IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-06922
Appellate Tracking No. 2014-000582

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

v.

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

Of Which South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; and Charleston Water System are the Respondents.

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STATEMENT OF ISSUES ON APPEAL

Respondents would respectfully restate the issues on appeal as[1]:

I. WHETHER THE TRIAL COURT ERRED IN GRANTING CHARLESTON WATER SYSTEM'S MOTION TO DISMISS?

A. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the Charleston Water System is immune from liability for negligence claims arising out of the design and maintenance of the drainage system under the provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?

B. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the Charleston Water System does not have any control over the City's drainage system and has no duty to lower the level of the Reservoir for flood control during heavy rains?

C. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by Charleston Water System?

D. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

II. WHETHER THE TRIAL COURT ERRED IN GRANTING THE CITY OF NORTH CHARLESTON'S MOTION TO DISMISS?

A. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?

B. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the City?

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[1] Rule 208(b)(1)(B), SCACR; Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court.").

C. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

III. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL?

A. Did the Trial Court properly grant judgment on the claims for negligence/gross negligence because the SCDHEC is immune from liability for negligence claims arising out of the drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?

B. Did the Trial Court properly dismiss the claims for negligence/gross negligence because SCDHEC is immune from liability for negligence claims arising out of its issuance of development permits under provisions of S.C. Code § 15-78-60(12)?

C. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the SCDHEC?

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF TRANSPORTATION?

A. Did the Trial Court properly grant judgment on the claims for negligence/gross negligence because the SCDOT is immune from liability for negligence claims arising out of design, construction, and maintenance decisions related to a drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?

B. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the SCDOT?

C. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

STATEMENT OF THE CASE

This case arises from various flooding events in North Charleston over the course of years from 2003-2009 which resulted in damages to the La-Z-Boy Furniture Gallery operated by Appellant Tipperary Sales at Northwoods Pointe Shopping Center. Tipperary originally filed a Complaint on April 20, 2010, seeking compensation under theories of negligence/gross negligence, inverse condemnation, and trespass from various governmental entities – South Carolina Department of Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, and Charleston Water System.[2] After various proceedings, the case was restored to the docket and this case is currently before the Court on an amended complaint filed October 24, 2012. [ROA ___; Amd. Complaint.] Tipperary alleges causes of action for negligence/gross negligence and inverse condemnation against all four Respondents, and a cause of action for trespass against SCDOT, the City of North Charleston[3], and the Charleston Water System.

Each of the Governmental Entities timely answered the amended complaint: SCDOT filed an answer on December 10, 2012 [ROA ___]; SCDHEC filed an answer on November 2, 2012 [ROA ___]; City of North Charleston filed an answer on December 27, 2012 [ROA ___]; and Charleston Water System filed an answer on November 13, 2012 [ROA ___]. Over the course of the next year, Tipperary took only one deposition – the deposition of a SCDHEC employee, Mr. Richard Geer. [ROA ___; Geer

[2] Tipperary also seeks compensation from Associated Developers, Inc., and Parkhill, LLC; however, those claims are not the subject on this appeal.

[3] Tipperary also alleged at cause of action against the City of North Charleston for violation of S.C. Code Ann. §5-31-450; however, it has not pursued that claim on appeal.

Deposition; see Hearing Tr. 15:6-7.] By the end of 2013, the Governmental Entities each filed dispositive motions: the City of North Charleston filed a Rule 12(c) motion to dismiss on November 21, 2013 [ROA ___]; SCDOT filed a motion for summary judgment on November 21, 2013 [ROA ___]; SCDHEC filed a motion for summary judgment on November 25, 2013 [ROA ___]; and Charleston Water System filed a Rule 12(c) motion to dismiss, or, in the alternative, for summary judgment on December 6, 2013 [ROA ___]. The motions came for hearing before the Honorable R. Markley Dennis on January 7, 2014.[4] [ROA ___; Transcript.]

The Trial Court granted summary judgment to SCDOT and SCDHEC, and dismissed the claims against the City of North Charleston and Charleston Water System.[5] Separate orders were filed as to each Defendant; however, the Court's holdings rely on common legal foundations and reasoning. [ROA ___, ___, ___, ___; Orders filed February 18, 2014.] As to each Defendant, the Trial Court held that the Governmental Entities are immune from liability for any negligence claims arising out of any design, construction, and maintenance decisions related to a drainage system because such

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[4] At the hearing, Tipperary acknowledged that the Court could rely on matters outside of the record in ruling on Charleston Water System's motion in the alternative. [ROA ___; Tr. 2:21-15.] In its Brief, the Appellant Tipperary claims that it has not had the opportunity to depose anyone from CWS, [Appellant's Brief, p. 26]; however, this case had been pending for three years at the time the Court heard the motions, and, further, Tipperary did not ask for additional time to conduct further discovery at the hearing or submit any affidavit under Rule 56(f), SCRCP. *See* Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 480, 465 S.E.2d 765, 772 (Ct. App. 1995) (party made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery).

[5] The Trial Court dismissed all claims related to any flood events prior to April 8, 2008, based on the two-year statute of limitations, S.C. Code Ann. §15-78-110. Tipperary has not appealed from this ruling.

decisions are quasi-judicial, relying on the immunity provisions of the South Carolina Tort Claims Act, S.C. Code. Ann. §15-78-60, and the Court of Appeals' decision in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The Trial Court further held that the inverse condemnation claims fail because Tipperary did not allege any affirmative, positive, aggressive act, and similarly, the trespass claims fail because Tipperary did not allege any affirmative, intentional action of invasion onto Tipperary's property. The negligence claims against Charleston Water System were dismissed on the additional ground that it is a statutorily-created Public Works entity under S.C. Code Ann. §§ 5-31-210 et seq., and, as such, it does not have any control of any design, construction, or maintenance of any drainage system in the City of North Charleston. The negligence claims against SCDHEC were dismissed on an additional ground that it is immune from liability for negligence claims arising out of its issuance of development permits under provisions of S.C. Code § 15-78-60(12).

Tipperary served and filed a Notice of Appeal on March 17, 2014. [ROA ___.] Tipperary served and filed an Amended Notice of Appeal on April 2, 2014. [ROA ___.]

