THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
Case No. 2012-CP-22-00558

David M. Repko...Appellant,

v.

County of Georgetown ....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in construing Article V, Section 3-1 of the Georgetown County Improvement Standards Ordinance to preclude a *tort-like* "duty" even though the plain language of the Ordinance disclaims only a *financial-like* "obligation?"

2. Did the Circuit Court err in relying on the Ordinance's Sovereign Immunity provision even though that provision is unenforceable because it is preempted by and inconsistent with the South Carolina Tort Claims Act?

3. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that Article V, Section 3-1 of the Ordinance did not create a "special duty" owed to Repko even though Repko presented evidence of all six elements of the "existence of a special duty" test?

4. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(4) provided the County with immunity to Repko's negligence claim?

5. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(5) provided the County with immunity to Repko's negligence claim?

6. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(13) provided the County with immunity to Repko's negligence claim?

7. Did the Circuit Court Judge err by not recusing himself pursuant to Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, based upon prior business relationships concerning the transactions involved?

8. Did the Circuit Court Judge's failure to recuse himself deprive Repko of the right to due process guaranteed by the Constitutions of South Carolina and the United States?

STATEMENT OF THE CASE

On April 20, 2013, David M. Repko filed a civil action for damages against Georgetown County. He filed this suit in the Court of Common Pleas for Georgetown County. (R. pp. 17-24). Repko alleged that he was the owner of two undeveloped lots in Phase D-1 of the West Stewart Subdivision of Harmony Township, a planned development located in Georgetown County. He further alleged that the County's negligence and gross negligence in handling a financial guarantee posted by the subdivision's developer resulted in the loss of most of the funds that were to be used in building the subdivision's infrastructure. Repko also alleged that: (1) the developer failed to complete the infrastructure; (2) that there were insufficient funds to complete the infrastructure (due to the County's gross negligence); and (3) that the lack of infrastructure reduced his property value to "zero." Repko sought to recover "past and future actual damages." (R. p. 23, ¶ 16).

The County filed an Answer on May 18, 2012, denying liability and raising affirmative defenses that alleged, in relevant part, that Repko's claims were barred by six immunity provisions of the South Carolina Tort Claims Act ("SCTCA" hereinafter), specifically Sections 15-78-60(1), (2), (4), (5), (12), and (13) of the South Carolina Code. (R. p. 28, ¶ 19).

Two independent actions were merged into the Appellant's case in preparation for trial. Prior to trial, those above-captioned Plaintiffs settled and their cases were dismissed. As a result, Repko was the sole Plaintiff in the case which proceeded to trial before the Honorable Benjamin H. Culbertson on September 16, 2013. The County moved for a directed verdict at the close of the Plaintiff's evidence. Judge Culbertson

granted this motion from the bench and, by Order dated September 13, 2013, entered judgment in favor of the County and against Repko. (R. p. 249, lines 9-10).

Subsequently, Repko filed a Motion for Reconsideration and New Trial on October 9, 2013. Judge Culbertson heard this motion on December 19, 2013 and denied it without comment by Form 4 Order that same day. On January 15, 2014, Repko filed and served a Notice of Appeal.

STATEMENT OF THE FACTS

Georgetown County Improvement Standards Ordinances

Georgetown County regulates improvements to major subdivisions through the provisions of Article V of the Georgetown County Ordinances. (R. pp. 281-286). Those ordinances provide that "[f]inal plans shall not be approved for recording unless the [developer] has installed the required improvements as specified and required in this Article, *or* has provided a financial guarantee as specified in Section 3 of this Article." (R. p. 281)(Ordinance, Art. V, § 1-5)(emphasis added). "Required improvements" include installation of: monuments at street corners; a storm water management system; specified roadway improvements, including grading and paving; and utilities and services. Alternatively, the ordinances instruct that "financial guarantees:"

> [M]ay be posted in lieu of completing improvements required by this Ordinance to allow for the recording of a final plat or to obtain building permits for properties for which ownership will be transferred . . . Acceptance of financial guarantees is discretionary and Georgetown County reserves the right to refuse a financial guarantee for any remaining improvements and require that such improvements be completed before the recording of a final plat or issuance of building permits. Acceptance of a financial guarantee by Georgetown County shall not be construed as an *obligation* to any other agency, utility or property owner within affected developments.

(R. p. 284)(Ordinance, Art. V, § 3-1)(emphasis added); *see* Statement of Issues on Appeal, No. 1.

If a developer seeks to post a financial guarantee, the following procedure must be followed as delineated in Section 3-2. First, the financial guarantee must be submitted to the Georgetown County Planning Department ("Planning Department" hereinafter) along with an "itemized cost estimate" for the improvements that the financial guarantee will cover. The itemized cost estimate must: (1) bear the original signature and seal of a licensed professional engineer; (2) be on company letterhead; and (3) be in a form acceptable to the Planning Department. "Upon receipt of an itemized cost estimate, the Planning Department shall forward such estimate to the appropriate departments or agencies for review." (R. p. 284)(Ordinance, Art. V, § 3-2).

The County may accept, *inter alia*, a letter of credit as a financial guarantee. An approved letter of credit must adhere to these six specific standards: (1) be equal to 125% of the approved cost estimate; (2) be issued for an initial coverage period not less than 12 months from the date the final plat is submitted for recording; (3) be irrevocable, unconditional and subject to presentation for drawing within the State of South Carolina; (4) be payable to Georgetown County; (5) be for no less than $10,000 in construction; and (6) substantially conform to the format shown in Appendix B, Certificate 1. (R. pp. 284-85)(Ordinance, Art. V, § 3-3). An approved guarantee, however, "shall be independent of the development project's construction loan" because "[p]ayment of monthly expenditures is the sole responsibility of the developer and does not affect the amount of money held by the Planning Department." (R. p. 284)(Ordinance, Art. V, § 3-3).

If the County accepts a financial guarantee from the developer, the County normally holds the guarantee until all covered improvements are completed unless a reduction in the guarantee has been approved pursuant to the following procedure:

> A developer may reduce a financial guarantee during the initial coverage period. A request to reduce the financial guarantee shall be submitted to the Planning Department and include a revised construction cost estimate. The Planning Department will forward the revised cost estimate to the Georgetown County Department of Public Works for approval. Reductions of financial guarantees will not be allowed within 6-months of any previous reduction request and shall be no less than 125% of the revised construction cost estimate.

(R. p. 285)(Ordinance, Art. V, § 3-5).

At trial, the Planning Department's Chief Planner testified that the County required, in addition to the requirement of Section 3-5, "a letter from the engineer certifying that the work had been complete and certifying the number, the dollar amounts that were left to be done." (R. p. 101, lines 16-19; p. 116, lines 1-3). Likewise, the Planning Department's director testified that the County should receive an estimate from an engineer with a cost to complete before approval of a reduction in the guarantee. (R. p. 147, line 11; p. 162, lines 4-12 and 18-20).

Harmony Holdings, LLC Posts Letters of Credit in Lieu of Completing Required Improvements in Harmony Township.

