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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case 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 . . . . . .Respondents.

FINAL BRIEF OF APPELLANT

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Statement of the Case

This case arises from the recurring flooding at the Northwoods Pointe Shopping Center in North Charleston, South Carolina (hereinafter "Northwoods"). After the Appellant Tipperary Sales d/b/a La-Z-Boy Furniture Gallery's (hereinafter "Appellant") store was flooded again in October of 2008, it brought the instant action against the South Carolina Department of Health and Environmental Control ("SCDHEC"), The South Carolina Department of Transportation ("SCDOT"), Charleston Water System ("CWS") and the City of North Charleston ("North Charleston"), alleging causes of action for Negligence, Gross Negligence, Trespass and Inverse Condemnation.[1] As to the City of North Charleston, Appellant further alleged the City was in violation of S.C. Code Ann. § 5-31-450 for failing to provide adequate storm water drainage in the Northwood's area watershed.

[1] The Appellant also brought causes of action against Associated Developers, Inc. and Parkhill, LLC. These entities are not parties to the instant appeal.

SCDHEC and SCDOT moved for summary judgment pursuant to *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (2004) and the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to-200 (2005) (Tort Claims Act). Similarly, CWS and North Charleston filed motions to dismiss pursuant to the *Hawkins* decision and the Tort Claims Act.

The hearing on the various motions was held on January 7, 2014. Pursuant to orders filed February 18, 2014, the trial court granted Summary Judgment to DHEC and DOT, and granted CWS and North Charleston's motions to dismiss. On March 17, 2014, Appellant filed the Notice of Appeal and now appeals the trial court's February 18, 2014 orders.

Facts

Taken in the light most favorable to Appellant, the facts alleged are as follows. The Appellant has a leasehold interest in its store facilities at Northwoods Pointe Shopping Center in the City of North Charleston, South Carolina. (**R. 38; 359**) Appellant has leased the space since 2000. (**Id.**) Appellant up-fitted the space for its business purposes and installed fixtures and various interior upgrades at its own expense. (**Id.**) Unbeknownst to Appellant, the Northwoods Mall area was and had always been prone to flooding. (**Id.**)

Appellant would soon learn the extent of the problem. Immediately upstream from the Appellant's store, storm water is channeled through a box culvert beneath the Highway 52 Connector. (**R. 38-46**) The box culvert was installed by SCDOT. (**R. 39**) The box culvert is not sufficiently sized to handle upstream storm water runoff. (**Id.**) Immediately downstream from the box culvert are twin 84" pipes, which are the intake

point for the drainage system that runs below and through Northwoods Mall parking lot. **(Id.)** SCDOT installed, owns, and maintains, the twin 84" pipes that are intended to carry storm water beneath the Northwoods Mall parking lot until they empty into an open ditch. **(Id.)** The twin 84" pipes have *never* been adequate for managing storm water runoff since they were installed by DOT. **(Id.)** CWS owns and controls the open ditch running through the lower part of the Northwoods Mall parking lot. **(Id.)** The drainage basin then flows down an open ditch or streambed, which is owned and controlled by CWS, to its outflow terminus at the Goose Creek Reservoir, also owned, controlled, managed, and operated by the CWS. **(Id.)**

The outflow point at the Reservoir is actually at a higher elevation than the intake point for the entire drainage system at SCDOT's twin 84" pipes. **(Id.)** As a result, the entire drainage system remains approximately one-half full even during dry conditions, and is in reality a branch extension of the Reservoir itself. **(R. 39-40)** This lack of appropriate slope dramatically reduces the volume of water that can be carried by the entire drainage system, such that its capacity is substantially less than was intended. **(R. 40)**

In addition to the drainage from upstream of the Highway 52 Connector, storm water also flows down the roadbed of Northwoods Boulevard from Ashley Phosphate Road. **(Id.)** This storm water from the watershed also flows to the intake of the drainage system at the twin 84" pipes. **(Id.)** During a rain event, the storm water runoff flows down from the upstream Subdivisions and other points to the rear of the La-Z-Boy store. **(Id.)** In addition, storm water runs from the Ashley Phosphate Road system down Northwoods Boulevard to the front of the La-Z-Boy store. **(Id.)** The entire flow of storm

water, both from the front and rear of the building, is intended to enter SCDOT's 84" pipes and to flow down the CWS-owned watershed to the Goose Creek Reservoir. **(Id.)** Rather than being channeled down the watershed, the storm water runoff backs up at the constriction point at the opening of SCDOT' s twin 84" pipes. **(Id.)** As Appellant soon would find out, not only had the above described conditions caused periodic flooding for nearly three decades, the Respondents were all aware of these significant issues the entire time. **(R. 38-46)**

