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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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SC Court of Appeals

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
Lower Court Case No. 2012-CP-22-00558
Opinion No. 5374 (S.C. Ct. App. filed Jan. 6, 2016)

David M. Repko,..Appellant,

v.

County of Georgetown,..Respondent.

RESPONDENT'S PETITION FOR REHEARING

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GROUNDS AND ARGUMENTS FOR REHEARING

I. Respectfully, this Court erred in ruling that Article V, § 3-1 created a private duty to Repko upon which he could bring a private cause of action.

A. This Court's analysis of the duty issue in Part I of its opinion is based on the wrong analytical framework and this error, coupled with others, led this Court to erroneously decide several questions, which in turn led this Court to erroneously conclude that Article V, § 3-1 created a private duty upon which Repko could bring a private cause of action.

The principal question is whether Article V, § 3-1 creates a private duty upon which Repko may bring a private cause of action against the County, *i.e.*, whether § 3-1 creates an actionable statutory duty. This is a statutory interpretation question, and like all such questions, the controlling inquiry is the intent of the legislative body. The primary source for determining that intent is the plain and ordinary meaning of the language used in § 3-1, and if this shows a legislative intent to not create a private duty, judicial inquiry ends and there is no private cause of action.

Here, the question turns on the legislative intent expressed in § 3-1: "Acceptance of a financial guarantee by Georgetown County shall not be construed as an obligation to any other agency, utility or property owner within affected developments." (Emphasis added). The plain and ordinary meaning of the emphasized language shows a legislative intent to not create a private duty or private cause of action with respect to the financial guarantee. This is particularly true when considered with the firmly established "public duty rule," which is a rule of statutory construction that creates a presumption that there is no private claim for breach of a statute absent a legislative intent to create one.

The "special duty test" is also a rule of statutory construction for determining legislative intent. It is irrelevant here, because § 3-1 plainly states the controlling legislative intent. Courts resort to the "special duty test" when the statute is silent on legislative intent. It cannot be used to change a plainly stated legislative intent. It is a rule of statutory construction – not a substantive rule of law – and like all such rules, it is subservient to the cardinal rule of determining and giving effect to legislative intent. Thus, Repko has no cause of action for any alleged violations of § 3-1, because § 3-1 plainly states a contrary legislative intent.

Respectfully, when this Court addressed the "role" of § 3-1 in Part I(A) of its opinion (Op. at 29-30), it erroneously deviated from the foregoing analytical framework and the focus on legislative intent. This deviation led this Court to mistakenly treat the "obligation" issue separately as an issue of "disclaiming liability" rather than expressing an intent of "no duty," which ultimately led this Court to mistakenly conclude that the Tort Claims Act pre-empted and forbade enforcement of the plainly stated legislative intent in § 3-1. This Court compounded this error by misconstruing the plain meaning of the language in § 3-1, and then using that misconstruction to reverse the trial court based on an argument that was never made to the trial court and, more importantly, was never made to this Court. (See Ground I(B), *infra*).

Respectfully, this Court's erroneous deviation from the foregoing analytical framework and the focus on legislative intent reverberated through and caused errors in this Court's discussion of "the public duty rule and special duty exception" in Part I(B) of its opinion. (Op. at 30-32). This Court correctly noted that the "public duty rule" is a rule of statutory construction that aids the court in determining legislative intent. This Court also correctly noted that, because this determination of legislative intent goes to the issue of duty rather than immunity, the Tort Claims Act (TCA) did not affect this rule and became relevant only if a duty is found (which hinges upon

determining legislative intent). This Court, however, failed to recognize that the same analysis of the TCA applies to the "obligation" issue because it, like the public duty rule, goes to the determination of legislative intent. This Court exacerbated this error by erroneously treating the "obligation" issue as involving a "disclaimer of liability" (*i.e.*, a claim of immunity that was preempted by the TCA) rather than what it actually is, an application of the fundamental statutory construction rule that legislative intent is to be determined from the plain and ordinary meaning of the words used in the legislation. (See Ground I(C), *infra*).