In the early 2000's, Harmony Holdings, LLC ("Harmony Holdings" hereinafter) began developing the Harmony Township community within Georgetown County. Although roads, utilities, and other required improvements were not constructed in the community, Harmony Holdings sought permission from the Planning Department to begin selling the undeveloped lots to buyers. The County allowed Harmony Holdings to post letters of credit as a financial guarantee in lieu of completing the required

improvements. (R. p. 104, lines 10-13). Harmony Holdings posted a letter of credit for each phase of Harmony Township, including a letter of credit for Phase 2-D-1 of the West Stewart Subdivision. (R. p. 104, lines 17-19 and 20-23).

Harmony Holdings applied to Wachovia Bank, National Association to obtain a letter of credit for Phase 2-D-1. Upon granting the application, Wachovia issued a letter of credit on May 23, 2006 entitled Clean, Irrevocable Standby Letter of Credit Number SM220037W in the amount of $1,301,705.63 ("Wachovia letter of credit" hereinafter). (R. p. 294). The letter of credit designated Georgetown County as beneficiary and Harmony Holdings, LLC as applicant.

Shortly thereafter, Harmony Holdings submitted the letter of credit to the Planning Department. It also submitted an engineer's estimate of $1,040,000.00 as the cost of completing the required improvements. Accordingly, the $1,301,705.63 Wachovia letter of credit was 125% of the engineer's estimated amount. (R. p. 108, lines 18-24).

Upon acceptance of the submissions, the Planning Department permitted Harmony Holdings to sell undeveloped lots in Phase 2-D-1. The Plat for Phase 2-D-1 was recorded on May 24, 2006. An employee of the Planning Department certified on the Plat that the County held a letter of credit in the amount of $1,301,705.63 to "ensure the completion of the remaining public improvements." (R. p. 113, lines 8-10); *see* (R. pp. 292-93).

The County Approves the Developer's Successive Requests for Reductions in the Letter of Credit.

First Request and Approval for Reduction

On July 20, 2006, Harmony Holdings submitted a request for reduction in the letter of credit to the County. (R. pp. 295-97). The request referenced "Pay Request # 3"

and included an Application and Certificate for Payment for Phase 2-D, which was signed by an Earthworks Group employee. The application described Earthworks as the architect for the project. (*Id.*).

In a letter to Wachovia dated July 26, 2006, the County advised that it approved a request to reduce the letter of credit by $331,311.00. (R. p. 298); *see* (R. p. 114, lines 16-20). The reduction request was approved despite noncompliance with the Ordinances and the Planning Department's protocol. First, the County approved the request without the required letter of an engineer certifying that "the work had been complete[d]" and [the] dollar amounts that were left to be done." (R. 116, lines 1-3). Second, the County approved the request without "forward[ing] the revised cost estimate to the Georgetown County Department of Public Works for approval." Third, the County approved the request even though it indicated that the developer sought to use the letter of credit funds to pay its contractor, contrary to Section 3-3. Fourth, an engineer's cost of completion estimate made by Earthworks on December 6, 2006, showed that the County approved the request without retaining 125% of the funds needed to complete the infrastructure; the estimate showed that virtually no work was done at that time on the infrastructure of Phase 2-D-1. *See* (R. pp. 306-312). Pursuant to the County's letter, Wachovia released $331,000 thereby reducing the letter of credit to $970,394.63. (R. p. 114, line 24 – p. 115, line 3).

Second Request and Approval for Reduction

On September 25, 2006, the developer submitted its second request for reduction in the letter of credit. This request sought a reduction of $117,024.42, and like the first request for a reduction, it included an Application and Certificate for Payment that was

signed by an Earthworks employee. (R. pp. 300-01); *see* (R. p. 118, line 25 – p. 119, line 8).

In fall 2006, Repko contracted with Harmony Holdings to purchase Lots 1077 and 1076, in Phase 2-D-1. Repko, who planned to build his retirement home on these lots, paid $78,000.00 for Lot 1077 and $77,000.00 for Lot 1076. (R. p. 186, lines 7-22). Harmony Holdings executed the deeds on October 3, 2006, thereby transferring both lots to Repko. (R. pp. 318-328). Repko knew that the developer had not yet installed infrastructure on the lots, but Repko was not concerned because he knew that the developer posted financial guarantees with the County. Repko testified that he would not have purchased the lots had the developer not posted financial guarantees with the County. (R. p. 192, lines 7-12).

On October 9, 2006, just six days after Repko closed on the lots, the County approved the second request for reduction and, by letter, advised Wachovia to reduce the letter of credit by $117,024.42. (R. p. 299); (R. p. 117, lines 15-23). Accordingly, the County approved the request for reduction: (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate; (2) without forwarding a cost of completion estimate to the Department of Public Works for completion; (3) without retaining 125% of the funds needed to complete the infrastructure, as shown in the engineer's cost of completion estimate, made by Earthworks on December 6, 2006; (4) even though the Application and Certificate for Payment indicated that the developer was seeking to use the letter of credit funds to pay his contractor; and (5) even though the reduction was requested within six months of the previous request, contrary to Section 3-5. Pursuant to the County's letter, Wachovia

released $117,024.42 thereby reducing the letter of credit to $853,370.21. (R. p. 117, line 7 – p. 118, line 1).

Third Request and Approval for Reduction

In a letter to the County dated November 7, 2006, Earthworks advised that it approved pay application number three for Phase 2-D, reflecting work completed as of October 25, 2006 and totaling $300,000.00. (R. pp. 302-04); (R. p. 123, lines 5-6). The letter included an Application and Certificate for Payment apparently signed by the architect. (R. pp. 302-04).

On November 8, 2006, the County approved the third request for reduction and, by letter, advised Wachovia to reduce the letter of credit by $300,000.00. (R. p. 305). At trial, the County's Chief Planner testified that the third reduction request was approved based upon Earthworks' "letter and approval of the $300,000." (R. p. 124, lines 9-13). Accordingly, the County again approved the request: (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate; (2) without having sought approval from the Department of Public Works, as required in Section 3-5; (3) without retaining 125% of the funds needed to complete the infrastructure; (4) even though the Application and Certificate for Payment indicated that the developer was using letter of credit funds to pay its contractor, contrary to Section 3-3; and (5) even though the request was made within six months of the earlier two requests, in violation of Section 3-5. (R. p. 123, lines 11-13; p. 124, lines 16-18). Also, at the time of approval, virtually no work was done on the infrastructure of Phase 2-D-1. (R. p. 306). Pursuant to the County's letter, Wachovia released $300,000.00 thereby further reducing the letter of credit to $553,370.21. (R. p. 124, lines 23-25).