As early as 1979, E.M. Seabrook, Jr., Inc. was commissioned to perform an extensive study of the flooding issues at the Northwoods Mall. As is reflected in the 1980 E.M. Seabrook Jr., Inc. ("Seabrook Study"), the Northwoods Mall parking lot has had a long history of flooding. **(R. 38)** The Seabrook Study noted that the flooding issues were discussed with SCDOT and North Charleston. **(Id.)** The Seabrook Study determined that flooding would take place upstream of the Highway 52 Connector in any 50-year storm due to the sizing of the pipes under the highways and downstream to two 84" pipes laying beneath the Northwoods Mall parking lot, which were and are grossly undersized and form a constriction point and obstruction to storm water drainage for the entire watershed. **(Id.)** Ultimately, the Seabrook study also revealed that more than 1,900 acres drained to the twin 84" pipes running beneath the Northwoods Mall parking lot - 900 acres more that any previous drainage calculation had projected. **(R. 38-39)** To date, no actions have been taken to correct the flooding issues. **(R. 38-46)** The Seabrook report specifically states that North Charleston and SCDOT were involved in discussions concerning the report and flooding issue at the Northwoods Mall at the time. **(R. 40)**

Affirmative Acts Exacerbate Flooding

In September 2002, SCDOT began construction to improve the interchange at I-26, Ashley Phosphate Road, and the Highway 52 Connector in North Charleston. **(R, 41)** On or about March 20, 2003, while construction was ongoing, there was a heavy rainfall that resulted in considerable flooding downstream from the interchange improvements with maximum effect at the Appellant's store. **(Id.)**

Various merchants in the Northwoods Mall and Northwoods Pointe Shopping Center, including Appellant, notified SCDOT, North Charleston and CWS and complained about the extensive flooding and of its concern over future flooding, insisting that the government agencies immediately investigate the cause of the flooding and take steps to remedy the problems causing the flooding that imperiled the livelihoods of the businesses affected by the torrent. **(R. 41-42)**

In response to its demand for investigation into the cause of the flooding, Appellant was informed that the extensive roadwork in the area coupled with heavy rainfall were the contributing factors in the flooding that damaged the La-Z-Boy store and inventory. **(R. 42)** The only roadwork that could have exacerbated and increased the flooding was the I-26/Ashley Phosphate/Highway 52 Connector improvements being built by SCDOT. **(Id.)**

SCDOT contended that the floodwaters traversed the parking lot and collected in a retention pond at the rear of the store after which it passed into SCDOT's drainage pipes, which SCDOT believed were adequate and operating properly. In reality, the upstream watershed also extended uphill from SCDOT's expanded Highway 52

Connector through the upstream Subdivision and other upstream commercial developments, all of which drained directly to SCDOT's inadequate 84" pipes. (**Id.**)

Additionally, all runoff from the added impervious acreage of the expanded highway and interchange likewise flowed to the twin 84" pipes located in SCDOT's right-of-way and within SCDOT's exclusive control. (**Id.**) SCDOT to date has refused to make requisite improvements to the choke point in the drainage system at the mouth of the 84" pipes. (**Id.**)