STATEMENT OF THE FACTS[6]

Overview of the Periodic Flooding at Northwoods Pointe Shopping Center

As alleged by Tipperary, there has been a problem for more than 30 years with flooding in the Northwoods Mall area in the City of North Charleston, including the

[6] Tippeary's Amended Complaint makes many factual assertions and legal conclusions to which these Respondents do not concede. However, for the purposes of this Brief, Tipperary's factual assertions are treated as true as required by the applicable motion to dismiss standard. The fact that these Respondents reference or incorporate certain of Tippeary's factual assertions into this appellate brief does not represent a waiver by these Respondents to later challenge any of those factual assertions if necessary.

Northwoods Pointe Shopping Center where Tipperary operates a La-Z-Boy store in a leased space. Notwithstanding the alleged existence of this generally, well-known flooding problem, Tipperary alleges that it did not have any knowledge of any prior flooding events when it leased the space in 2000 and undertook improvements and upgrades. The La-Z-Boy store is the lowest point in the area and tends to flood first.

Over the course of years, the La-Z-Boy store has been flooded on a number of occasions as a result of which Tipperary suffered damages. The amended complaint alleges damages from specific flooding events ranging from March 20, 2003, to December 18-19, 2009. As a result of Tipperary's decision not to appeal the Trial Court's ruling on the statute of limitations issue, the only events at issue are: July 16, 2008; October 24, 2008; April 2, 2009; July 8, 2009; July 29, 2009; August 26, 2009; October 28, 2009; and December 18-19, 2009.

Tipperary's amended complaint contains extensive allegations as to the purported cause(s) of the recurrent flooding. In a more condensed version, Tipperary alleges that the problem originates from a box culvert and two 84" storm water drainpipes installed by SCDOT near the Northwoods Mall at some point prior to 1980 and that the problem has grown worse over time as the area has been developed and road construction projects have impacted the area. [ROA ___; Amd. Complaint ¶ 11-12.] Of note, while Tipperary broadly contends that the two 84" pipes were never adequate to handle storm water, Tipperary more specifically alleges that an engineering study (the Seabrook Study) performed in 1979, determined that flooding would take place upstream *in a 50-year storm.* [ROA ___; Amd. Complaint ¶12, 8.] Tipperary further alleges the engineering report put the SCDOT and the City of North Charleston on notice of the drainage

problem, and that Tipperary itself has been complaining about the drainage and flooding since 2003, but SCDOT and the other agencies have ignored the problem and done absolutely nothing to remedy the drainage problem. [ROA ___; Amd. Complaint ¶[9-10.]

S.C. Department of Transportation

As to SCDOT, Tipperary alleges that the drainage system, as originally installed, was inadequate to provide sufficient drainage, and that SCDOT has not made any effort to improve the "choke point" at the mouth of those 84" drainage pipes[7]:

> 58. By reason of SCDOT' s installation of inadequate and insufficient drainage and its addition of more than 13 acres of impermeable material immediately adjacent to and upstream from the La-Z-Boy store, La-Z-Boy has been deprived of its property and the value of its property has been greatly diminished. La-Z-Boy has been adversely impacted by continual and repeated flooding.
>
> 60. SCDOT has also refused to remedy the drainage in its right of way, resulting in repeated flooding of the La-Z-Boy and deprivation of its use and access to its property. [ROA ___.]

Tipperary alleges that SCDOT was negligent/grossly negligent in certain particulars, all of which amount to alleged failure to provide adequate drainage, i.e.:

> a. In ***refusing to ensure adequate and appropriate drainage*** from the Northwoods Mall site, when, as early as the E.M. Seabrook, Inc. drainage study in 1980, SCDOT knew that its twin 84" pipes were woefully inadequate to provide adequate drainage in the area surrounding Northwoods Mall and Northwoods Point Shopping Center.
>
> b. In ***refusing to take any steps to remedy and correct the inadequate drainage*** from the entire Northwoods area, though on notice of the existing problem and future exacerbating factors of increased development and the addition of vast areas of impermeable material

[7] Tipperary alleged that SCDOT road improvements in 2002-03 caused flooding in March 2003 and July 2005, but any damages from those flooding events are barred by the statute of limitations.

causing increased water flow to the low points of the watershed- at the front door and rear loading dock of the La-Z-Boy store.

c. In ***failing and refusing to ensure adequate drainage*** for implementation of a storm water system in the Northwoods Mall and Northwoods Pointe area after being placed on notice of the necessary remedial action as recently as the 2007 Davis & Floyd Report, which set forth specific measures that could be taken to prevent further flooding.

d. In designing, constructing and maintaining the Highway 52 Connector improvements ***without providing for sufficient drainage*** of surface water from the highway, which surface drainage flows directly to the La-Z-Boy store, as is reflected in the Earth Tech study of2003.

e. In ***refusing to take any substantive steps to mitigate or prevent future flooding*** after the October, 2008 flood event.

f. In ***failing to properly supervise the surface water drainage system*** in the Northwoods Mall and Northwoods Pointe Shopping Center area, including its twin 84" pipes, to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA ___; Amd. Complaint ¶126 (emphasis added).]

S.C. Department of Health and Environmental Control

As to SCDHEC, Tipperary complains that the Department issued permits allowing a Centex Homes residential development in 2001 upstream from the "choke point" without conducting any investigation into the adverse impact such development would have on the flooding problems:

66. DHEC's issuance of permits to applicants whose permit applications failed to account for any potential flooding downstream from the respective sites constituted an affirmative and aggressive act by DHEC.

Tipperary alleges that SCDHEC was negligent/grossly negligent in failing to ensure adequate drainage and approving drainage plans for construction projects in the area:

a. In failing and refusing to ensure adequate drainage for implementation of a storm water system in the Northwoods Mall and Northwoods Pointe area after being on notice of severe and repeated flooding.

b. In negligently reviewing, inspecting, and approving ill-conceived and factually erroneous drainage plans for construction upstream from the designated and well known flood areas in and around Northwoods Mall and Northwoods Pointe Shopping Center.

c. In failing and refusing to take any substantive steps to mitigate or prevent future flooding after the October, 2008 flood event.

d. In failing to properly supervise the surface water drainage in the Northwoods Mall and Northwoods Pointe Shopping Center area to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA ___; Amd. Complaint ¶ 122.]