By letter dated December 6, 2006, Earthworks advised the County's Public Works Department that it "reviewed and accepted the following changes in price to Harmony 2D1 and 2D2." (R. p. 306). An "Opinion of Probable Cost" for Phase 2-D-1, attached thereto, provided an estimated cost of $1,153,205.45 to complete: (1) the sewer and water systems; and (2) the roads, site, and drainage remaining improvements. (*Id.*); (R. p. 126, lines 13-15; p. 127, line 1). The cost of completing the infrastructure for Phase 2-D-1 was $1,153,205.45. (R. p. 127, lines 10-12). Because the engineer's original estimate was $1,040,000.00, this 2006 estimate shows that virtually no work was done on the infrastructure because the remaining estimated costs were actually *higher* than the original estimate.

<u>Fourth Request and Approval for Reduction</u>

On March 9, 2007, Harmony Holdings emailed the County a "revised pay request from February 7, 2007" covering pay application # 4 for Phase 2-D-1 and also requested reduction in the Wachovia letter of credit by an amount of $396,666.18. (R. p. 313); (R. p. 129, lines 13-24; p. 130, lines 24-25). Then, by letter dated April 3, 2007, Earthworks advised the County that pay application 4 reflected work completed by February 28, 2006 and also included an Application and Certificate for Payment containing the contractor's request for payment of $396,666.18. (R. pp. 314-15). The pay application had an illegible signature, however, the words "for Steve Strickland" were handwritten by the signature. Also, "Engineer" was handwritten in the signature block and the printed word "ARCHITECT" was marked through with two lines. (R. p. 315).

On April 5, 2007, the County approved the fourth request for reduction and, by letter, advised Wachovia to reduce the letter of credit by $396,666.18. (R. p. 316); (R. p.

132, lines 16-24). The County approved this request: (1) without having sought approval from the Department of Public Works, as required in Section 3-5; (2) without retaining 125% of the funds needed to complete the infrastructure, contrary to Section 3-5; (3) even though the Application and Certificate for Payment indicated that the developer was using letter of credit funds to pay its contractor, contrary to Section 3-3; and (4) even though the request was made within six months of the earlier two requests, contrary to Section 3-5. (R. p. 123, lines 11-13; p. 124, lines 16-18). Pursuant to the County's letter, Wachovia released $396,666.18 thereby further reducing the letter of credit to a mere $156,704.03. (R. p. 317); (R. p. 133, line 2).

In an April 7, 2007 letter, Georgetown Water and Sewer District advised the County that an inspection of the water and sewer lines in Phase 2-D-1 was completed. (R. p. 365); (R. p. 141, lines 3-8). The letter advised that water and sewer lines were completed as indicated in the Earthworks letter, however, it failed to provide a cost to complete the infrastructure. (R. p. 144, lines 11-16; p. 141, lines 14-22).

At some point before the Wachovia letter of credit expired on May 23, 2007, the developer provided the County with a $140,000.00 check. The County placed these funds in a segregated account to be used at Harmony but cashed in a letter of credit covering Phase 2-D-2. (R. p. 135, lines 11-13; p. 167, lines 14-23; p. 168, lines 1-2).

Aside from the water and sewer work described in the foregoing letters, virtually no other work on the infrastructure for Phase 2-D-1 was completed by this time. Furthermore, from May of 2007 until August of 2007, the developer failed to complete *any* meaningful progress on the infrastructure. In August of 2007, the developer met with County's planning staff and advised that "he no longer had the financial means to put any

infrastructure within any phase of Harmony" and that, because the letters of credit were about to expire, "to call all the letters of credit that were still in good standing." (R. p. 61, lines 1-4 and 11-13).

Harmony Holdings subsequently declared bankruptcy. At that time, the developer failed to complete basic infrastructure, such as utilities or roads, within Phase 2-D-1. Although the letter of credit was originally a sufficient amount of $1,301,705.63, the repetitive reductions approved by the County whittled the funds to $140,000.00, an amount that is wholly insufficient to enable completion of the Phase's infrastructure.

Thereafter, a new owner took over the project, hired his own contractor, and requested that the County release funds for payment to the contractor after work was completed. (R. p. 64, lines 14-20). The County released funds "quite a few times and maybe for a year after that," however, the County ultimately deemed the new owner untrustworthy and stopped the release of funds. (R. p. 64, line 23 – p. 65, line 1 and lines 3-11). As a result, the new developer walked off the job. (R. p. 74, lines 16-22).

At trial, Repko testified that there is no prospect of anybody completing the infrastructure in Phase 2-D-1. (R. p. 200, line 25 – p. 201, line 1). Essentially, his lots are "woods" accessible by a path cleared out seven years ago, but inaccessible by road. (R. p. 201, line 15 and lines 17-21). Because of the missing infrastructure, he believes the value of his property is "zero." (R. p. 201, lines 2-11). In fact, within the last 18 months, only one lot in the whole development sold. The sales price was $500.00. (R. p. 201, lines 6-8).

Despite his having paid property taxes, the County has denied Repko the right to build on his property because of the absence of basic utilities. *See* (R. pp. 331-364). On

March 30, 2012, Repko received an email from a friend alerting him to the County's mishandling of the financial guarantees. (R. p. 194, lines 22-25). Shortly after being notified of the County's mishandling of the financial guarantees, Repko filed this lawsuit.

ARGUMENT

On appeal from an order granting a directed verdict motion, this Court must reverse the judgment when there is no evidence to support the ruling or when the ruling is governed by an error of law. *See Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005). In making this determination, this Court applies the same standard of review as the trial court and is required to "view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). This Court may not weigh the evidence, but must determine if there is *any* evidence from which the jury is warranted in making a finding. *See Washington v. Whitaker*, 317 S.C. 108, 113-14, 451 S.E.2d 894, 897-98 (1994). The Court may grant the directed verdict only when the evidence yields but one inference. *See The Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2006). Accordingly, the Court must deny the motion when either the evidence yields more than one inference or the inferences are in doubt. *See Law v. South Carolina Dep't. of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

A directed verdict is also warranted when the case presents only questions of law. In this situation, a directed verdict motion should be granted only if the evidence would not be legally sufficient to sustain a verdict for the opposite party. *See McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).

When these standards are applied properly, they yield the conclusion that the Circuit Court erred in granting the County's directed verdict motion and in denying the Plaintiff's motion for reconsideration and for a new trial.

I. THE CIRCUIT COURT ERRED IN RULING THAT GEORGETOWN COUNTY DID NOT OWE A DUTY OF CARE TO REPKO.

A. The Circuit Court Misconstrued the Plain Language of Article V, Section 3-1.

In granting the County's directed verdict motion, the Court relied on a provision of Article V, Section 3-1, which states: "Acceptance of a financial guarantee by Georgetown County shall not be construed as an obligation to any other agency, utility or property owner within affected developments." (R. p. 4). The Court interpreted this provision as a Sovereign Immunity provision, as the Court effectively construed it to provide the County with sovereign immunity for accepting a financial guarantee. The Court read it to "expressly disclaim[] any 'private duty' to Plaintiff who is a 'property owner within the affected development' (i.e. Harmony Township)." (*Id.*).