After the March 20, 2003 flood, Appellants contacted SCDOT's resident engineers on the I-26/Ashley Phosphate Road/Highway 52 Connector project, Davis & Floyd and Earth Tech, to notify them of the flooding problem and demanded that Davis & Floyd take such steps as were necessary to remedy the problem. (**R. 43**) Davis & Floyd commissioned Earth Tech n/k/a AECOM, SCDOT's design engineers for the improvement project, to study the impact of the interchange improvements on downstream storm water management. (**Id.**) Earth Tech concluded that the Highway 52 Connector improvements would add 13.7 acres of impermeable material directly adjacent to the choke point in SCDOT's right-of-way at the inadequate twin 84" pipes. (**Id.**) Earth Tech notified SCDOT that "the double pipe system under the [North woods] Mall parking lot is not adequately sized to handle the flows that the upstream box culvert [under the Highway 52 Connector] can handle." (**Id.**) Earth Tech determined that when the 84" pipes' capacity was exceeded, the water level seeks the low point- adjacent to the back of Appellant's store. (**Id.**) In July 2005, another flood event occurred. At the time, SCDOT was still constructing the improvements to the interchange and to the Highway 52 Connector at the time. (**R. 43-44**)

Back in 2001, Centex Homes began development of 36.2 acres of land immediately upstream from the Northwoods Mall that became known as Phases 3, 4, and 5 of Parkhill Place subdivision. In 2003, Centex added 21 additional acres of improved property and an additional 151 residential lots. Parkhill Place Subdivision is just upstream from the choke point at SCDOT's 84" pipes and Appellant's store. (**R. 44**) In 2004 Associated Developers, and Parkhill began developing the last phase of Parkhill Subdivision, known as Phase 6. (**Id.**) North Charleston and SCDHEC are and were the permitting agencies whose permits were necessary for the development of Parkhill Place Phases 3, 4, 5, and 6 (hereinafter "the Subdivision"), without which the Subdivision's construction could not have taken place. (**R. 44-45**)

SCDHEC issued permits for the construction and development immediately upstream in the watershed that ended at the constriction point at SCDOT's inadequate 84" pipes, numerous times between 2000, when La-Z-Boy first took up occupancy of its leasehold in the store, and 2009. (**R. 38-46**) SCDHEC did no investigation into the adverse impact each of these developments would have on the existing flooding problems downstream. (**Id.; R. 168-182**).

In October 2008, a heavy rain event took and inundated the entire area, including Appellant's store and the Northwoods Pointe Shopping Center. (**R. 46**) The La-Z-Boy store was flooded to a depth of several feet; its inventory ruined just as the Christmas shopping season was beginning; the store fixtures and displays were destroyed; and, the store was forced to close for a significant period to effect repairs and to develop a plan to attempt to prevent additional flooding. (**Id.**)

Argument

I. SUMMARY JUDGMENT IN FAVOR OF SCDHEC WAS IMPROPER WHEN ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND THE ISSUANCE OF NUMEROUS PERMITS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001).

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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(c), SCRCP. *See also Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

A. Negligence/Gross Negligence[2]

The trial court granted summary judgment in favor of SCDHEC, finding the *Hawkins* decision and the Tort Claims Act prevented recovery as a matter of law. This ruling was in error. The *Hawkins* decision is distinguishable and SCDHEC's conduct in issuing permits for development in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct.

To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. *Hinds v. Elms*, 358 S.C. 581, 585, 595 S.E.2d 855, 857 (Ct. App. 2004). "The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are 'liable for their torts in the same manner and to the same extent as a private individual under like circumstances,' subject to certain limitations and exemptions provided in the Act." *Hawkins*, 358 S.C. at 292, 594 S.E.2d at 563; S.C. CODE ANN. § 15-78-40 (2005). "The governmental entity is not liable for a loss resulting from . . . (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*." S.C. CODE ANN. § 15-78-60 (12) (2005) (emphasis added).

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[2] The causes of action against the various government entities are essentially the same but are analyzed in different sections herein. Appellant will therefore attempt to not unnecessarily duplicate citations to authorities and the elements of each cause of action in every section.

In *Hawkins*, Plaintiff brought a claim against the City of Greenville for simple negligent design and maintenance of its drainage system. *Id.* at 288. Here, unlike *Hawkins*, the Appellant alleges SCDHEC was grossly negligent, which triggers certain sections of the Tort Claims Act not applicable in *Hawkins*. *See* S.C. CODE ANN. § 15-78-60 (12) (providing exception to government immunity for the issuance of permits or similar authority where exercised in a grossly negligent manner).