Respectfully, this Court's application of the "special duty test" further reflects an erroneous deviation from the proper analytical framework. First, it appears this Court treated the "special duty test" as a substantive rule of law that creates a private duty and private cause of action whenever the "six-part test is met." (Op. at 31). The "special duty test," however, is nothing more than a rule of statutory construction that courts use to determine legislative intent when the statute is silent. Like all statutory construction rules, it is subservient to the cardinal rule of giving effect to the intent expressed in the legislation and, because § 3-1 plainly states the controlling legislative intent, it is irrelevant to the question presented here. Moreover, in applying the "special duty test," this Court relied on its erroneous analysis of the "obligation" issue as being a "disclaimer of liability" that is preempted by the TCA rather than what it is, using the plain and ordinary meaning of the language in § 3-1 to determine legislative intent on the creation of a private duty and private cause of action. (See Ground I(C), *infra*).

Respectfully, this Court's erroneous deviation from the proper analytical framework and the focus on legislative intent, also caused this Court to misapprehend the meaning of the Supreme Court's ruling in *Brady, infra*, and, as a result, this Court erroneously distinguished and effectively overruled *Brady*. (Op. at 33-35). The operative regulation, facts, and claim in *Brady* are virtually

identical to the regulation, facts, and claim in this case. Thus, without the "preamble" addressed in *Brady*, this Court's application of the "special duty test" to *Brady* would have necessarily led to the same result reached by this Court in this case. The "preamble" prevented this result, because it demonstrated an implicit legislative intent to not create a private duty. Here, § 3-1 does this expressly, so there is no need for a "implicit" statement of intent by way of a "preamble" or otherwise. Moreover, the Supreme Court's "insurer" ruling in *Brady* was not tied to the existence of the "preamble," but it appears this Court mistakenly viewed it as being so. Rather, it reflects a ruling that the "special duty test," without any other indication of legislative intent, cannot make a county the insurer of a regulated development. (See Ground I(D), *infra*).

B. This Court misapprehended the "role" and meaning of § 3-1, as well as the role of the Tort Claims Act; and this Court exacerbated these errors by reaching and ruling upon grounds that were never argued to the trial court or to this Court.

In Part I(A) of its opinion, this Court held that § 3-1 did not preclude Repko's claim against the County for two reasons: (1) the "disclaimer of an obligation" in § 3-1 was very limited; and (2) the Tort Claims Act (TCA) preempted the "disclaimer of liability" in § 3-1. Respectfully, both rulings are erroneous for several reasons.

1. This Court erred procedurally and substantively in its ruling on the meaning of § 3-1.

This Court narrowly interpreted the "shall not be construed as an obligation" language in § 3-1 and used this narrow interpretation to reverse the trial court and find that § 3-1 imposed a private duty in favor of Repko:

> We find that disclaiming an "obligation" to property owners when the County accepts a financial guarantee <u>means</u> the County is not required to pay to property owners the money made available through the letter of credit or other financial guarantee and the County is allowed to complete the infrastructure and ignore the preference of the property owners in doing so.

(Op. at 30) (emphasis added). Respectfully, this ruling was in error for several reasons.

First, it is axiomatic that, subject to limited exceptions not applicable here, the appellate courts will not reverse on a ground not raised to the trial court. *McClurg v. Deaton*, 716 S.E.2d 887, 887 (S.C. 2011). The entire directed verdict proceedings in this case are set forth at pages 224-251 in the Record on Appeal. Nowhere in these pages did Repko make the above-quoted argument to the trial court. Thus, this issue is not preserved for appeal and, therefore, this Court erred in reversing on this ground.

Second, it is also axiomatic that, subject to limited exceptions not applicable here, the appellate courts will not reverse on a ground not argued to the appellate court. *McClurg*, 716 S.E.2d at 888 n.2; *Bickerstaff v. Prevost*, 670 S.E.2d 660, 662 n.2 (S.C. App. 2009). Here, Repko did not make the above-quoted argument to this Court and, therefore, this Court erred in reversing the trial court on this ground. (See App. Br., *passim*).