In so ruling, the Court misinterpreted the plain language of the Sovereign Immunity provision because that provision does not *expressly* disclaim any private duty; the words "private" and "duty" do not even appear in the provision. Instead, the provision uses the word "obligation" without an indication as to whether "obligation" is intended to include the tort concept of duty or merely to prevent a property owner from arguing that he is an intended third party beneficiary of the financial guarantee. The more reasonable (and better) construction is that "obligation" refers only to a contractual obligation because, as discussed herein, the ordinance would be overridden and preempted by the SCTCA if "obligation" is construed to include a tort duty.

Moreover, the provision states only that *acceptance* of a financial guarantee shall not be construed as an obligation to a property owner. The provision says nothing about whether an obligation or duty will arise based on the County's *handling* of the funds secured by a financial guarantee *after* this acceptance. The provision is silent as to whether a duty may arise in tort when the County is grossly negligent in permitting a reduction in the guarantee or cashes the guarantee and then is grossly negligent in handling the funds.

This is supported by the trial testimony. The notion that the ordinance should be construed to disclaim any obligation by the County *after* it accepts a financial guarantee is contrary to the trial testimony of the County's own witnesses. The County Attorney testified that he advised another lot owner that the County owed that lot owner a fiduciary duty in managing the letter of credit funds:

> Q. And then the language in this e-mail which really I want to focus on . . . says "We felt we had a good monitoring system in place and also had a fiduciary duty to the citizens who purchased property in Harmony to effectively manage this LOC money" being the letter of credit money, and not let Harmony throw it into the wind." Is that right?
>
> A. Correct.

(R. p. 69, line 24 – p. 70, line 7). Although not controlling, the Court must accord "great deference" to the decisions of those charged with interpreting and applying ordinances. *See Mikell v. County of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). The record is strikingly void of the legislative intent underlying the Sovereign Immunity provision, and the Court appears to have afforded no deference—none—to the County Attorney's testimony. The judgment entered in favor of the County on the directed

verdict motion should be reversed. The ordinance does not support the Circuit Court's decision.

B. The Circuit Court Committed Reversible Error in Relying on the Sovereign Immunity Provision of the Ordinance Because this Provision is Unenforceable.

Even assuming, *arguendo*, that the Court properly construed the Sovereign Immunity provision of the ordinance as disclaiming any "duty" to Plaintiff, the judgment must still be reversed. By relying on the Sovereign Immunity provision to conclude that the County owed no duty to the Plaintiff, the Court committed reversible error because the provision is unenforceable. As Plaintiff argued in opposing the directed verdict motion, the SCTCA governs the County's tort liability and the County cannot overcome application of SCTCA by enacting an ordinance that waives liability for their negligent conduct. (R. p. 239, lines 21-24; p. 240, lines 6-8); *see also* (R. p. 263, lines 24-25)("[e]ssentially what the County has sought to do is circumvent the Tort Claims Act by including that language").

South Carolina case law supports Plaintiff's position. Determining whether a local ordinance is enforceable is involves a two-step inquiry: "(1) Did the municipality have the power to enact the ordinance? and (2) Is the ordinance inconsistent with the Constitution or general law of the State?" *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 35, 530 S.E.2d 369, 372 (2000). For the following reasons, the Sovereign Immunity provision of the County's ordinance fails both of these steps.

1. The County Did Not Have the Power to Enact the Sovereign Immunity Provision in its Ordinances.

"[A] county lacks [the] power to enact an ordinance if the state has preempted the subject matter of the ordinance. If the state has preempted a particular area of legislation,

then the ordinance is invalid, and [i]f no such power existed, the ordinance is invalid and the inquiry ends." *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 460, 716 S.E.2d 280, 284 (2011) (internal citations omitted).

There are three kinds of preemption: (1) express preemption; (2) implied field preemption; and (3) implied conflict preemption. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *Id.* at 462, 716 S.E.2d at 286. Implied field preemption occurs "when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." *Id.* at 465, 716 S.E.2d at 287. Finally, implied conflict preemption occurs "when the ordinance hinders the accomplishment of the [state] statute's purpose or when the ordinance conflicts with the [state] statute such that compliance with both is impossible." *Id.* at 467, 716 S.E.2d at 288.

To the extent that the provision is construed as granting the County immunity for negligently mishandling a financial guarantee, the SCTCA preempts the ordinance under all three approaches. The SCTCA waives sovereign immunity subject only to the limitations and exemptions contained in the Act. Specifically, the Act provides that "a political subdivision . . . [is] liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40(a). Further, the Act defines "political subdivision" as, *inter alia*, "the counties." S.C. Code Ann. § 15-78-39(h). Thus, under the SCTCA,

Georgetown County is liable for its torts in the same manner and to the same extent as a private individual, subject to the limitations and exemptions contained in the Act.

i. The Ordinance's Sovereign Immunity Provision is Unenforceable as it is Expressly Preempted by the SCTCA.

Counties are expressly preempted from altering their liability by ordinance because the General Assembly clearly stated its intent that counties be held liable "*only* to the extent provided" within the SCTCA:

> (b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein.

S.C. Code Ann. § 15-78-40(b). The legislature reaffirmed this principle with enactment of the SCTCA's exclusive remedy provision, which states that the Act is the *exclusive remedy* for a tort of a government employee "notwithstanding any other provision of law." S.C. Code Ann. § 15-78-200.

If a county injures a person through negligently mishandling funds entrusted to it by the county's own ordinance, the injured person's sole and exclusive remedy in tort is within the SCTCA. In granting the directed verdict motion, the Court construed the Ordinance to operate as an *additional* layer of protection. Under this erroneous construction, even when the County is liable under the SCTCA, the Ordinance's Sovereign Immunity provision effectively precluded the County's liability by disclaiming *any* creation of a duty to a person from the acceptance of a financial guarantee. The plain language of the SCTCA, however, expressly prohibits the Court's construction of the Sovereign Immunity provision is such a manner.

ii. The Ordinance's Sovereign Immunity Provision is Unenforceable as it is Impliedly Preempted by the SCTCA.

The SCTCA preempts the Ordinance's Sovereign Immunity provision by both implied field and implied conflict preemption thereby rendering the provision unenforceable. By covering the field of government liability so thoroughly and pervasively, the SCTCA impliedly preempts other laws to the extent they intrude into the field of government tort liability. The SCTCA provides that "a political subdivision, [is] liable for . . . [its] torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40(a). But the Circuit Court construed the ordinance to say just the opposite. Under the Circuit Court's construction, the County is not liable if the tort arises from the County's negligent mishandling of financial guarantee funds, even if a private individual would be liable under such circumstances. The County lacked the power to enact the Sovereign Immunity provision of the ordinance to the extent it is construed as excluding any liability of the County for negligently mishandling the financial guarantee.

2. The Ordinance's Sovereign Immunity Provision is Unenforceable Because it is Inconsistent with the Constitution or General Law of this State.