"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." *Clyburn v. Sumter County Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "It is the failure to exercise even the slightest care." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 294-95, 628 S.E.2d 496, 504-05 (Ct. App. 2006). "Gross negligence ... means the absence of care that is necessary under the circumstances." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887; *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct.App.2004). In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S. Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

Here, there exists 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. The trial court found

there was no evidence that SCDHEC issued the various permits in a grossly negligent manner. A review of the record evidence indicates otherwise. Summary judgment was improper. *See Proctor*, 368 S.C. at 312, 628 S.E.2d at 514 ("Therefore, because Proctor proceeded under a theory of gross negligence as provided in section 15-78-60(12), the other subsections of that statute do not provide immunity from DHEC's acts of gross negligence.").

B. Inverse Condemnation

The trial court likewise erred in granting summary judgment to SCDHEC on Appellant's Inverse Condemnation claim. An action for inverse condemnation is appropriate where the government takes private property for public use. *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 38, 530 S.E.2d 369, 373 (2000). While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. *Hawkins*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001).

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." *Marietta*

Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002).

Relying on *Hawkins*, the trial court found Appellant had not established any affirmative, positive, aggressive act on the part of SCDHEC. The court's reliance on *Hawkins* was misplaced. Here, the issuance and approval of the development permits constitute affirmative, positive, aggressive acts sufficient to constitute an inverse condemnation claim. The Appellant is not merely alleging SCDHEC failed to Act. On the contrary, Appellants allegations allege that SCDHEC's issuance of each of the permits constituted "an affirmative and aggressive by DHEC." **(R. 49)** Summary judgment was inappropriate.

II. SUMMARY JUDGMENT IN FAVOR OF SCDOT WAS IMPROPER WHERE ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND THE ROAD CONSTRUCTION AND IMPROVEMENTS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *Catawba Indian Tribe,* 372 S.C. at 524, 642 S.E.2d at 753. Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe ex rel. Doe*, 345 S.C. at 321-22, 548 S.E.2d at 857 (2001).

A. Negligence/Gross Negligence

Initially, it is important to note the trial court analyzed Appellant's negligence/gross negligence claims against SCDOT under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an affirmative, positive, and aggressive act." This finding is contrary to South Carolina law. Negligence does not require an affirmative act; the trial court's analysis is fatally flawed.[3]

Moreover, any reliance the trial court made on the *Hawkins* decision as to Appellants negligence claims against SCDOT was improper. SCDOT's conduct under the circumstances of this case is entirely inapposite of the municipality defendant in *Hawkins*. Unlike *Hawkins*, SCDOT's here clearly constitutes gross negligence. Indeed, the municipality in *Hawkins* attempted to remedy the problem once it knew it existed. *See Hawkins*, 358 S.C. at 286, 594 at 560. Here, SCDOT has been on notice for three decades that these flooding problems existed. Not only has it done absolutely nothing to correct the problem it created, it has in fact made the problem worse. Much worse. What SCDOT has done – and indeed failed to do – in the present case is outrageously negligent. A close reading of *Hawkins*' reasoning makes clear this instant case is distinguishable.

Noting that no South Carolina cases had addressed the issue, The *Hawkins* court relied on a Texas Supreme Court opinion, stating, "the Supreme Court of Texas has held that municipalities are not liable for the *design and planning* of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for

[3] The trial court mistakenly believed the *Hawkins* decision held the Tort Claims Act required an affirmative, positive, aggressive act." It did not. As to the negligence holding, the *Hawkins* court relied solely on certain exemptions found in the Tort Claims Act. There is no requirement under any negligence theory of an affirmative act.

which a government entity is not liable." *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564 (citing *City of Tyler v. Likes,* 962 S.W.2d 489, 501 (Tex.1997)). Thus, in Hawkins, the court found a "comparable degree of discretion" and found the municipality was not liable to property owner. *Id.* A finding that SCDOT's conduct in the instant case was quasi-judicial and discretionary is absurd. The exemptions in the Tort Claims Act relied on by the trial court do not apply.

SCDOT installed and constructed the twin 84" pipes. It has known for three decades they were installed negligently, and has done nothing. In fact, the Texas *City of Tyler* opinion – relied on by *Hawkins* – actually found the municipality could be held liable for constructing and maintaining the storm sewer because those are "proprietary" functions. *See City of Tyler*, 962 S.W.2d at 501 (1997) ("The City could be liable for the negligent performance of these acts if they proximately caused Likes's damages."). The trial court erred in its analysis and reliance on *Hawkins*. Under the facts of this case, summary judgment was inappropriate.