City of North Charleston

As to the City of North Charleston, Tipperary alleges that the City constructed streets and roads in the Mall area and that the grade results in storm water being directed to its store:

72. North Charleston constructed or participated in the construction of the streets and roads surrounding Northwoods Mall and Northwoods Pointe Shopping Center, including Northwoods Boulevard, extending from Ashley Phosphate Road to the Mall and Shopping Center parking lots, and Northwoods Boulevard.

73. Northwoods Boulevard and the parking lots of Northwoods Mall are graded and improved as streets or thoroughfare suitable for public travel, and North Charleston has caused them to become the permanent and established grade. That grade results in storm water flowing and collecting directly to the front and rear of the La-Z-Boy store.

74. La-Z-Boy was deprived of the use of its property and store numerous times because of the following flooding and near flood events, the effects of which were magnified and made worse by North Charleston's affirmative act of constructing, maintaining, and operating streets and thoroughfares graded such that storm water

flowed and collected directly in the front and rear of the La-Z-Boy store. [ROA ___; Amd. Complaint.]

However, Tipperary has not alleged that the City was negligent in constructing or maintaining the roads; rather, Tipperary alleges that the City of North Charleston was negligent/grossly negligent in failing to provide adequate drainage:

a. **In failing and refusing to ensure adequate and appropriate drainage from the Northwoods Mall site**, when, as early as the E.M. Seabrook, Inc. drainage study in 1980, North Charleston knew the level of the Northwoods drainage system was below the mean water level of the outflow of the entire drainage system at the Goose Creek Reservoir.

b. **In failing and refusing to take steps to remedy and correct the inadequate drainage from the entire Northwoods area**, though on notice of the existing problem and future exacerbating factors of increased development and the addition of vast areas of impermeable material causing increased water flow to the low points of the watershed- at the front door and rear loading dock of the La-Z-Boy store.

c. **In failing and refusing to ensure adequate drainage for implementation of a storm water system** in the Northwoods Mall and Northwoods Pointe area after being placed on notice of the necessary remedial action as recently as the 2007 Davis & Floyd Report, which set forth specific measures that could be taken to prevent further flooding.

d. **In negligently reviewing, inspecting, and approving ill-conceived and factually erroneous drainage plans for construction upstream** from the designated and well known flood areas in and around Northwoods Mall and Northwoods Pointe Shopping Center to account for increased drainage from Ashley Phosphate Road and the increased commercial development between Ashley Phosphate.

e. **In failing to provide for sufficient drainage** for surface water from Ashley Phosphate Road and down Northwoods Boulevard, which surface drainage flows directly to the doors of the La-Z-Boy store.

f. **In failing and refusing to take any substantive steps to mitigate or prevent future flooding** after the October, 2008 flood event.

g. **In failing to design and maintain a reasonably' adequate surface water drainage system** in the Northwoods Mall and Northwoods Pointe Shopping Center area and downstream to the discharge of the flood plain at the Goose Creek Reservoir.

h. **In failing to properly supervise the surface water drainage system** in the Northwoods Mall and Northwoods Pointe Shopping Center area to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA ___; Amd. Complaint ¶ 118 (emphasis added).]

Charleston Water System

The Charleston Water System owns, operates and manages the Goose Creek Reservoir which is one of the sources of the water it provides to its customers. The Reservoir is downstream from the Mall area. The Charleston Water System also owns and controls a drainage ditch in the area of the Mall that runs into the Reservoir. [ROA ___; Amd. Complaint ¶ 94.]

Tipperary complains that the Charleston Water System failed to provide a drainage system to prevent or mitigate flooding and it should have lowered the level of the Reservoir to prevent the upstream flooding:

79. The drainage system running from the Northwoods Mall site to its outflow at the Goose Creek Reservoir is controlled and maintained by the Charleston Water System f/k/a Commissioners of Public Works.

80. CWS also controls the level of the Goose Creek Reservoir and, as it is believed to have occurred in December, 2009, can lower the level of the reservoir to that the drainage system and watershed upstream to above Northwoods Mall and Northwoods Pointe Shopping Center will adequately and effectively drain during a torrential downpour:

81. Upon information and belief, CWS owns, controls, maintains, and operates the drainage watershed from the Northwoods Mall parking lot to the outflow at Goose Creek Reservoir. CWS's drainage system throughout is either flat or ascending from the Mall parking lot to the reservoir, the result of which is that, because CWS maintains the level of the Reservoir above the level of the drainage basin, the drainage

watershed remains approximately half full and does not properly drain any storm water.

82. CWS' operation and maintenance of the Goose Creek Reservoir and its maintaining the level of the Reservoir above the level of the drainage watershed outflow resulted in the following floods and near flood events, the effects of which could have been nullified or abated had the Reservoir been lowered: ****

83. As a direct and proximate result of CWS' affirmative and aggressive act of constructing, maintaining, and controlling a drainage system that is flat or ascending, rather than descending, La-Z-Boy has repeatedly been deprived of the use of its property and business. [ROA ___; Amd. Complaint.]

Tipperary alleges that the Charleston Water System was negligent/grossly negligent in failing to provide a drainage system to prevent flooding and failing lower the level of the Reservoir to prevent flooding:

a. Failing to design, maintain, and operate the drainage system under its control to prevent or mitigate flooding resulting from even moderate rainfall;

b. Failing to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding. [ROA ___; Amd. Complaint ¶ 98; see also ¶ 101-105.]

ARGUMENT

Standard of Review

On review of a grant of summary judgment, the Appellate Court applies the same standard which governs the trial court, namely, summary judgment is properly granted when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP; Hawkins v. City of

Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Id.*

Similarly, the Appellate Court applies the same standard of review implemented by the trial court on a motion under Rule 12(c), SCRCP. Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006). On a motion for judgment on the pleadings under Rule 12(c), the court must regard all properly pleaded factual allegations as admitted, and the court may not consider matters outside the pleadings. Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000).

In this case, the Trial Court granted summary judgment to SCDHEC and SCDOT and dismissed the claims against the City of North Charleston and Charleston Water System. However, the appellate review is substantially the same because the Plaintiff did not submit any evidentiary materials and the Trial Court relied almost exclusively on the allegations of the Amended Complaint.

The S.C. Tort Claims Act- Generally

As succinctly stated in Hawkins v. City of Greenville, supra, the Tort Claims Act governs all tort claims against governmental entities. It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann § 15-78-20(b). However, while the Tort Claims Act makes governmental entities liable for their torts, a plaintiff must present evidence of the governmental entity's duty to act in order to recover under the Act, and any potential liability is subject to certain limitations and exemptions as provided in the Act. S.C. Code Ann. §15-78-40.