With respect to the second step of the test governing enforceability of an ordinance, the Court must determine whether the ordinance is inconsistent with the Constitution or general law of this state. The Ordinance's Sovereign Immunity provision is unenforceable insofar as it is inconsistent with the SCTCA. As discussed, the SCTCA holds the County liable for its negligence in handling financial guarantee funds, subject to the limitations and exemptions in the Act. Contrariwise, the Circuit Court effectively

construed the Ordinance's Sovereign Immunity provision to *preclude* the County's tort liability for negligently handling the financial guarantee funds. As a result, either the Circuit Court erroneously interpreted the Ordinance's Sovereign Immunity provision or the provision is unenforceable as being inconsistent with the general law of the state.

C. The County's Improvement Standards Ordinance Created a Special Duty Owed by the County to the Plaintiff.

Independent of the Sovereign Immunity provision, the Court's directed verdict judgment should be reversed because the Ordinance created a special duty owed by the County to the Plaintiff thereby excepting application of the public duty rule. Although the public duty rule provides that public officials normally "are not liable to individuals of the public for negligence in discharging their statutory obligations," South Carolina courts have long recognized an exception to this rule where a special duty exists. *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 697 S.E.2d 575 (2010). A special duty exists if six elements are present:

> (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within that class; (5) the public officers know or should know of the likelihood of harm to the class if he fails in his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Id. at 446, 697 S.E.2d at 577.

The Ordinance at issue created a special duty owed by the County to the Plaintiff. In part, the Ordinance provides that the County *will not* (a) approve a plat submitted by a developer, or (b) grant permits to allow for construction on a lot, *until* the developer has completed the infrastructure in the development or posted financial guarantees in lieu of

completing the improvements. Because all six elements of the special duty exception to the public duty rule exist, the County's Ordinance created a special duty owed to the Plaintiff, as a lot purchaser, with respect to the County's management of the financial guaranty which allowed the sale of lots to the Plaintiff.

The essential purpose of this ordinance "was to ensure that if someone like Mr. Repko purchased raw land in a development to be built that the monies would be there to ensure that the infrastructure would be there if the developer failed to go forward." (R. p. 242, lines 15-19). As this testimony indicates, this Ordinance exists precisely to protect lot buyers from developers who sell lots to them, but then fail to complete basic infrastructure necessary to make the lot suitable for building. Even the County's own witnesses testified that this is the Ordinance's essential purpose. The County Attorney admitted that, in a 2008 email to Harmony Holdings, he stated that "the whole point behind the letter of credit . . . is to protect owners who purchase property and are made promises that are not kept." (R. p. 76, line 23 – p. 77, line 1 and lines 9-12). The County Attorney also testified that he advised another lot owner in 2009 that, with respect to the management of letter of credit funds, the County owed the lot owner a fiduciary duty. (R. p. 69, line 24 – p. 70, line 7). Another County witness admitted that the ultimate beneficiaries of the letter of credit were "the people living on the road who purchased the property." (R. p. 152, lines 20-22).

Furthermore, the County seems to have conceded this point. In arguing that the Court should grant a directed verdict, the County's counsel did not dispute that the essential purpose of the ordinance was to protect lot buyers, nor did he present any other purpose underlying the ordinance. Instead, County's counsel based the "no duty" part of

his motion solely on the Sovereign Immunity provision and *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 77-78, 439 S.E.2d 266, 268 (1993). (R. p. 224, line 11 – p. 227, line 19). However, as discussed below, the court in *Brady* found that the essential purpose of the ordinance in question was to prevent overbuilding, not to protect lot owners. Accordingly, the County has conceded that the first element was satisfied.

Second, although the Court found that the "ordinance neither directly or indirectly imposed on a specific public officer of Georgetown County a duty to guard against or not cause a specified harm," this finding was based solely on the unenforceable Sovereign Immunity provision. (R. pp. 7-8). Further, the Court's finding ignores the express language of the ordinance as the County's decision to accept a financial guarantee in lieu of requiring completion of the infrastructure is imposed on the employees of the County's Planning Department. *See* Section 3-1; *see also* (R. p. 243, line 24 – p. 244, line 8). Under Section 3-5, the decision to grant a reduction in the financial guarantee is imposed in the first instance on the County's Planning Department and then entrusted to the Department of Public Works for the final decision. The ordinance seeks to prevent the harm that would be caused if the developer sold lots to buyers, accepted their money, and then never finished the required infrastructure. It prevents this harm by requiring the developer to post the financial guarantee and tasking the Planning Department and the Department of Public Works with the duty of overseeing any reduction in these funds. *See* (R. p. 285).

Third, the class of persons the statute intends to protect is identifiable before the fact. The ordinance intends to protect a specific class of persons: those persons who buy a lot in the development *after* the County's acceptance of financial guarantees from the

development. (R. p. 244, lines 9-13). As soon as a putative buyer closes on the property, he or she becomes a member of the identifiable class of lot purchasers. The Court held that "the class of persons the statute intends to protect was not identifiable before the fact." (R. p. 8). However, the Court's holding is clearly erroneous as all lot buyers are identifiable as a class *before* the County agrees to accept a financial guarantee; in fact, that class would not exist unless and until the County agrees to accept the guarantee. Further, the persons of that class are identifiable as individuals as soon as they close on their property. The Court reasoned that the ordinance "specifically disclaim[s] any obligation on the part of the County as a result of its acceptance of a financial guarantee." (*Id.*). However, as discussed above, this provision of the ordinance is unenforceable if construed in this manner. Accordingly, the Court's finding regarding the class of persons that the statute intends to protect is clearly erroneous.

Fourth, it is undisputed that the Plaintiff is a member of this class, as Plaintiff purchased two lots in the development.

The fifth element of the special duty test is also satisfied by the evidence. (R. p. 244, line 15 – p. 245, line 8). The County Attorney admitted knowing that, if the County failed to properly apply or enforce this ordinance, lot purchasers would have no remedy if the developer failed to complete the infrastructure and filed for bankruptcy. The public officers know or should know of the likelihood of harm to the lot-purchasing class should the officers fail in their duty. There is no other way to read this testimony.

Finally, the testimony shows that two County employees, Boyd Johnson and Holly Richardson, had *de facto* authority to prevent any drawdowns of the letter of credit until the infrastructure was completed. Johnson testified that every time the developer

sought a reduction, the other Planning Department employees would consult him on the decision to grant the request. (R. p. 161, lines 3-6). Thus, Johnson not only had the authority to prevent letter of credit drawdowns, he had an actual opportunity to do so. (R. p. 244, line 15 – p. 245, line 8). Assuming that the Planning Department employees lacked statutory authority to approve the reductions, the ordinance vested this authority in the Department of Public Works. Nevertheless, the sixth element of the special duty test is satisfied for directed verdict purposes.

In ruling that the County owed no special duty to Plaintiff, the Court erroneously concluded that *Brady* "compels the conclusion that the County owed no private duty to Plaintiff." (R. p. 5). In *Brady*, however, the Supreme Court held that there was no special duty because the essential purpose of the ordinance at issue in that case was to prevent the "dangers of overdevelopment," rather than to protect lot purchasers. *Brady*, 312 S.C. at 77-78, 439 S.E.2d at 268.