B. Inverse Condemnation

Similarly, the trial court erred in granting SCDOT summary judgment on its inverse condemnation claim. Once again, the trial court misconstrued and improperly relied on the *Hawkins* decision in its analysis. Specifically, the trial court found that Appellants had failed to allege any "affirmative, positive, aggressive act" on the part of SCDOT. A plain reading of the Amended Complaint clearly indicates otherwise. Specifically, Appellants allege that SCDOT "caused the twin 84" pipes to be installed." **(R. 47)** Further, Appellants allege "SCDOT improvement project added considerably to

the impermeable material." **(Id.)** To suggest these allegations do not constitute affirmative, positive, aggressive acts is absurd. Of course they do.

As SCDOT is well aware, it and its predecessor have always been subject to inverse condemnation liability for the flooding individuals' properties. *See, e.g., Cutchin v. S. Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990) (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property).

The facts of the *Cutchin* case are almost identical to the present. In *Cutchin,* SCDOT's predecessor, the South Carolina Department of Highways and Public Transportation, constructed a cement culvert under a highway in 1954. *Cutchin*, 301 S.C. at 36-37, 389 S.E.2d at 647 (1990). During the 1970s, the Cutchins' yard flooded on several occasions. *Id.* In 1984, floodwaters again rose onto the property, causing extensive damage. *Id.* After finding the suit timely filed and the injury abatable, the *Cutchin* court upheld the jury award of $70,000.00. Here, the Appellant alleges affirmative, positive, and aggressive acts similar to those found in *Cutchin.* The trial court misapplied the *Hawkins* decision to the instant case. In *Hawkins*, the court found the municipality's placement of additional pipes and rocks (an attempt to alleviate the flooding) actually helped the problem. Thus, in *Hawkins*, the affirmative, positive, aggressive act did not cause the injury. The facts of this case are the exact opposite. *See also Newsome v. Town of Surfside Beach*, 300 S.C. 14, 17, 386 S.E.2d 274, 276 (Ct. App. 1989) (affirming jury award and finding affirmative act in inverse condemnation case against town for flood damage he sustained during heavy rain following reconstruction of

adjoining street.) Here, SCDOT's affirmative acts directly caused the Appellant's property to be taken. Summary Judgment was inappropriate.

A. Trespass

The trial court, relying on *Hawkins*, found Appellant trespass claim failed to set forth facts to constitute a claim for relief against SCDOT. The trial court failed to consider the allegations against SCDOT. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." *Hawkins*, 358 S.C at 297. Here, the Amended Complaint alleges sufficient affirmative and intentional acts on behalf of SCDOT to constitute an action for trespass.

First, the Amended Complaint alleges that SCDOT has been aware of the flooding problems for three decades. (**R. 38**). Second, the Amended Complaint alleges that SCDOT, in spite of its knowledge of the existing flooding issues, proceeded with a road project knowing that doing so would result in the exacerbation of the flooding. This conduct was intentional. This conduct was affirmative. The Amended Complaint alleges facts sufficient to constitute a cause of action for trespass, and the trial court erred in granting summary judgment to SCDOT. Whether SCDOT's actions did constitute a trespass must be decided by the jury.

III. THE TRIAL COURT ERRED IN GRANTING THE CITY OF NORTH CHARLESTON'S MOTION TO DISMISS WHEN ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND PERMITTING NUMEROUS DEVELOPMENTS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *Catawba Indian Tribe v. State,* 372 S.C. at 524, 642 S.E.2d at 753. A judgment on the pleadings is a drastic remedy. *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (1991). When considering such motion for a judgment on the pleadings under Rule 12(c), SCRCP, "the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000); *Russell,* 305 S.C. 86, 406 S.E.2d 338. On review of the motion, the court may not consider matters outside the pleadings. *Firemen's Ins. Co. v. Cincinnati Ins. Co.,* 302 S.C. 234, 394 S.E.2d 855 (Ct. App.1990). "A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." *Falk*, 341 S.C. 281, 286, 533 S.E.2d 350, 353. "[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Id.*

In reviewing a 12(b)(6) motion, the question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the alleged facts and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of

the case, then dismissal under Rule 12(b)(6) is improper. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

A. Negligence/Gross Negligence

Once again, it is important to note the trial court analyzed Appellant's negligence/gross negligence claims against North Charleston under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an affirmative, positive, and aggressive act." This finding is contrary to South Carolina law. Negligence does not require an affirmative act; the trial court's analysis is fatally flawed.