Section 15-78-60 sets out forty "exceptions" to this waiver of sovereign immunity

which significantly limit the tort liability of government entities, and those limitations and exemptions must be liberally construed in favor of limiting liability of the State. S.C. Code Ann § 15-78-20(f). Potentially applicable sections of § 15-78-60 as referenced in the Trial Court's orders, include:

> The governmental entity is not liable for a loss resulting from:
>
> (1) legislative, judicial, or quasi-judicial action or inaction;
>
> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
>
> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
>
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
>
> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
>
> ...
>
> (7) a nuisance;
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> ...
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> (9) entry upon any property where the entry is expressly or impliedly authorized by law;
> ...
>
> (12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner;

> (13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;
>
> ...
>
> (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons.

As the Trial Court noted, the application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental agency's drainage system has been addressed by the Court of Appeals in Hawkins v. City of Greenville, in which the Court held that the city was entitled to summary judgment on claims of negligence, inverse condemnation and trespass brought by a business property owner alleging that the city's improper and negligent design and maintenance of its drainage system caused his business to flood.

Tipperary argues that Hawkins is distinguishable on the facts, procedural posture and pleadings, and specifically contends that: (1) Greenville had attempted to remedy the flooding problems; (2) Tipperary has pleaded gross negligence; and (3) Tipperary alleges affirmative acts of building and approving roads and issuance of permits. As a general proposition, it is rare that any two cases are identical on every point of fact, but, as to the law, Hawkins is substantially on-point and bars Tipperary's claims as a matter of law. Tipperary's attempt to ignore the key holdings of the Hawkins binding precedent and sound rationale based upon irrelevant facts is unavailing.

As in this case, the plaintiff Hawkins was a business owner who brought an action against the City of Greenville alleging that the City had improperly and negligently designed and maintained its municipal drainage system in the area which caused his

business property to flood after a rainstorm. Hawkins alleged the same causes of action for: inverse condemnation, negligence in the City's design and maintenance of its storm water drainage system, and trespass.[8] Any other specific factual differences do not weaken the rationale or application of those holdings in this case. The Trial Court's rulings in this case are well-founded on the statutory provisions of the Tort Claims Acts, and the precedent found in the Hawkins opinion and other settled legal propositions as discussed in detail below.[9]

I. *Quasi-judicial Immunity*: The Governmental Entities are immune from claims of negligence/gross negligence arising from the exercise of their quasi-judicial duties related to the design and maintenance of the drainage system under § 15-78-60(1).

Section 15-78-60(1) provides that governmental entities are not liable for a loss resulting from quasi-judicial action or inaction. In Hawkins v. City of Greenville, supra, the Court of Appeals held that the City was immune from any liability for any negligence claims arising out of the design and maintenance of the drainage system because a governmental entity's duties in regards to its drainage system are of a quasi-judicial nature. In reliance on the statutory provisions of §15-78-60(1) and the Hawkins holding, the Trial Court properly granted judgment and/or dismissed all claims against the Respondents related to the design, construction, and maintenance of the drainage system.

In Hawkins, the Court of Appeals relied on and quoted from a Texas appellate decision in City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex.1997), discussing the quasi-

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[8]Hawkins also alleged a violation of S.C. Code § 5-31-450, as did Tipperary.

[9] The following arguments are organized by the nature of the cause of actions in an effort to provide clarity and avoid repetition. Specific points and arguments as to the Governmental Entities may be discussed therein.

judicial nature of a governing authority's actions in adopting public drainage systems:

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

594 S.E.2d at 564. The Court of Appeals found "a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville." *Id.*

In addition to the supporting rationale of the Texas decision, the quasi-judicial immunity ruling is also supported by comparable decisions in other jurisdictions, including an opinion from the U.S. Supreme Court, in Johnston v. D.C., 118 U.S. 19, 20-21 (1886):

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

See also J.N. Legacy Grp., Inc. v. City of Dallas, 745 S.E.2d 721, 725 (Ga. App. 2013)("'the duty of a city to maintain its sewerage-drainage system in a good working and sanitary condition is a governmental function," for which no liability against the municipality exists in an action for negligence'); Coleman v. Portage Cty. Eng'r, 975

N.E.2d 952, 960 (Ohio 2012)("a claim based on a failure to upgrade [a storm water drainage system] is a claim based on a failure of design and construction, for which political subdivisions enjoy immunity"); Beck v. City of New York, 199 N.Y.S.2d 584, 591 (Sup. Ct. 1960) aff'd, 229 N.Y.S.2d 736 (1962) (inadequacy of sewer system is a discretionary decision committed in the exercise of a quasi-judicial determination). Ultimately, "a municipality cannot be held liable for its failure to provide a drainage system sufficient to dispose of surface waters flowing as a result of the natural drainage, the grading and paving of streets." Beck, *id.*

Tipperary argues that the City of Tyler opinion "actually found the municipality could be held liable for constructing and maintaining the storm water system because those are 'propriety' functions." [Appellant's Brief, p. 14.] However, Tipperary miscomprehends the Texas appellate rulings. First and foremost, the Texas court definitively held that the City's design and planning of its culvert system were quasi-judicial functions subject to governmental immunity. 962 S.W.2d at 501. To the extent that the court held that the City of Tyler could be liable for the negligent performance in constructing and maintaining the storm system prior to 1970, that holding was based on a distinction between propriety and governmental functions in the context of significant changes in Texas law. Namely, Texas common law classified operation and maintenance of storm sewers as proprietary functions for which a municipality could be sued, and that common law distinction remained in place when Texas enacted a Tort Claims Act in 1970; but, in 1987, the Texas Tort Claims Act was amended to reclassify operation of a storm sewer system from a proprietary function to a governmental function subject to immunity. Thus, the Texas appellate court held that, while the claim for negligent

operation of the system was barred under the 1987 amendment, the claim for negligent construction before 1987 was not subject to dismissal.

In contrast to Texas law, prior to the Supreme Court's decision to abolish sovereign immunity in McCall v. Batson,[10] the Court had "consistently refused to recognize a distinction between governmental and proprietary functions of a municipal corporation." Boyce v. Lancaster Cnty. Natural Gas Auth., 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976); *see also* Horton v. United States, 622 F.2d 80, 83 (4th Cir. 1980)("While a majority of states today find waiver of immunity when the sovereign engages in proprietary functions, ... as opposed to purely governmental activities, South Carolina has declined the invitation to adopt this distinction."). Thus, under South Carolina precedent, there is no distinction between proprietary and governmental function to support Tipperary's attempt to avoid the holding of Hawkins.