The present case is different. In the present case, the testimony of both the County Attorney and the Director of the Planning Department show that the essential purpose of the County's ordinance was to protect lot buyers, not to prevent overbuilding. The record is devoid of any other purpose underlying the ordinance. The reasoning in *Brady* has no application to this case.

Further, the court in *Brady* also based its holding on public policy considerations. The court explained that "[t]o recognize such a duty would make the Town substantially an insurer of all developments it undertook to inspect and control through its Development Standards Ordinance and would likely discourage all efforts at such control." *Id.* at 78, 439 S.E.2d at 268-69. The policy concern in *Brady*, however, is not

implicated in the present case. Imposition of a duty owed by the County to Repko, and other lot owners in Harmony Township, would not make the County an insurer of all developments it undertook to inspect and control. Instead, the duty would only apply when the County exercises its discretion to permit a developer's posting of financial guarantees, in lieu of completing required infrastructure, and subsequent management and reduction thereof.

The holding of *Brady* did not "compel" the Circuit Court to grant the directed verdict motion. To the contrary, *Brady* is inapplicable because: (1) the essential purpose of the County's ordinance, unlike the ordinance in *Brady*, is for the protection of lot owners; and (2) the public policy concerns of *Brady* are not implicated. Because *Brady* is inapposite, the satisfaction of all six elements of the special duty test establishes that the ordinance created a special duty owed by the County to the Plaintiff which was not barred by virtue of the public duty rule. Because the evidence compels the recognition of such a duty, the judgment of the Court must be reversed and the case remanded for trial.

II. THE CIRCUIT COURT ERRED IN RULING THAT THE SCTCA PROVIDES GEORGETOWN COUNTY WITH IMMUNITY FROM REPKO'S NEGLIGENCE CLAIM.

The County alternatively moved for a directed verdict on the grounds that Sections 15-78-60(4), (5), (12) and (13) provided the County with immunity as a matter of law. (R. p. 232, line 6 – p. 233, line 16). The Court denied the County's claim that § 15-78-60(12) entitled it to immunity. However, the Court granted the County's claim that § 15-78-60(4), (5), and (13) entitled the County to immunity as a matter of law. (R. p. 11). Viewing the evidence in the light most favorable to the Plaintiff, however, Sections

15-78-60(4), (5), and (13) of the SCTCA do not provide the County with immunity as a matter of law.

A. Section 15-78-60(4) Does Not Provide Immunity to the County as a Matter of Law.

With respect to the SCTCA's exceptions to waiver of immunity, subsection (4) provides that a "governmental entity is not liable for a loss resulting from . . . 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 . . . provision, ordinance . . . or written policies." S.C. Code Ann. § 15-78-60(4). Although this subsection does not contain a gross negligence exception on its face, subsection (12), which was raised by the County in its Answer and motion for a directed verdict, does contain a gross negligence exception. Because subsection (12) was raised by the County, South Carolina law mandates that a similar gross negligence exception be read into subsections (4), (5), and (13).

Subsection (12) provides that a "governmental entity is not liable for a loss resulting from . . . 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." S.C. Code Ann. § 15-78-60(12). South Carolina case law provides that "[w]hen an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 319-20, 743 S.E.2d 109, 115 (Ct. App. 2013) (*citing Steinke v. South Carolina Dep't of Labor, Licensing and Reg.*, 336 S.C. 373, 520 S.E.2d

142 (1999)). The justification for this principle is that "[o]therwise, portions of the [SCTCA] would be a nullity, which the Legislature could not have intended." *Steinke*, 336 S.C. at 398, 520 S.E.2d at 155. Accordingly, if a governmental entity may be liable for its gross negligence pursuant to subsection (12), it may also be liable for its gross negligence in other applicable subsections even though those subsections do not expressly provide a gross negligence exception.

Because the County raised subsection (12) as a defense, the Court was required to construe the remaining immunity provisions as also containing a gross negligence exception. *See* (R. p. 266, lines 5-13). In finding subsection (4) entitled the County to immunity, the Court stated that the "gravamen of Plaintiff's Complaint and his trial evidence was that Georgetown County failed to comply with or enforce its own regulation regarding the acceptance and reduction of a financial guarantee." (R. p. 9). The Court concluded that "Plaintiff's allegations of failure to enforce the Development Regulation fall squarely within exception § 15-78-60(4) and the County is not liable for any loss resulting from that conduct." (R. p. 10).

The Court completely overlooked that subsection (4) is subject to a gross negligence exception. Under South Carolina law, gross negligence is "the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). It is the failure to exercise slight care. It has also been defined as a relative term meaning the absence of care that is necessary under the circumstances. Ordinarily, gross negligence is a mixed question of law and fact. *Id.*

Viewing the evidence in the light most favorable to the Plaintiff, a jury could reasonably find that the County and its employees intentionally and consciously: (1) failed to follow their own ordinance and professional standards; (2) failed to exercise the care necessary under the circumstances; or (3) failed to exercise even slight care in allowing reductions in the $1.3 million financial guarantee posted by the developer. For purposes of the directed verdict, the Plaintiff's evidence established that the County's Planning Department and its employees: (1) allowed the reductions without obtaining both a certification from an engineer that the work had been completed and an estimate of completion cost of the required improvements, in violation of their own standards; (2) allowed multiple reductions in the Wachovia letter of credit within six months of the first reduction allowed, in flagrant violation of Section 3-5; (3) allowed multiple reductions in the letter of credit without obtaining approval of the Department of Public Works, in flagrant violation of Section 3-5; (4) continued to allow reductions in the letter of credit even after receiving the December 6, 2006 certification from the Earthworks engineer that the cost of completing the required improvements had not been reduced at all and, in fact, had actually increased; (5) allowed reductions in the letter of credit to pay the developer's contractor, in flagrant violation of Sections 3-3; and (6) allowed reductions without retaining 125% of the funds needed to complete the infrastructure, in flagrant violation of Sections 3-3 and 3-5. Because the gross negligence exception of subsection (12) applies to subsection (4), the Court should have submitted the question of subsection (4) immunity to the jury to determine if the County was grossly negligent in its management of the letter of credit funds.

B. Section 15-78-60(5) Does Not Provide Immunity to the County as a Matter of Law.

The Court also erred in ruling that Section 15-78-60(5) provided the County with immunity as a matter of law. In relevant part, subsection (5) provides that a "governmental entity is not liable for a loss resulting from . . . 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." S.C. Code Ann. § 15-78-60(5).

In granting the County immunity under this subsection, the Court correctly noted that the County's decisions to accept the financial guarantee and to subsequently authorize reductions in the letter of credit were all discretionary acts. The Court then reasoned that the County was entitled to discretionary immunity under subsection (5) as a matter of law because "Chief Planner Richardson testified that she could have denied the developer's requested reductions to the letter of Credit but she had no reason to do so after considering the submission of engineering certifications and confirmation of completed infrastructure from the Georgetown County Water and Sewer District." (R. p. 10).