Nevertheless, the trial court granted summary judgment in favor of North Charleston, finding the *Hawkins* decision and the Tort Claims Act prevented recovery as a matter of law. This ruling was in error. The *Hawkins* decision is distinguishable and North Charleston's conduct in issuing permits and approving these developments in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct.

"The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are 'liable for their torts in the same manner and to the same extent as a private individual under like circumstances,' subject to certain limitations and exemptions provided in the Act." *Hawkins*, 358 S.C. at 292, 594 S.E.2d at 563; S.C. CODE ANN. § 15-78-40 (2005). "The governmental entity is not liable for a loss resulting from . . . (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.*" S.C. Code Ann. § 15-78-60 (12) (2005) (emphasis added).

In *Hawkins*, Plaintiff brought a claim against the City of Greenville for simple negligent design and maintenance of its drainage system. *Id.* at 288. Here, unlike *Hawkins*, the Appellant alleges North Charleston was grossly negligent, which triggers certain sections of the Tort Claims Act not applicable in *Hawkins*. *See* S.C. CODE ANN. § 15-78-60 (12) (providing exception to government immunity for the issuance of permits or similar authority where exercised in a grossly negligent manner).

"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." *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. "It is the failure to exercise even the slightest care." *Proctor*, 368 S.C. at 294-95, 628 S.E.2d at 504-05. "Gross negligence ... means the absence of care that is necessary under the circumstances." *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277 (2000).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887; *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct. App. 2004). "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Faile*, 350 S.C. at 332, 566 S.E.2d at 545.

Here, there exists ample evidence for a jury to find that North Charleston 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. Indeed, North Charleston was well aware of these issues in the 1970s. In spite

of the serious flooding concerns, North Charleston permitted numerous developments, intentionally ignoring the historical and ongoing flooding concerns. Because Appellants clearly alleged a cause of action for gross negligence, and there is clearly evidence of gross negligent conduct, summary judgment in favor of North Charleston was improper. *See Proctor*, 368 S.C. at 312, 628 S.E.2d at 514 ("Therefore, because Proctor proceeded under a theory of gross negligence as provided in section 15-78-60 (12), the other subsections of that statute do not provide immunity from DHEC's acts of gross negligence.").

B. Inverse Condemnation

Similarly, the trial court erred in granting North Charleston's Motion to Dismiss on Appellant's inverse condemnation claim. Once again, the trial court misconstrued and improperly relied on the *Hawkins* decision in its analysis. Specifically, the trial court found that Appellants had failed to allege any "affirmative, positive, aggressive act" on the part of North Charleston. A plain reading of the Amended Complaint, however, clearly indicates otherwise. Specifically, Appellants allege that North Charleston "Constructed or participated in the construction of the streets and roads surrounding Northwoods Mall and North Pointe Shopping Center, including Northwoods Boulevard, extending from Ashley Phosphate Road to the Mall Shopping parking lots." Further, Appellants allege its loss of property was "made worse by North Charleston's affirmative act of constructing, maintaining and operating streets and thoroughfares . . ." **(See R. 51)** To suggest these allegations do not constitute affirmative, positive, aggressive acts is contrary to law.

Government entities have always been subject to inverse condemnation proceedings when their construction projects lead to adverse effects on bystanders' land.

See Cutchin, 301 S.C. at 38-39, 389 S.E.2d at 648 (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property); *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 17, 386 S.E.2d 274, 276 (Ct. App. 1989) (affirming jury award and finding affirmative act in inverse condemnation case against town for flood damage he sustained during heavy rain following reconstruction of adjoining street.) *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (finding city's removal of a public sidewalk and support in the course of an urban redevelopment project constituted the affirmative, positive, aggressive act required for unconstitutional taking).