Third, nothing in § 3-1 or the regulations as a whole supports this Court's narrow construction of the "shall not be construed as an obligation" language in § 3-1. This controlling legislative directive on interpreting § 3-1 certainly includes the matters found by this Court, but nothing in the regulations limits that directive to the matters found by this Court. To the contrary, this language expresses a broad legislative intent that § 3-1 shall not be construed as creating any private duty to any property owner.

Fourth, § 3-1 specifically precludes any construction creating an obligation that is owed to a property owner, but that is precisely what this Court did by construing it as creating a privately enforceable obligation in managing the financial guarantee. Respectfully, the judiciary has no power to ignore the plain language of legislation or construe it in a manner to avoid the plain meaning of that language. Rather, when the legislative intent is clear, judicial inquiry ends and

the court must enforce the legislation as written, regardless of the court's sympathies or its view of the equities between the parties. *Sloan v. South Carolina Dep't of Rev.*, 762 S.E.2d 687, 688 n.3 (S.C. 2014); *Quigley v. Rider*, 593 S.E.2d 476, 479 (S.C. App. 2003); *Nemeth v. Nemeth*, 481 S.E.2d 181, 185 (S.C. App. 1997). There are only two exceptions to this rule: (1) the legislation is unconstitutional, but there is no such claim here; or (2) since this case involves a local ordinance, it cannot contravene a general state statute. This Court seized upon this second exception in holding that the Tort Claims Act (TCA) preempted § 3-1 but, as shown later, this Court's TCA analysis is in error.

Fifth, courts will not construe legislation so as to lead to an absurd result. *State v. County of Florence*, 749 S.E.2d 516, 518 (S.C. 2013). Respectfully, it would be an absurd result for § 3-1 to mean "the County is <u>not required</u> to <u>pay</u> to <u>property owners</u> the <u>money</u> made available <u>through</u> the letter of credit or other financial guarantee" (Op. at 30 (emphasis added)), but it is nevertheless required to pay money to property owners through some other source.

Finally, and most importantly, when the plain meaning of § 3-1 is considered within the proper analytical framework, it is clear that § 3-1 does not express any legislative intent to create an actionable statutory duty. The cardinal rule of statutory construction, to which all other rules are subservient, is to give effect to legislative intent *State v. County of Florence*, 749 S.E.2d at 518. When the plain and ordinary meaning of the language used in the legislation expresses a clear intent, judicial inquiry ends and the courts must enforce the statue as written. *Sloan*, 762 S.E.2d at 688 n.3; *Quigley*, 593 S.E.2d at 479; *Nemeth*, 481 S.E.2d at 185. Here, § 3-1 plainly states a controlling legislative directive that a financial guarantee "shall not be construed as an obligation to any . . . property owner." The word "obligation" is a broad and expansive term that captures and includes the concept of duty. BLACK'S LAW DICTIONARY (10th Ed. 2014) at 1242

("Obligation" has "many wide and varied meanings," including a duty "imposed by law."); *accord* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Ed. 2000) at 1212 ("obligation" includes "a social, legal, or moral requirement, such as a duty"). This has been the meaning of "obligation" in South Carolina law for 150 years. *Wood v. Wood*, 19 S.C.L. (14 Rich.) 148, 153 (S.C. App. 1867) (obligation "is a word of large extent" that "sometimes means only duty, and always includes this meaning"), *quoting* Lord Coke. Thus, § 3-1 precludes any construction of it as imposing or creating any private duty to a property owner related to the financial guarantee.[1]

2. The Tort Claims Act does not preempt or preclude a legislative intent to not create a private duty or private cause of action when enacting legislation.

This Court held that the Tort Claims Act (TCA) preempted the legislative intent to not create a duty in § 3-1. (Op. at 35-36). Respectfully, this was error for several reasons.