In South Carolina, the key distinction for immunity purposes has been between discretionary decisions and ministerial actions:

> The duties of public officials are in general classified as ministerial and discretionary. They are also referred to as being ministerial and quasi-judicial. The character of an official's public duties is determined by the nature of the act performed. The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Quasi-judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.

Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659, 662 (1973). The Court of Appeals in Hawkins held that the City exercised discretion in making policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville,

[10] 285 S.C. 243, 329 S.E.2d 741 (1985).

and the Trial Court properly relied on that holding in finding that the actions of which Tipperary complains fall in the same category of discretionary, quasi-judicial duties.

Tipperary alleges that there is inadequate drainage because the 84" pipes SCDOT installed and constructed do not provide adequate drainage – that is a design decision within the Department's quasi-judicial duties for which it retains immunity. To the extent that Tipperary also alleges that SCDOT and the other Governmental Entities are responsible for generally failing to provide an adequate drainage system and/or failing to remedy the flooding problems, such decisions are quasi-judicial and protected by the immunity provision of §15-78-60(1). Accordingly, the Trial Court orders dismissing those claims should be affirmed.

As to Charleston Water System, the Trial Court also properly dismissed the claims against the Charleston Water System related to the design, construction, and/or maintenance of the drainage system in the Mall area on the additional ground that CWS's authority is limited by § 5-31-250:

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

S.C. Code Ann. § 5-31-250. Tipperary's allegation that a drainage basin leading into the Goose Creek Reservoir – below the "choke point" -- is owned by CWS simply does not defeat the immunity under §15-78-60(1), or the scope of authority under §5-31-250.

II. *Gross Negligence*: SCDHEC is immune from claims of gross negligence related to the issuance of permits for development and construction in the Mall Area under § 15-78-60(12).

Tipperary claims that the Hawkins opinion does not support the dismissal of the claims against SCDHEC because it has alleged gross negligence in issuing permits for development in the area, relying upon Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006).[11] More specifically, Tipperary argues that the conduct of SCDHEC "in issuing permits for development in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct." [Appellant's Brief, p. 9.] Neither the opinion in Proctor nor the allegations/evidence support any viable claim for gross negligence by SCDHEC in issuing any development permits.

In Proctor, a tire waste disposal operator asserted a claim against DHEC for gross negligence in failing to restore operator to rebate list after an ALJ had ordered DHEC to do so. The Court discussed various provisions for immunity under separate subsections of § 15-78-60[12] and held that: "When 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." Proctor, *id.* at 513; see also Steinke v. S.C. Dep't of Labor, Licensing and Regulation,

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[11] As to the City of North Charleston, Tipperary's Complaint allegations do not specifically allege gross negligence related to the issuance of permits for the development and construction in the Mall area against the City. Moreover, any such claim would be barred against the City of North Charleston pursuant to Hawkins decision as well.

[12] §15-78-60(1), (2), (3), (4), (5) and (12).

336 S.C. 373, 397, 520 S.E.2d 142, 154 (1999) ("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.").

Discussing the licensing and permitting immunity provision of §15-78-60(12) as applicable in Proctor, the Court recited, "[g]ross 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." Proctor, *id.* (citation omitted). In upholding the trial court's decision to submit the question to a jury, the Court noted the evidence that DHEC violated its own policy in refusing to perform an inspection for over four years despite the plaintiff's request for one: "There is sufficient evidence to support the jury's finding of intentional, conscious failure by DHEC to do that which it ought to have done." *Id.*

Here, the Trial Court held that Tipperary "was unable to provide any evidence that the [DHEC] permits at issue were issued in a grossly negligent manner." [ROA ___; DHEC Order p. 4.] Tipperary maintains that "there is ample evidence for a jury to find that SCDHEC was grossly negligent in issuance of these permits. The overwhelming evidence is that the flooding problems in the Northwoods Mall area have been ongoing for over three decades. In spite of the serious flooding concerns, SCDHEC permitted numerous developments, intentionally ignoring the historical and ongoing flooding concerns." [Appellant's Brief, p. 10.]

SCDHEC maintains that Hawkins resolves all of the claims against DHEC, including the gross negligence claim, and that §15-78-60(12) provided an additional ground for the Trial Court to grant the motion for summary judgment. On the matter of

subsection 60(12), however, the only evidence – beyond the pleadings – sustains the grant of summary judgment to DHEC because unlike Proctor, there is no evidence that DHEC violated any policy or regulation in issuing the permits.

The only deposition that Tipperary has taken[13] is Richard Geer, the DHEC engineer associate with the division that issues storm water permits for development and redevelopment in the Coastal Counties area. As Mr. Geer explained, storm water permit applications were submitted under the regulations with the required plans and calculations which included a drainage analysis from a consulting engineer hired by the developer. See SC Reg. §§72-300-316 – Standards for Stormwater Management and Sediment Reduction. [ROA ___; Geer Dep. 14:10-15:9.] "[W]e review applications, issue the permit, do compliance inspections during construction and make sure it's built according to what we approved. As long as that's done, it's done." [ROA ___; Geer Dep. 29:6-9.] Under the regulations, DHEC relies upon the developer's engineer's report regarding the storm water impact. See SC Reg. § 72-305(H). [ROA ___, ___-___; Geer Dep. 17:8-13, 28-29.] DHEC does not approve or choose the engineer for a particular project. [ROA ___-___; Geer Dep. 30:24 – 31:1.] "[W]e rely on them [state registered professionals] and their preparations and that professional registration and goes with that." [ROA ___; Geer Dep. 30:10-16.]