In so ruling, the Court made three clear and reversible errors. First, as Plaintiff's counsel argued, subsection (5) does not entitle the County to immunity because the requirement that the County always retain 125% of the outstanding completion costs is mandatory and is not subject to discretion. (R. p. 246, lines 5-13). Second, the Court failed to recognize that the County bears the burden of proving discretionary immunity and must therefore prove both that: (1) the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice;

and (2) in weighing the competing considerations and alternatives, the government utilized accepted professional standards appropriate to resolve the issue before them. *See Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). The County failed to present any evidence whatsoever of accepted professional standards for deciding reduction requests pursuant to the ordinance. And while the County's own ordinance provides minimum (and mandatory) professional standards, the County Planning Department's employees flagrantly violated these standards when they approved these reductions.

Third, even assuming that the Chief Planner's reliance on the "submission of engineering certifications and confirmation of completed infrastructure from the Georgetown County Water and Sewer District" conformed with applicable professional standards, that agency advised the Planning Department that the water and sewer had been completed, but only on one occasion – by a single letter dated April 7, 2007. (R. p. 141, lines 3-8 and 14-22); *see* (R. p. 365). By this time, the Chief Planner had already authorized the developer's final request for a reduction by a letter *dated April 5, 2007*— two days earlier. The Chief Planner did not rely on the April 7, 2007 letter when she decided to authorize the reduction. She authorized the reduction *before* the letter existed. Moreover, the Georgetown County Water and Sewer District letter did not contain a cost to complete the infrastructure, which was required pursuant to Section 3-5 before permitting a cost reduction. (R. p. 144, lines 11-16). Furthermore, the ordinance did not vest the Chief Planner with the power to authorize the reduction, as the ordinance required her to forward the request to the Department of Public Works. She did not to forward the request. Finally, regardless of the merits of the April 7, 2007 letter to the

County's claim of discretionary immunity, the letter bears no relevance whatsoever to the County's approval of letter of credit reductions on July 26, 2006, October 9, 2006, or November 8, 2006. One letter cannot have justified four reductions.

The Court failed to recognize that the County, in exercising discretion, was grossly negligent as discussed above. Such a finding would have required denial of the directed verdict motion on subsection (5)'s discretionary immunity grounds. Therefore, the Court's judgment entered on the directed verdict motion cannot be sustained under Section 15-78-60(5).

C. Section 15-78-60(13) does not Provide Immunity to the County as a Matter of Law.

Finally, the Court also erred in ruling that Section 15-78-60(13) provided immunity to the County as a matter of law. In relevant part, that Section provides that a "governmental entity is not liable for a loss resulting from . . . regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(13). Subsection (13) has no application to the Plaintiff's negligence claim. The Plaintiff never contended that the County had a duty to make its own inspection. The Plaintiff's claim was solely based on how the County handled the letter of credit funds. (R. p. 247, lines 14-21).

The Plaintiff's negligence claim is that his loss was caused by the County's failure to comply with its own ordinance, particularly Section 3-5 regarding authorizing reductions in the letter of credit. Section 3-5 does not require the County to make physical inspections of the property, however, under that Section, the County *is* required

to obtain and submit a cost of completion estimate to the Department of Public Works. The County repeatedly failed to satisfy these requirements before authorizing the reduction requests. Furthermore, the County failed to obtain a certification from an engineer that the work had been completed and an estimate from an engineer of the cost of completion, as required by the County Planning Department's own standards.

Therefore, subsection (13) is not relevant or applicable to the cause of Plaintiffs loss in this case. Accordingly, Court's judgment entered on the directed verdict motion cannot be sustained under Section 15-78-60(13).

III. THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF WHERE HE PERSONALLY WAS INVOLVED AS AN ATTORNEY WITH A KEY PARTY AND CONDUCTED THE TRANSACTIONS IN QUESTION.

The Appellant requested that Judge Culbertson recuse himself during the Motion for Reconsideration hearing on December 19, 2013, after learning that his Honor had previously been hired by the development in question, Harmony Holdings, to handle real estate transactions. (R. p. 269, lines 3-11). Judge Culbertson should have recused himself pursuant to Canons 2 and 3 of the South Carolina Code of Judicial Conduct in order to ensure that the trial of this case was litigated in a fair and impartial forum.

A. Judge Culbertson Should Have Recused Himself Pursuant to Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR.

Canon 2 of the Code of Judicial Conduct requires that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(A), Rule 501, SCACR. The Commentary to the Canon further explains that a "judgment must avoid all impropriety and appearance of impropriety." *Id.*

Canon 3(E)(1) requires, in part, that:

> [a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it.

As the Commentary thereto notes, "[u]nder this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in [Canon 3(E)(1)] apply." Canon 3(E), Rule 501, SCACR.

Applying the plain language, commentary, and intent of both Canons 2 and 3 to the present case, this Court should find that Judge Culbertson should have recused himself and, accordingly, should remand this case for a new trial before an impartial judge.

1. Under Current South Carolina Law, Judge Culbertson's Impartiality Might Reasonably be Questioned Because His Findings Are Not Supported by the Record.

Under current South Carolina law, the applicable standard of review for a judge's failure to disqualify himself requires some evidence of actual bias or prejudice of the judge. *See Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct. App. 2008); *see also Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984). While an appellate court accords great weight to a trial judge's assurances of his own impartiality, a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. *Simpson*, 377 S.C. at 523, 660 S.E.2d at 277; *Patel*, 359 S.C. at 524, 599 S.E.2d at 118 (2004); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996).

2. Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, Should be Interpreted by Application of an Objective Test for Recusal and the Issue of Recusal Should be Reviewed *De Novo*.

The Appellant believes that the objective "appearance of impropriety" test is the proper test to determine recusal issues and asks that this Court adopt such a standard. In applying Canon 3(E), the Supreme Court previously considered adopting the objective test for recusal and review *de novo*, which is applied by federal courts in interpreting 28 U.S.C. § 455(a) after the United States Supreme Court's opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). *See Patel*, 359 S.C. at 524, 599 S.E.2d at 118. Indeed, the "federal status is similar to Canon 3(E)(1)(a)." *Patel*, 359 S.C. at 525, 599 S.E.2d at 119. Although the issue was not ultimately decided in *Patel*, our Supreme Court indicated that the issue remains viable. *Id.*

In *Liljeberg,* the United States Supreme Court considered the construction of 28 U.S.C. § 455(a), which provides: "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The issue in *Liljeberg* was whether Section 455(a) could be violated based on the appearance of impartiality. The court held that Section 455(a) requires recusal, even when there is no evidence of bias, if a reasonable person who knows all of the circumstances would expect that the judge is biased. This is known as the objective test. *See Liljeberg*, 486 U.S. at 860-61. The relevant question "is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances." *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998) (applying 28 U.S.C. § 455(a)).

