wrong measure of damages for either temporary or permanent injury to real property.

In response, the Grahams make two arguments. First, the Grahams insist that there is "ample evidence" from which the jury could have concluded that the Grahams' residence was totally and permanently damaged and/or needed to be razed. Despite promising "ample evidence," the Grahams remarkably cite primarily to the testimony of the Grahams' physician, Dr. David Culpeper, who advised the Grahams to seek other living arrangements until the issue with the

sewage was corrected. (R. 296). Dr. Culpeper, however, was never identified nor presented as a construction expert. He never offered the opinion, nor could he, that the residence was totally and permanently damaged and/or needed to be razed. The Grahams further cite to their own testimony regarding the clean-up efforts after the September 5-6, 2008 flooding event. That is the extent of the "ample evidence" cited.

The Grahams also mention Judge Lee's order on post-trial motions where she concluded that the "total loss" of the house could be inferred from Dr. Culpeper's testimony that the Grahams had respiratory problems that "may have" been related to the presence of mold after the flooding events. (R. 16). Judge Lee also cited to the testimony of Thomas Robertson, a home inspector who was never qualified as an expert. Robertson tested for mold and simply offered a laboratory report suggesting that mold was present in the residence. Robertson, however, never testified that the mold could not be remediated or that the house was a total loss or needed to be razed simply because of the presence of the mold. Frankly, it would be improper for a jury to infer that the presence of mold cannot be remediated and that a house must be razed merely due to the presence of mold. Inferences must be reasonable,⁴ and quite frankly, that is *not* a reasonable

⁴ The applicable standard for directed verdict or JNOV motions requires consideration only of "reasonable inferences." The Supreme Court has explained that "[w]hen considering a directed verdict motion, the trial court should view the evidence and all *reasonable*

inference. Thus, in order for the Grahams to have met their burden of proof, they must have presented expert testimony that the mold could not be remediated and that the residence was a total loss. No such testimony is in this record.

The Grahams essentially concede that point. They focus instead on the argument that Benton's testimony, which injected a damages figure of \$478,280.00 into the case, was mere harmless error.⁵ The Grahams suggest that the jury's award of \$225,000.00 in favor of Vickie Graham may be upheld on the bodily injury portion of the case alone. The Grahams insist that evidence of Mrs. Graham's medical bills, pain and suffering, emotional distress and loss of enjoyment of life support the jury's verdict. The Grahams' position is fatally flawed for several reasons. First, it is entirely speculative to suggest that the jury did not consider the \$478,280.00 damages figure testified to by John Benton. Second, Vickie Graham's medical bills totaled at most \$676.00. (R. 743).⁶ Dr. Culpeper testified that he had not seen Vickie Graham since 2009, except for an unrelated matter. (R. 300).⁷

inferences in the light most favorable to the non-moving party." *South Carolina Federal Credit Union v. Higgins*, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). (Emphasis added).

⁵ The Grahams do not use the term "harmless error," but that is the gist of their argument.

⁶ Plaintiffs' Exhibit 13, which was Vickie Graham's medical bill submitted into evidence, shows several office visits to Palmetto Internal Medicine of Florence crossed through. The visits that were not crossed through and thus appear related total \$234.00. The entire bill including the crossed through entries totals \$676.00 (R. 743).

⁷ The last office visit that was not crossed through on Plaintiffs' Exhibit 13 was dated January 19, 2009. (R. 743).

Vickie Graham herself offered only brief testimony of health issues. (R. 265-267). She mentioned having to be hospitalized for pneumonia but agreed in response to her own counsel's leading question that the pneumonia was unrelated. (R. 271). Third, the Grahams cannot rely on loss of enjoyment of life as an element of damages given that Judge Lee never charged that element to the jury. (R. 697-698).