First, this Court misapprehended the scope and nature of the TCA's preemptive effect. Prior to the abolition of sovereign immunity, a governmental entity was not liable to a would-be

[1] In its recitation of the evidence, this Court noted the testimony of the county's attorney (Bryant) that a letter of credit protects the property owners. (Op. at 23). This Court never relied specifically on this testimony in its rulings on the meaning of § 3-1. (Op., *passim*). To the extent this Court viewed this testimony as relevant or controlling, this was error because:

> Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "*a broader and more independent review is permitted when the issue concerns the construction of an ordinance*." The determination of legislative intent is a matter of law.

Mikell v. County of Charleston, 687 S.E.2d 326, 329 (S.C. 2009) (citations omitted) (all emphasis added). Thus, "[w]hen reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law." *Id.* at 330. Moreover, the plain language of the ordinance controls over any construction by persons involved in its administration. *Brown v. South Carolina Dept. of Health and Envtl. Control*, 560 S.E.2d 410, 415 (S.C. 2002) ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation."). Here, the county attorney believed that § 3-1 protected property owners, but having that effect is not controlling on the question of legislative intent to create a private duty and private cause of action. More importantly, his belief is irrelevant, because the plain language of the § 3-1 disclaims any such duty. *Brown*, 560 S.E.2d at 415. Finally, his testimony generally related to his beliefs about what the County should do under the ordinance after it called a letter of credit and received the cash, and after it had learned of questionable – perhaps fraudulent – activity by the developer. (R. 69-71, 85-86, 91-92). Here, there is no issue about County's actions after it received the cash from the letter of credit.

plaintiff, even if it was undisputed that the governmental entity had breached a duty owed to the plaintiff and thereby caused the plaintiff to suffer damages. With the abolition of sovereign immunity in *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985), governmental entities became liable for breaching a duty that was owed to a would-be plaintiff and thereby causing damages to the plaintiff. The TCA preempted this field of post-*McCall* liability, principally to limit governmental liability by imposing numerous immunities. In short, the TCA preempted and now controls the question of whether a governmental entity is liable when it is shown that the governmental entity caused a would-be plaintiff to suffer damages by breaching a duty owed to that plaintiff.

Second, the TCA has no impact on and is irrelevant to the existence or operation of the "duty-breach-causation-damages" paradigm for imposing liability. The TCA becomes relevant if, and only if, liability would otherwise be imposed by the operation of this paradigm under other law. In particular, the TCA has no effect on the question of whether the law imposes a duty that a governmental entity owes to a would-be plaintiff. The TCA does not create "duty," and nothing in the TCA purports to control how or when a "duty" exists – that question is left to the other law of South Carolina. This Court acknowledged all of this in its discussion of the "public duty rule," stating that: "Since the public duty rule is not grounded in immunity but rather in duty, . . . it has not been affected by the enactment of the TCA." (Op. at 31) (ellipsis in original) (citation omitted). Here, as with the "public duty rule," which itself is a rule of statutory construction directed at the controlling inquiry of legislative intent, the question is one of legislative intent to create an actionable statutory duty. The TCA is irrelevant to this question.

Third, this Court's erroneous conclusion of TCA preemption was driven by two analytical errors: (1) this Court failed to keep separate the completely different concepts of "duty" and "liability" in its analysis; and (2) this Court erroneously treated § 3-1 as a "disclaimer" of duty and

as "disclaiming" or "waiving" liability when, to the contrary, § 3-1 expresses a legislative intent to not create a private duty, *i.e.*, § 3-1 expresses a legislative intent that the "no duty" presumption imposed by the "public duty rule" applied to § 3-1.

In the opening paragraph of its discussion, this Court agreed with the following argument by Repko:

> [T]he trial court erred in relying on Article V, Section 3-1 to find the County did not owe him a duty because that provision is preempted by the TCA and is therefore unenforceable. [T]he TCA governs the County's tort liability and the County cannot override application of the TCA by enacting an ordinance that waives liability for its negligent conduct.