In *Berry's On Main, Inc.*, 277 S.C. 14, 281 S.E.2d 796, (1981), the court found that the municipalities removal of a side walk constituted an affirmative, positive, aggressive act. In doing so, the court noted that it had previously found that damage caused by a municipality's widening of a street constituted an affirmative, positive, and aggressive act. *See Kline v. City of Columbia*, 249 S.C. 532, 539, 155 S.E.2d 597, 600 (1967). Likewise, the act of building roads and thoroughfares that cause significant damages (including flooding) has always been found to give rise to an inverse condemnation claim. As the *Kline* court stated:

> It has long been recognized in this jurisdiction that the casting of water on adjoining premises by some act of governmental authority in the course of making improvements to a public way constitutes a taking of property in violation ... of the Constitution.

249 S.C. at 536, 155 S.E.2d 597. *(citing Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931). The allegations in the Amended

Complaint contain allegations of sufficient affirmative, positive, and aggressive acts to state an cause of action against North Charleston. The trial court erred in applying the *Hawkins* decision. Dismissing Appellant's cause of action for inverse condemnation on the pleadings was improper.

C. Trespass

The trial court, relying on *Hawkins*, found Appellant's trespass claim failed to set forth facts to constitute a claim for relief against North Charleston. The trial court failed to consider the allegations against North Charleston in the Amended Complaint. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." *Hawkins*, 358 S.C at 297. Here, the Amended Complaint alleges sufficient affirmative and intentional acts on behalf of North Charleston to constitute an action for trespass. First, the Amended Complaint alleges that North Charleston has been aware of the flooding problems for three decades. Second, the Amended Complaint alleges that North Charleston (in spite of its knowledge of the existing flooding issues) proceeded with road projects knowing that doing so would result in exacerbating and further contributing to the area's flooding. This conduct was intentional. This conduct was affirmative. The Amended Complaint alleges facts sufficient to constitute a cause of action for trespass, and the trial court erred din granting summary judgment to North Charleston. Whether North Charleston's actions did constitute a trespass must be decided by the jury.

IV. THE TRIAL COURT ERRED IN GRANTING CWS' MOTION TO DISMISS WHEN CWS OWNS AND CONTROLS BOTH THE GOOSE CREEK RESERVOIR AND THE DRAINAGE SYSTEM AT THE NORTHWOODS MALL.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 4; *Catawba Indian Tribe,* 372 S.C. at 524, 642 S.E.2d at 753. A judgment on the pleadings is a drastic remedy. *Russell,* 305 S.C. 86, 406 S.E.2d 338 (1991). When considering such motion for a judgment on the pleadings under Rule 12(c), SCRCP, "the court must regard all properly pleaded factual allegations as admitted." *Falk*, 341 S.C. at 286, 533 S.E.2d at 353 (Ct. App. 2000); *Russell,* 305 S.C. 86, 406 S.E.2d 338. On review of the motion, the court may not consider matters outside the pleadings. *Firemen's Ins. Co.,* 302 S.C. 234, 394 S.E.2d 855 (Ct. App.1990). "A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." *Falk*, 341 S.C. 281, 286, 533 S.E.2d 350, 353. "[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Id.*

In reviewing a 12(b)(6) motion, the question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192. If the alleged facts and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then dismissal under Rule 12(b)(6) is improper. *Stiles*, 318 S.C. at 300, 457 S.E.2d at 603.

A. Negligence/Gross Negligence

First, the trial court analyzed Appellant's negligence/gross negligence claims against CWS under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an "affirmative, positive, aggressive act." This finding is contrary to South Carolina law. A cause of action for negligence does not require an affirmative act; the trial court's analysis is fatally flawed.

Moreover, the trial court found that S.C. Code Ann. § 5-31-250 presented additional statutory basis for dismissal. Specifically, the trial court found that because CWS is a statutorily created Commission of Public Works, it did have control of any design, construction or maintenance of any drainage system. The trial court erred in so holding. A plain reading of the statute indicates CWS does have the authority to control and manage the Goose Creek Reservoir. Specifically, CWS has the authority to "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." S.C. Code Ann. § 5-31-250 (emphasis added).