The 1998 application for Phase 1 of the Parkhill Place development did not contain a question about whether there were any flooding concerns in the general area; however, by the time the 2000 application was submitted for Phase 2A & 2B, a question

[13] This is the only deposition that Tipperary has taken during the course of the litigation. See ROA ____; Hearing Tr. 15.

had been added: "14. Are there any existing flooding problems in the surrounding areas?" [ROA ___, ___, ___; Geer Dep. 24, 27; ex. 4.] The developer's engineer had answered "no" to the question on the 2000 application, as well as the 2001 application for Phases 3, 4, &5 and the 2004 application for Phase 6. [ROA ___, ___; Geer Dep. Ex. 5 & 7.][14] Tipperary inquired as to whether DHEC had some responsibility to follow-up on the answers given by the engineer once it became aware that there was in fact flooding. However, the only evidence is that DHEC has no responsibility or duty in that regard. [ROA ___; Geer Dep. 39-40.] Accordingly, the Trial Court properly granted judgment and dismissed the claims against SCDHEC under §15-78-60(12).

III. *Gross Negligence*: The claims of gross negligence against Charleston Water System failing to lower the water level in the Reservoir during the periods of heavy rainfall fail as a matter of law.

In addition to complaining that Charleston Water System was responsible for the flooding of the La-Z-Boy store because of the slope of the drainage basin that leads into the Reservoir, Tipperary alleges that CWS was grossly negligent in "failing to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding." [ROA ___; Amd. Complaint ¶ 98.] From one perspective, any decision as to water levels is discretionary and protected by the immunity provisions of §15-78-60(1), and, in addition, the allegation fails to state a claim for gross negligence, as a matter of law, because the alleged failure to act is not cognizable in the absence of a duty.

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[14] Tipperary also questioned the DHEC employee about a 2003 application for a school and a 2001 application for some townhomes both of which also contained the answer "no" to question 14 about flooding. [ROA ___-___, ___, ___, ___; Geer Dep. 38-39, 41, Ex. 8, 9.]

Tipperary alleges that CWS had a duty to lower the water level in the Reservoir to prevent the upstream flooding in the Mall area, but it cites no authority for its assertion. Existence of a legal duty is a matter of law, and a mere allegation of a duty is not accepted as true on a Rule 12(c) motion. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct.App.1986). ("The existence and scope of the duty are questions of law."); Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988)[15]("A motion under ... Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.").

"Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. It follows that a person usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act." Rayfield v. S. Carolina Dep't of Corr., 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). South Carolina Code includes a "Dams and Reservoirs Safety Act," §§49-11-110 et seq., but it only deals with the safety of the structure of a dam or reservoir and allows SCDHEC to order a drawdown where structure of dam/reservoir is threatened by imminent floods. S.C. Code §49-11-190. The Act does not, however, impose any duty on the CWS to open its spillway to release water to avoid upstream flooding during heavy rains.

[15] *Overruled on other grounds in* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

At common law, "the only obligation imposed upon a dam operator in the operation of his dam is not to worsen conditions downstream beyond what would have occurred in the absence of the dam. Key Sales Co. v. S. Carolina Elec. & Gas Co., 290 F. Supp. 8, 23 (D.S.C. 1968), *aff'd* 422 F.2d 389 (4th Cir. 1970). Courts in other jurisdictions also have held that the owner of a water supply reservoir has no duty to institute flood control during heavy rains. Shamnoski v. PG Energy, Div. of S. Union Co., 579 Pa. 652, 680, 858 A.2d 589, 606 (2004)("This was not a flood-control dam, but a water supply reservoir and there is no support for an argument that every dam owner has a duty to institute flood control measures in times of heavy precipitation."); Kambish v. Santa Clara Val. Water Conservation Dist. of San Jose, 185 Cal. App. 2d 107, 110, 8 Cal. Rptr. 215, 217 (Ct. App. 1960) ("no duty to improve that situation by using the dam for flood control"); Iodice v. State, 277 A.D. 647, 648-49, 102 N.Y.S.2d 742, 743 (App. Div.) aff'd, 303 N.Y. 740, 103 N.E.2d 348 (1951)(no legal duty imposed upon state as owner of water storage reservoir to operate its dam for flood control purposes).

From an additional perspective, CWS's refusal to open the spillway is a discretionary decision under the immunity provision of §15-78-60(1). Consistent with the Texas appellate court's decision in City of Tyler, as cited in Hawkins and discussed above, the Texas appellate court has also held that a county water company's decision whether to open the spillway of a reservoir to manage flood control constituted a discretionary decision for which the water district was immune from liability. Bennett v. Tarrant Cnty. Water Control & Imp. Dist. No. One, 894 S.W.2d 441, 452 (Tex. App. 1995).

IV. *Inverse Condemnation* -- The claims for inverse condemnation fail because Tipperary does not allege any affirmative, positive, aggressive acts by the Governmental Entities.

The well-settled law, as recited in Hawkins, holds that:

> An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. To establish an inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.' ...594 S.E.2d at 562

The Court of Appeals found that Hawkins had failed to allege any affirmative acts by the city and affirmed the summary judgment to the city: "The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient."[16] Hawkins, 594 S.E.2d at 563. Tipperary does not dispute that the applicable law requires a showing of an affirmative, positive, aggressive act to establish a claim of inverse condemnation. Rather, Tipperary argues that it has alleged the requisite affirmative, positive, aggressive acts by each of the Governmental Entities.

As to the City of North Charleston, Tipperary's inverse condemnation claim fails

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[16] Section 5-31-450 provides certain duties and rights upon municipalities that install drainage systems to avoid damage to landowners, however, any such liability is not imposed absent some affirmative act by the municipality which alters the course or increases the amount of storm water runoff onto private property. In Hawkins, the Court found that the claims under this section failed for lack of any offer proof of any affirmative, positive acts on the part of the City that caused the flooding. Here, the Trial Court found that Tipperary's claim against the City of North Charleston under § 5-31-450 fails on three grounds: (1) Tipperary is a tenant, not the landowner; (2) there is no allegation that the landowner made demand as required under the statute; and (3) there is no allegation of any affirmative, positive, aggressive acts. Tipperary did not appeal the Trial Court's dismissal of its §5-31-450 claim against the City of North Charleston; therefore, the issue is not before the Court on appeal.

pursuant to the Hawkins decision. Hawkins had argued that the city was liable for his inverse condemnation claim, contending he was deprived of his full right to his property without just compensation as a result of the city's design and maintenance of the drainage system. In affirming the trial court's summary dismissal of Hawkins' claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

> In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the Servicemaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by "affirmative, positive, aggressive" acts by the governmental agency. Allegations of mere failure to act are insufficient. *See, e.g., Berry's On Main, Inc. v. City of Columbia,* 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); *Gray v. South Carolina Dep't of Highways & Pub. Transp.,* 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). 594 S.E.2d at 562-63 (emphasis added).