(Op. at 29) (emphasis added). This Court then ruled and concluded as follows:

> We find the County cannot avoid application of the TCA by disclaiming a duty through Article V, Section 3-1. [T]he TCA preempts Article V, Section 3-1's disclaimer of liability. We disagree with the trial court's finding that the County could waive its tort liability by including disclaimer language in a county ordinance. Article V, Section 3-1 is a county ordinance, and it cannot dictate the application of the TCA . . .. A governmental entity cannot override application of the TCA through language in a local ordinance disclaiming all liability. Accordingly, the trial court's construction of Article V, Section 3-1 is preempted by the TCA.

(Op. at 29-30) (emphasis added). As shown by the emphasized language in the two quotes above, each time this Court mentioned "duty," this Court thereafter treated it in terms of "liability." As shown below, these are completely different concepts and erroneously equating them with each other inexorably leads to an erroneous conclusion. As also shown by the emphasized language in the two quotes above, this Court's analysis focused on notions of "disclaiming" a duty and "disclaiming" or "waiving" liability. As shown below, the issue is one of "creation," not disclaimer or waiver, and the creation of a duty is controlled by legislative intent, not the TCA.

"Liability" is the result of applying the "duty-breach-causation-damages" paradigm, and it is this resulting liability, not the paradigm creating it, that is controlled by the Tort Claims Act

(TCA). The paradigm that creates liability, including the question of whether a duty exists and is owed to a would-be plaintiff, is controlled by other law, not the TCA. And with respect to whether a private duty and private cause of action arises under a statute, that "other law" mandates that legislative intent is the controlling inquiry. Absent a legislative intent to create a private duty, there simply is no duty, and therefore no paradigm for imposing any liability that would *thereafter* be controlled by the TCA. And as shown earlier, the "shall not be construed as an obligation" language in § 3-1 plainly demonstrates a legislative intent to not create a private duty and to leave undisturbed the "no duty" presumption created by the "public duty rule."

To "disclaim" or "waive" something, that something must first exist. By analyzing § 3-1 in terms of "disclaiming" a duty and "disclaiming" or "waiving" liability, this Court skipped the first and most critical inquiry, to-wit: does §3-1 express a legislative intent to abandon the "no duty" presumption imposed by the "public duty rule" and create a privately actionable statutory duty? As shown earlier, the "shall not be construed as an obligation" language in § 3-1 plainly expresses a legislative intent to not do so. Thus, there is no duty to disclaim, nor is there any liability to disclaim or waive. The TCA therefore does not apply here, because it has nothing to do with the controlling question of whether there exists an actionable statutory duty.

C. This Court erred in applying the "special duty test."

In Part I(B) of its opinion (Op. at 30-33), this Court considered the "public duty rule" and the related "special duty test." As noted earlier, this Court correctly observed that the "public duty rule" is a rule of statutory construction on legislative intent to create an actionable statutory duty, and that the resulting "no duty" presumption was not affected by the enactment of the Tort Claims Act. Respectfully, as also noted earlier, this Court erred in failing to recognize that, like the "public duty rule," the meaning of the "shall not be construed as an obligation"

language in § 3-1 is also a question of legislative intent to create an actionable statutory duty and, therefore, it is also not affected or preempted by the Tort Claims Act. As to the application of the "special duty test," it is respectfully submitted that this Court erred for the reasons set forth below.

First, it appears that this Court treated the "special duty test" as a "rule of law" but, like the "public duty rule," it is a rule of statutory construction. Like all such rules, its sole purpose is to aid the Court in determining the dispositive question of legislative intent to create an actionable statutory duty. Compare *Edwards v. Lexington County Sheriff's Dept.*, 688 S.E.2d 125, 129 (S.C. 2010) ("The *public duty rule* is a rule of statutory construction which *aids the court in determining whether the legislature intended* to create a private right of action for a statute's breach. [T]he *dispositive issue* is . . . *whether the statute was intended* to provide an individual a private right of action." (emphasis added)) with *Adkins v. Varn*, 439 S.E.2d 822, 825 (S.C. 1993) (there is no special duty if "there does not appear to be a *legislative intent to create such a duty*." (emphasis added)) and *Bellamy v. Brown*, 408 S.E.2d 219, 221 (S.C. 1991) ("*No legislative intent to create a duty* of confidentiality can be found in the language of the Act. We hold, *therefore*, that *no special duty* of confidentiality is established by FOIA." (emphasis added)).