The Amended Complaint alleges CWS owns and operates the Goose Creek Reservoir. **(R. 37)** The Amended Complaint alleges CWS owns the portion of the drainage system below the 84" pipes in the SCDOT right of way. **(R. 56)** The Amended Complaint alleges this portion of the drainage system "remains half filled at all times because the level of the Goose Creek Reservoir is generally higher than the level of the drainage system." **(R. 22)** This section of the drainage system – owned by CWS – is a mere extension of the Goose Creek Reservoir. The trial court erred in finding S.C. Code Ann. § 5-31-250 constitutes an additional basis for dismissal.

As to the trial court's reliance on Hawkins as to the negligence/gross negligence causes of action, this too, was misplaced. First, the defendant in *Hawkins* was a municipality. Here, CWS owns, operates, and controls the Goose Creek Reservoir. As such – as alleged in Amended Complaint – CWS has a duty to control the water level so as not to flood any upstream (and downstream) bystanders' property. These are the allegations in the Amended Complaint. *Hawkins* is simply not applicable. The facts and circumstances here are very different. CWS owns and controls the water level. CWS has failed to show how any exception found in S.C. Code Ann. § 16-78-60 apply to its gross negligent conduct in failing to control the water level of a major water body. The trial court's dismissal of Appellant's negligence/gross negligence claims was improper.

B. Inverse Condemnation

The trial court found Appellant had not alleged any affirmative, positive, and aggressive act on the part of CWS. Based on this alone, the court granted CWS' Motion to Dismiss. However, a plain reading of the Amended Complaint clearly shows that Appellant has indeed alleged affirmative acts on behalf of CWS. Specifically, the Amended Complaint alleges "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 flood events . . ." (**R. 52**) The Amended Complaint continues, "As a direct and proximate result of CWS' affirmative and aggressive act of refusing to lower the water level of Goose Creek Reservoir to prevent upstream flooding, [Appellant] has repeatedly been deprived of it's the use of its property and business." (**Id.**)

These allegations are sufficient to plead a cause of action for inverse condemnation against CWS. *See, e.g., Cutchin v. S. Carolina Dep't of Highways & Pub.*

Transp., 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990) (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property). In any event, Appellant had not even had the opportunity to depose CWS or otherwise complete discovery in the matter. The trial court's dismissal of Appellant's Inverse Condemnation claim was improper.

C. Trespass

The trial court dismissed Appellant's trespass claim against CWS, finding no allegation of intentional conduct. Appellant's Amended Complaint, however, sufficiently pleads affirmative and intentional act on the part of CWS. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." *Hawkins*, 358 S.C at 297. The evidence and allegations establish that the flooding had been a serious problem for over three decades. The evidence and allegations establish that CWS is in control of the Goose Creek Reservoir. The intentional mishandling of the Goose Creek Reservoir water level therefore constitutes – or at the very least alleges – an affirmative and intentional act that resulted in harm to Appellant's property. The Amended Complaint alleges CWS "intentionally and knowingly directed storm water runoff to [Appellant's] premises." The trial court erred in dismissing the trespass claim against CWS.

Conclusion

Based on the foregoing, this court should reverse the trial court's orders granting summary judgment and dismissing its claims against the various government entities. The *Hawkins* decision does not control. Unlike *Hawkins*, The Appellant has pleaded

gross negligence. Unlike *Hawkins*, the Appellant has pleaded affirmative, positive, aggressive acts. The Appellants therefore prays this court reverses the orders of the trial court.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case 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, and Associated Developers, Inc. . . . . .Defendants,

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

Certificate of Compliance

I, Yancey A. McLeod III, do hereby certify that the enclosed Appellants' Final Brief in the above referenced case is in compliance with Rule 211(b), SCACR.

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October 29, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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PROOF OF SERVICE

I, Yancey A. McLeod III, do hereby certify that on October 29, 2015, I served opposing counsel with a copy of Appellants' Final Brief via United States Mail, postage pre-paid, addressed as follows:

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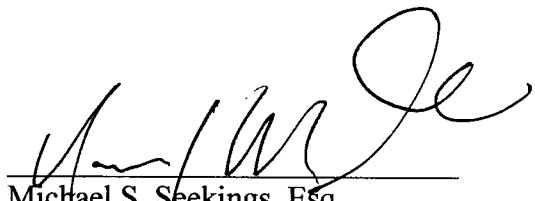

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