Similarly, here, Tipperary fails to allege any "affirmative, positive, aggressive" on the part of the City of North Charleston. Complaint Paragraphs 4-52, and 72-74 do not factually allege any "affirmative, positive, aggressive act" on the part of the City. The allegations of the City's mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the City of North Charleston giving rise to Tipperary's inverse condemnation claim is practically the same as the City of Greenville's conduct absolved

by the court in Hawkins. Pursuant to the Hawkins' Court's ruling, the City's action in "allow[ing] the development of neighboring parcels of commercial property" which alleged "add[ed] strain" to the existing upstream watershed, as well as its alleged failure to remedy the drainage defects, do not constitute the type of "affirmative, positive aggressive" act by [a] governmental agency to render it liable for inverse condemnation. At most, the City's actions amount to a "mere failure to act," which Hawkins hold is an insufficient basis to render a municipality liable for inverse condemnation. Id.

As to the Charleston Water System, Tipperary argues that the allegations that CWS maintained the level of the Reservoir and refused to lower the level are sufficient to plead a cause of action for inverse condemnation. However, consistent with the Court of Appeals' holding in Hawkins, the Trial Court properly held a failure to act does not allege or show any requisite "affirmative, positive, aggressive act". *See also* Brown v. Sch. Dist. of Greenville Cnty., 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968)("In such case there would normally have to be some positive, aggressive, overt act on the part of the agency which brings about the taking. In other words, it is difficult, if not impossible, to take anything from someone negatively or by failing to act.")

As to SCDHEC, Tipperary argues, without citation to any authority, that "the issuance and approval of the development permits constitute affirmative, aggressive, positive, and aggressive acts sufficient to constitute an inverse condemnation. [Appellant's Brief, p. 12.] The Trial Court correctly found that "the mere allegation that DHEC issued permits without accounting for potential downstream flooding is insufficient to support a claim for inverse condemnation." [ROA ___; DHEC Order, p. 4.] *See supporting authorities from other jurisdictions*: City of Keller v. Wilson, 168

S.W.3d 802 (Tex. 2005) (allegations that city approval of drainage plans resulted in flooding of private property did not prove inverse condemnation); First Gaston Bank of N. Carolina v. City of Hickory, 203 N.C. App. 195, 202, 691 S.E.2d 715, 721 (2010) (inverse condemnation claim not sustained by allegation that city was reckless in approving development upstream that concentrated unreasonable amounts of storm water resulting in a sinkhole); Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club, 283 Mich. App. 264, 769 N.W.2d 234 (2009) (city's approval of construction plans nor city's failure to construct a drainage system constituted an affirmative act, for purposes of an inverse condemnation claim); State ex rel. City of Blue Springs v. Nixon, 250 S.W.3d 365, 371 (Mo. 2008)(inverse condemnation claim not stated based on mere approval of plat in compliance with city code because there is no liability in absence of an affirmative act). The words of the Missouri Supreme Court are most apt:

> While the Stevenses may be correct that "as a matter of good government" cities *should not* approve plats unless developers prevent rainwater from running on other property, they simply fail to cite any authority for finding inverse condemnation occurred where the municipality does approve them. A failure to meet aspirational goals does not result in liability.

State v. Nixon, 250 S.W.3d at 372. The Trial Court correctly held that SCDHEC is not liable for inverse condemnation based on issuance of the development permits.

As to SCDOT, Plaintiff argues that the allegation that DOT originally installed the culvert and the 84" pipes and constructed roads in the area is an allegation of an affirmative, positive and aggressive act. Tipperary similarly argues, as to the City of North Charleston, that allegations the City constructed or participated in road

construction in the Mall area which made the flooding worse constitutes affirmative, positive, aggressive acts to state an claim for inverse condemnation.

At their core, the allegations of injury are based on the ***failure*** to provide adequate drainage for 50-year rains. As alleged by Tipperary, the cause of the flooding is the inadequacy of the twin 84" pipes and culvert. [ROA ___; Amd. Complaint ¶33.] The allegation is that the storm water flows from the Parkhill development and other areas above the Mall/Shopping area and pools at the lowest point – the location of the La-Z-Boy store because the culvert and pipes are inadequate to carry away all the storm water fast enough during a heavy – "50-year" – storm. [ROA ___; Amd. Complaint ¶18]. There is no allegation that road construction (within the statute of limitation time period) directly caused any flooding; rather, the allegations are that the roads added impervious acreage which increased the runoff and that storm water collects at the La-Z-Boy store because of the grade of roads. [ROA ___; Amd. Complaint ¶20, 58, 74.] While it might be that installing the pipes and building roads are positive actions, the allegations do not amount to the type of aggressive, affirmative acts that impose liability under inverse condemnation because no affirmative acts, as alleged, actually collected the storm water and directed it onto La-Z-Boy store property.

"It is an actionable injury for one to collect surface water into an artificial channel, and thence cast the same in concentrated form upon adjacent lands." Taylor v. Lexington Water Power Co., 165 S.C. 120, 163 S.E. 137, 142 (1932) (erection of dam across Saluda river impounded a large volume of water, and opening the gates during a heavy rainfall turned the flood waters down river and upon the plaintiff's land). To recover, the Plaintiff must plead and prove that the defendant constructed the highway in

such a manner as to cause the impounding of waters and the casting of such upon its property. Lail v. S. Carolina State Highway Dep't, 244 S.C. 237, 246, 136 S.E.2d 306, 311 (1964). If a governmental entity might be liable in inverse condemnation for flooding caused by road construction, there must be a showing of more than the fact that the road is impervious and creates or increased runoff; there must be proof that the city collects, channels and/or thrusts water upon the land of another in a different matter from the natural flow, *See* DiBlasi v. City of Seattle, 136 Wash. 2d 865, 879, 969 P.2d 10, 16 (1998). *Compare* Brown v. Sch. Dist. of Greenville Cnty., 251 S.C. 220, 222, 161 S.E.2d 815, 815 (1968)("natural flow of rain water was directed in concentrated form into and across the drive and onto the landowners' property with great force and volume"); Hoffman v. Greenville Cnty., 242 S.C. 34, 39-40, 129 S.E.2d 757, 760 (1963)(ditches and drains impounded surface water and casting it upon their property); M & M Corp. of S. Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 261, 701 S.E.2d 33, 36 (2010)("deliberately channeled and cast upon Plaintiff's land").