Second, like all rules of statutory construction, it is irrelevant if the legislative intent is set forth in the legislation itself. Thus, there can be no "special duty" when the legislation expresses a legislative intent "to foreclose" a special duty. *Edwards*, 688 S.E.2d at 129. As shown earlier, the "shall not be construed as an obligation" language in § 3-1 plainly expresses a legislative intent to not create a private duty. Thus, the "special duty test" is irrelevant and cannot be used to override the expressed legislative intent. *Id.*

Third, in considering the "third element" of the "special duty test," this Court held in part that the trial court erred because the TCA preempted § 3-1. As shown earlier, however, the TCA

did not preempt and is irrelevant to the controlling inquiry of legislative intent. Thus, the TCA does not and cannot preempt the "shall not be construed as an obligation" language in § 3-1.

Fourth, as to the "merits" of the "special duty test," this Court erred in finding that Repko satisfied the second and third elements of that test. As noted by this Court, the second element requires a duty imposed on a "*specific* public officer." (Op. at 31) (emphasis added). This Court held that the regulations' imposition of oversight responsibilities on the Planning Department and the Department of Public Works satisfied this element. (*Id.*). By definition, the imposition of responsibility upon two separate departments cannot satisfy the requirement of a "specific" public officer.[2] As to the third element, this Court reasoned that it was satisfied because the "property owners in the subdivision were the only group that would benefit from the requirement that infrastructure be completed or financial guarantees be in place before the Developer was allowed to sell lots in a subdivision." (Op. at 32) (emphasis added). To the contrary, however, providing for the completion of the infrastructure benefits the County (*i.e.*, the public at large) in numerous ways, including but not limited to: (1) increasing property tax revenues; (2) preventing "blighted" property in the county; and (3) increased spending in the local economy, which also generates increased sales tax revenues.

D. This Court misconstrued the Supreme Court's ruling in *Brady Dev. Co. v. Town of Hilton Head Island*, 439 S.E.2d 266 (S.C. 1993) and, as a result, erroneously distinguished it and effectively overruled it.

In Part I(C) of its opinion (Op. at 33-35), this Court held that *Brady* was distinguishable and therefore not controlling in this case. Respectfully, this was error.

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[2] This Court also stated that the second element's language of imposing "a duty on a specific public officer 'directly or indirectly' further supports our finding that the second element is satisfied here." (Op. at 32). This Court never explains this "further support," so it is not possible to address it in any meaningful way. To the extent necessary, the County respectfully requests an amended opinion that provides this explanation so that it may address this issue.

The operative regulation, facts, and claim in *Brady* were virtually identical to the present case: (1) the developer posted a letter of credit so that it could sell lots prior to completing the infrastructure in the development; (2) the plaintiff purchased a lot; (3) the developer went bankrupt prior to completing the infrastructure; (4) as a result, the plaintiff could not build a home on his lot; and (5) the plaintiff sued the town for mismanaging the letter of credit. *Brady*, 439 S.E.2d at 267. The trial court in *Brady*, like this Court here, held "that the Town owed [Brady] a special duty in the administration of its [regulations]." *Id.* The Supreme Court reversed the trial court's "special duty" ruling on two grounds. First, the Supreme Court held there was no "special duty," because the preamble to the regulations demonstrated a legislative intent that the regulations were for a public purpose only, *i.e.*, the preamble demonstrated there was no legislative intent to create a "special duty" to the plaintiff. *Id.* at 268. Second, the Supreme Court rejected the plaintiff's "special duty" argument, which was identical to this Court's "special duty" ruling in this case, because such a duty would make the town an insurer of regulated developments and likely discourage all regulation efforts. *Id.*

Admittedly, the Supreme Court's ruling in *Brady* was not delineated as precisely as summarized above. This was due in large part to there being no express statement of legislative intent in the *Brady* regulations like that expressed here in § 3-1. A close reading of the Supreme Court's analysis, however, shows that its focus was on legislative intent.