When the Supreme Court of South Carolina previously considered application of *Liljeberg*'s objective test in South Carolina, the court declined to rule on the policy arguments supporting the federal rule and *de novo* standard of review because, *at that time*, the record in question did not demonstrate that the movant would prevail under the *Liljeberg* test. *See Patel*, 359 S.C. at 524, 599 S.E.2d at 118. Appellant submits that the objective test from *Liljeberg* should be applied in the case at bar for the reasons considered by our Supreme Court in *Patel.* Under an objective view, Judge Culbertson's disclosure that he knew some of the parties professionally and had worked for them is sufficient to raise question as to his impartiality in the case.

The "appearance of impropriety" test, employed by the Judicial Merit Selection Commission, embraced by the Code of Judicial Conduct, and mandated by the United States Supreme Court, is the proper test for determining disqualification or recusal issues. The proof of actual bias or prejudice should not be required. Under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers. Theoretically, judges who act in accordance with Canon 2 or 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality. If the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge. In practice, however, it is extremely rare that judges' *sua sponte* disqualify themselves. Therefore, it becomes even more important that judges honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality. This will permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal.

Due to these imposing requirements, most lawyers refrain from requesting recusal for fear of the Court. Furthermore, motions to recuse in this State are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted. It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists. Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal. An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *cf.*, *Lyvers v. Lyvers,* 280 S.C. 361, 312 S.E.2d 590 (Ct. App. 1984); *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993); *Simpson,* 377 S.C. at 519, 660 S.E.2d at 274; and *Eadie v. Krause,* 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008).

Unfortunately, the use of the "no evidence of bias or prejudice" standard by our appellate courts on a near universal basis for affirmation of trial judges' refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely what evidence of bias or prejudice, or what degree of proof of such evidence, would warrant disqualification or recusal.

In the present case, the record is clear with evidence that Judge Culbertson's findings are not supported by the record, such that his impartiality "might reasonably be questioned," and thereby rendering his disqualification mandatory. The evidence includes

not only evidence of bias or prejudice against Appellant, but also evidence of partiality and bias in favor of counsel for the Respondents. Judge Culbertson made it clear that he was hired and worked directly with Harmony Holdings involved in these transactions. (R. p. 269, lines 22-25). Further, his personal and professional interactions could have resulted in his being called as a witness in the trial of this case.

Pursuant to the plain language, commentary, and the intent of Canon 3, Judge Culbertson should have recused himself because these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned. Furthermore, the circumstances are certainly such as to create in the mind of a reasonable person at least a suspicion of bias. Since Judge Culbertson did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

Having failed to disqualify himself or to reveal any information concerning his qualifications on the record, the judge should have granted Appellant's recusal motion.

B. Judge Culbertson Failed to Ensure that Appellant's Claims were Being Litigated in a Fair and Impartial Forum, Thereby Resulting in Deprivation of the Right to Due Process of Law Under the Constitutions of the State of South Carolina and the United States of America.

The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question. "Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case." 46 Am. Jur. 2d, *Judges,* § 146. "The right to disqualify a judge for bias and prejudice is substantive . . . and it is included within the right to a fair trial guaranteed by

the due process clause of the . . . United States Constitution." *Id.* The constitutional guarantee of a fair and impartial judge and forum is recognized in this State. *Mallett*, *supra* ("the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process.").

In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to South Carolina's current standard requiring a "showing of actual prejudice," is the proper procedure to be followed. *See Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009) (*cf. Simpson*, 377 S.C. at 525, 660 S.E.2d at 277 (applying current South Carolina standard requiring a "showing of actual prejudice")). As recently analyzed and stated by Professor John P. Freeman:

> *Caperton*, of course, rejects any requirement that a party present on appeal some proof of actual bias or prejudice in order to win a reversal premised on a lower court judge's failure to recuse . . . Since proof of a serious *risk* of judicial bias establishes a due process violation under *Caperton*, the need for a showing of *actual* prejudice in order to win a recusal case in South Carolina is a requirement that in effect has been overruled . . . After all, why should a litigant whose trial has been tainted by the judge's violation of the appearance of impropriety standard have to prove something more than that in order to prevail on appeal?

John P. Freeman, *Appearance of Impropriety, Recusal, and the Segars-Andrews Case*, 62 S.C. L. Rev. 485, 495 (2011). In other words, the *Caperton* decision is particularly relevant to the case at bar because it squarely calls into question the constitutionality of South Carolina's currently applied "showing of actual prejudice" standard. *Id.*, p. 487.

First, part of the alleged bias claimed in *Caperton* involved the judge's personal and professional relationships with a party, and his receipt of benefits derived from those

relationships; specifically, donations to his campaign for election. In this case, Judge Culbertson's professional relationship with Harmony Holdings is at issue, together with his loyalty to a former client and the benefits received for work done. Importantly, Canon 3(E)(1) does not distinguish between "a party or a party's lawyer" where bias is alleged.

Second, the court's finding in *Caperton* that a judge's refusal to disqualify or recuse himself was a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1). The court discarded the judge's assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias. Instead, the court adopted the "appearance of impropriety" and reasonableness language of the Code. This is wholly consistent with Appellant's position in the case at bar and is congruent to plain language of South Carolina's current Canon 3 and the commentary thereto.

Third, the case at bar amply demonstrates the concern expressed by the court in *Caperton* regarding the focus upon proof of evidence to show bias in fact, rather than a reasonable perception of bias. The court stated that:

> there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias . . . Objective standards may also require recusal whether or not actual bias exists or can be proved. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.*

Caperton, 129 S.Ct. at 2252.

The case at bar is not merely a case where the former lawyer is now presiding over a field that he used to practice involving two parties wholly unrelated to his former position. In the present case, Judge Culbertson is presiding over legal claims asserted

regarding his former client, against the County in which he now sits as judge, concerning transactions that he conducted and with which he was directly involved. Further, Judge Culbertson and his clients owed each other fiduciary duties which required a high degree of fidelity, good faith, and absolute and undivided loyalty. To a reasonable person, Judge Culbertson's former fiduciary relationship with Harmony Holdings, which required absolute and undivided loyalty, would create a reasonable basis to question the judge's impartiality.

The professional relationships involving Judge Culbertson and his former clients create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring his disqualification and recusal pursuant to the Code of Judicial Conduct and the applicable laws. These relationships, coupled with the evidence that the judge was involved in these transactions, and that his rulings are not supported by the record, result in denying the Appellant a fair and impartial forum. This violates the Appellant's right to due process under the Constitutions of the State of South Carolina and the United States.

CONCLUSION

For the foregoing reasons, the judgment granting the County of Georgetown a directed verdict, denying the Appellant's motion to recuse, and denying Appellant's Motion for Reconsideration and for New Trial should be reversed. This case should be remanded for trial.

(Signature Page Follows)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
Case No. 2012-CP-22-00558

David M. Repko...Appellant,

v.

County of Georgetown ....Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the **Final Brief of Appellant** complies with the provisions of Rule 211(b), SCACR, and with the April 15, 2014, Supreme Court Order regarding personal identifying information and other sensitive information.

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