Tipperary cites to Newsome v. Town of Surfside Beach, 300 S.C. 14, 15, 386 S.E.2d 274, 275 (Ct. App. 1989), as precedent in support of its inverse condemnation claims against the DOT and the City; however, in that case, a dam had been created, and waters from a heavy rain breached the dam and drained onto the plaintiff's property. In Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 15, 281 S.E.2d 796, 797 (1981), the facts as set forth in the Court's opinion show that the City had excavated two trenches to the basement that impounded water during a heavy rain and cast the water into the store's basement.

Tipperary also cites to Cutchin v. S. Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 36-37, 389 S.E.2d 646, 647 (1990), a case in which the Court upheld a jury verdict in an inverse condemnation action predicated on a culvert that was "improperly constructed." Respondents would submit that the factual foundation as found in the Court's opinion in Cutchin is too sparse to make a worthwhile comparison to allegations of this case in the face of Hawkins and the other inverse condemnation cases discussed above, which recognize a claim for inverse condemnation where water is impounded and cast upon the plaintiff's land.

Similarly, the other pre-Hawkins cases cited by Tipperary do not support a reversal of the Trial Court's decision in this case and are unavailing to support Tippeary's urging that the Court ignore its own precedent in Hawkins. In this case, Tipperary's allegations do not amount to impounding surface water and casting it onto Tipperary's property. Accordingly, the Trial Court properly dismissed the inverse condemnation causes of action.

V. *Trespass* – The trespass claims fail because Tipperary does not allege any affirmative, intentional action of invasion onto its property.

Tipperary has attempted to assert claims for trespass against SCDOT, the City of North Charleston, and the Charleston Water System. As with inverse condemnation, the basic legal premises of a cause of action for trespass are well settled:

> "[T]respass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property...." *Hedgepath v. Am. Tel. Tel. Co.,* 348 S.C. 340, 356, 559 S.E.2d 327, 337 (Ct.App.2001) (quoting *Silvester v. Spring Valley Country Club,* 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001), *cert. denied* (citing *Ravan v. Greenville County,* 315 S.C. 447, 434 S.E.2d 296 (Ct.App.1993))). "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion."

Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct.App.1991); *accord Mack v. Edens,* 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct.App.1995).

Hawkins, 594 S.E.2d at 565-66.] Relying upon Hawkins, the Trial Court dismissed the trespass claims as to each Governmental Entity because trespass will not lie for failure to perform a duty.

Tipperary argues that that the Trial Court erred because its amended complaint pleads affirmative and intentional acts. As to CWS, Tipperary contends that allegations that the flooding had been a problem for decades and that CWS controls the Reservoir amounts to intentional mishandling of the water level and constitutes a sufficiently affirmative, intentional act to support a claim for trespass. As to SCDOT and the City, Tipperary contends that allegations that they knew full well of the history of flooding and still proceeded with road projects that would exacerbate the flooding constitutes affirmative and intentional actions to state a claim for trespass.

In Snow v. City of Columbia, as cited in Hawkins, the Court found that the plaintiff had not established a trespass claim where "the immediate cause of the entry on the Snows' land was the discharge of water from the leaking pipe joint. However, the City did not intentionally discharge the water.... Since the event which constituted the entry was not a voluntary act of the City, an action for trespass will not lie." 409 S.E.2d at 802. Here, the immediate cause of the entry of the storm water onto the La-Z-Boy store was the heavy rainfall which by no means can be considered an affirmative act by any of the Governmental Entities. To the extent that some of the storm water from the heavy rain pooled down in Tippeary's store because the drainage system could not carry it away quickly enough, the failure to provide an adequate drainage system at the core of

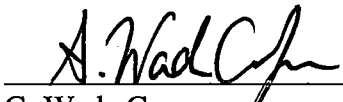
Tipperary's case is a failure to act that is not cognizable in trespass. Finally, even if the act of installing the pipes or building roads was affirmative, none of the Governmental Entities intentionally discharged water into the La-Z-Boy property.

CONCLUSION

The Trial Court properly granted judgment on all of Tipperary's claims under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60 and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The Governmental Entities are immune from claims of negligence/gross negligence arising from the exercise of their quasi-judicial duties related to the design and maintenance of the drainage system under § 15-78-60(1). The Defendant SCDHEC is immune from claims of gross negligence related to the issuance of permits for development and construction in the Mall Area under § 15-78-60(12). The claims of gross negligence against Charleston Water System for failing to lower the water level in the Reservoir during the periods of heavy rainfall also fail as a matter of law. Likewise, the claims for inverse condemnation fail because Tipperary does not allege any affirmative, positive, aggressive acts by the Governmental Entities, and the trespass claims fail because Tipperary does not allege any affirmative, intentional action of invasion onto its property.

Therefore, the Respondents respectfully request that the Court affirm the Trial Court's orders.

Respectfully submitted,



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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-06922
Appellate Tracking No. 2014-000582

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

v.

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

Of Which South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; and Charleston Water System are the Respondents.

CERTIFICATE OF SERVICE

I, G. Wade Cooper, Counsel for the Respondent Charleston Water System, do hereby certify that on June 11, 2015, I served a copy of the Initial Brief of Respondents along with their Designation of Matter to be Included in the Record on Appeal, on Counsel for Appellant, via U.S. Mail, first class, postage prepaid to the following address:

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June 11, 2015

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JUN 15 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Tipperary Sales d/b/a La-Z-Boy Furniture Gallery v. SCDOT, et al.
Appellate Tracking No. 2014 -000582

Dear Madam Clerk:

Enclosed for filing please find a copy of the Initial Brief of Respondents, along with their Designation of Matter to be Included in the Record on Appeal. As indicated on the Certificate of Service, I am serving Counsel for the Appellant by copy of this letter.

Sincerely yours,

G. Wade Cooper

cc: Michael S. Seekings/Yancey Alford McLeod, III, Counsel for Plaintiff
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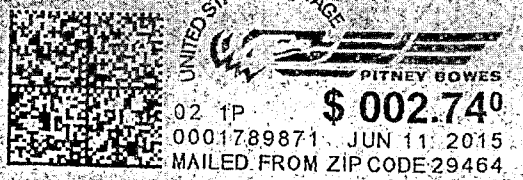

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