In reciting the elements of the "special duty" test, the Supreme Court cited its prior decision in *Bellamy, supra.* 439 S.E.2d at 268. As noted earlier, the Supreme Court rejected the "special duty" claim in *Bellamy* as follows: "*No legislative intent to create a duty* of confidentiality can be found in the language of the Act. We hold, *therefore*, that *no special duty* of confidentiality is established by FOIA." 408 S.E.2d at 221 (emphasis added). Thus, when the Supreme Court

immediately thereafter turned to the "preamble" in *Brady*, 439 S.E.2d at 268, it was focused on legislative intent, and the "preamble" implicitly demonstrated there was no legislative intent to create a "special duty." Here, there is no need to search the regulations for an implicit statement of legislative intent, because § 3-1 expressly states that there is no duty to Repko.

As to the Supreme Court's "insurer" ruling in *Brady*, which the trial court also specifically relied upon in this case, it appears that this Court limited that ruling to situations involving a public purpose preamble. Although the "insurer" ruling is in the same paragraph as the "preamble" ruling, there is no linkage therein between the two. Rather, the "insurer" ruling is in direct response to the same "special duty" analysis used here by this Court. Thus, the more logical reading of the Supreme Court's ruling is that the "special duty test," standing alone, will not be permitted to make a town (or county) the insurer of regulated developments absent legislative intent to do so, because it would discourage such regulation to the detriment of the public at large. Here, § 3-1 clearly demonstrates that there was no legislative intent to become the insurer of the development.

In summary, this Court misapprehended the role and scope of the Supreme Court's "preamble" analysis in *Brady*, which was a search for legislative intent in the absence of an expressly stated intent. Here, § 3-1 expressly states the same intent that the Supreme Court found to be implicitly stated in *Brady*. By reaching a contrary result in this case, this Court has implicitly overruled *Brady* or illogically limited it to hold that expressly stated intent is not controlling when implicitly stated intent is controlling. In like manner, this Court has erroneously limited the "insurer" ruling in *Brady* to implicit intent stated in a "preamble" but rejected it when that same intent is stated expressly. Respectfully, such rulings are not and cannot be the law.

II. Respectfully, this Court erred in ruling that the County was not entitled to immunity under sub §§ (4), (5), and (13) of § 15-78-60 in the Tort Claims Act.

In Part II of its opinion (Op. at 35-36), this Court reversed the trial court's directed verdict on immunity under sub §§ (4), (5), and (13) of § 15-78-60, because the trial court failed to apply the "gross negligence exception" contained in sub § (12) to sub §§ (4), (5), and (13). Respectfully, this was error for several reasons.

A. The issue of a "gross negligence exception" to immunity under sub §§ (4), (5), and (13) is not preserved for appeal, because Repko did not make this argument to the trial court.

The entire directed verdict proceedings in this case are set forth at pages 224-251 in the Record on Appeal. Nowhere in these pages did Repko argue to the trial court that the "gross negligence exception" in sub § (12) applied to sub §§ (4), (5), or (13). Thus, this issue is not preserved for appeal and this Court erred in reversing on this ground. *McClurg*, 716 S.E.2d at 887.[3]

B. It is the law of this case that sub § (12) is inapplicable here and, therefore, the "gross negligence exception" in sub § (12) cannot be applied to sub §§ (4), (5), or (13).

It is axiomatic that an unchallenged ruling by the trial court is the law of the case and, right or wrong, requires affirmance. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998). Here, Repko himself argued to the trial court that sub § (12) did not apply to this case. (R. 240-241). The trial court agreed and ruled that sub § (12) was not "applicable."