The Grahams' "harmless error" argument is not supported by the case law they cite. In particular, the case of *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984), does not support their position. The Grahams cite *Hutson* for the proposition that "[t]he fact that damages occurred in one of several ways does not defeat a verdict if the evidence tends to support the reasonable probability of the theory of damages relied upon." *See*, Grahams' Respondents' Brief, p. 11. The Grahams rely on some creative editing of what the *Hutson* Court actually held. *Hutson* actually provides: "In determining whether there was sufficient evidence on which the jury could base its verdict, we are mindful that the fact that damages occurred in one of several ways does not defeat a claim if the evidence tends to support the reasonable probability of the theory relied on." *Hutson*, 314 S.E.2d at 23. This is a statement of law regarding multiple theories of *liability* and not multiple theories of *damages* as the Grahams' creative editing suggests. Further reading of *Hutson* makes that clear. Thus, the Grahams

have offered no citation to a case where this Court or the Supreme Court found that an unsupported damages claim of a substantial amount (in this case \$478,280.00) was harmless error and allowed a verdict to stand. The reason: no such case exists. However, in the absence of a case on point, it is not appropriate to re-write a holding by adding words to alter the court's meaning. That should be soundly rejected, and this Court is urged to reverse the lower court's denial of the directed verdict and JNOV motions or, at the very least, grant a new trial on liability and damages.

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

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

Specifically, the Town pointed out that Claude Graham testified to the loss of hand tools, golf equipment, two lawnmowers, and other equipment that were located in a storage room on the property. (R. 120-121). Yet, he never testified that those items of personal property were damaged subsequent to the flooding of the yard that occurred on September 5-6, 2008. Moreover, he never offered testimony that those items were undamaged in the September 5-6, 2008 event.⁸

In response, the Grahams baldly assert that evidence exists and then offer a string cite to the transcript without further discussion as to what the cited pages of testimony provide. The eight transcript pages cited (R. 114, 120-123, and 125-127), however, do not support any claim that the damage to the personal property resulted from any events occurring after September 5-6, 2008.⁹

The Grahams then make reference to a jury charge on evaluating the loss of personal property. The significance of that reference is unclear. The Town has not appealed the issuance of that charge.

Finally, the Grahams make the same "harmless error" argument as already discussed with regard to the Vickie Graham verdict. They argue that the

⁸ It is important to recall that Judge Lee granted a directed verdict on the Grahams' negligence claims related to the events of September 5-6, 2008. That ruling is now the law of the case. Therefore, the Town cannot be liable for any damages to real or personal property occurring on those dates.

⁹ That testimony includes a reference to photographs that were taken on September 6, 2008, but that testimony does not discuss the property in the storage room. (R. 126-127).

\$100,000.00 verdict may be upheld because of other elements of damages including bodily injury damages including loss of enjoyment of life, an element that was never charged to the jury.¹⁰ The "harmless error" argument is unsupported by any case law cited by the Grahams and does not justify the affirmance of a verdict based on a damages claim that had no evidentiary support.

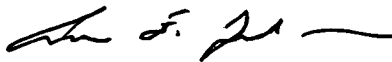
¹⁰ Claude Graham's sole medical bill in evidence shows charges of \$350.00 but two of the charges are crossed through. The charges which are not crossed through total \$201.00. (R. 731).

CONCLUSION

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

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Appellant-Respondent
Town of Latta*

Columbia, South Carolina

May 13, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Appellant-Respondent
Town of Latta*

Columbia, South Carolina

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Reply Brief of Appellant-Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Appellant-Respondent
Town of Latta*

Columbia, South Carolina

May 13, 2014

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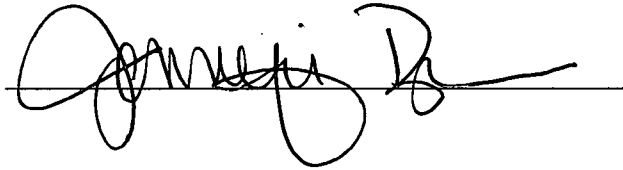
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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Latta, does hereby certify that service of **Reply Brief of Appellant-Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 13th day of May 2014:

Reynolds Williams, Esquire
Willcox, Buyck & Williams
Post Office Box 1909
Florence, South Carolina 29503-1909

A handwritten signature in black ink, appearing to read "Reynolds Williams", is written over a horizontal line.

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