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[3] Repko timely made a motion to reconsider but did not raise any "gross negligence exception" issue regarding immunity under sub §§ (4), (5), and (13). (R. 381-382, *passim*). Of course, any attempt to do so would have been futile, because it is axiomatic that an issue cannot be raised for the first time in a motion to reconsider. *Johnson v. Sonoco Prods. Co.*, 672 S.E.2d 567, 570 (S.C. 2009); *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). Seventy-nine days after making his motion, at the hearing on his motion, Repko handed up a memorandum and argued for the first time that the immunity granted by sub § (4) was subject to a "gross negligence exception." (R. 255, 265-267, 397-408). Manifestly, an issue cannot be raised for the first time at oral argument on a motion to reconsider. See *Johnson* and *Patterson*, both *supra*. Thus, the "gross negligence exception" issue is not preserved for appeal. Moreover, even if raising the issue at the hearing was timely, the trial court did not rule upon it in denying the motion. (R. 15-16). Since this was the first time this issue had been raised to the trial court, it was incumbent upon Repko to make a motion to obtain a ruling. He did not do so and, therefore, the issue is not preserved for appeal. *Johnson v. Lloyd*, 757 S.E.2d 705, 706 (S.C. 2014).

(R. 243; see also R. 11). Neither party challenged this ruling on appeal and, therefore, it is the law of this case. Accordingly, the "gross negligence exception" in sub § (12) cannot be read into sub §§ (4), (5), or (13), because sub § (12) itself does not apply here. Respectfully, therefore, this Court erred in ruling that the "gross negligence exception" in sub § (12) precluded a directed verdict under sub §§ (4), (5), and (13).

C. Repko's appellate argument that raising the defense of sub § (12) made the "gross negligence exception" applicable to sub §§ (4), (5), and (13) is not preserved for appeal, has no merit, and therefore, this Court erred in "agreeing" with this argument.

On appeal, Repko argued that the "gross negligence exception" in sub § (12) must be read into sub §§ (4), (5), and (13), because the County "raised" sub § (12) in its answer. (App. Br. 27, 28). This Court "agreed" with this argument in the opening paragraph of its discussion of the Tort Claims Act issues:

> Repko asserts *because* the County *pled* subsection 15-78-60(12) as an affirmative defense in its answer, "South Carolina law mandates that a similar gross negligence exception be read into subsections 15-78-60(4), (5), and (13)." We agree.

(Op. at 35) (emphasis added). Repko never made this argument to the trial court during the directed verdict proceedings. (R. 224-251). Thus, this argument is not preserved for appeal. *McClurg*, 716 S.E.2d at 887. Respectfully, therefore, this Court erred in "agreeing" with this argument and reversing the trial court.

In any event, merely "pleading" a subsection that contains a "gross negligence exception" does not transport that exception into other subsections of § 15-78-60. In *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142, 158 (S.C. 1999) (emphasis added), the Supreme Court held that "when an *applicable* exception contains the gross negligence standard, then any other *relevant* exception must be read in light of that standard." 520 S.E.2d at 158 (emphasis added). The Supreme Court's rationale for this ruling is simple and straightforward. If the conduct

protected by a subsection with a gross negligence exception is the same conduct protected by another subsection without a gross negligence exception, then it would make no sense to allow the governmental entity to escape "gross negligence" liability for that conduct. *Id.* at 154 (gross negligence standard applies to all exceptions from liability "when it is contained in one *applicable* exception") (emphasis added).

Merely pleading a subsection that contains a "gross negligence exception" does not make it applicable to the facts of this case. Rather, the evidence must show that it, in fact, applies to the conduct at issue and provides immunity in the absence of gross negligence. Accordingly, it is respectfully submitted that this Court erred in agreeing with Repko's "pleading" argument which, in any event, is not preserved for appeal.

D. This Court erred in holding that sub § (12) applied to this case, because Repko never made this argument to the trial court and, more importantly, Repko never made this argument to this Court.

After summarily agreeing with Repko's "pleading" argument (discussed *supra*), this Court undertook an analysis to conclude that sub § 12 applied to this case: (1) the reductions in the letter of credit were tantamount to a "renewal" of a permit to sell lots even though the reductions were improper; and (2) under this evidence, "a jury could have found that subsection 15-78-60(12) *applied.*" (Op. at 35) (emphasis added). This was error for several reasons.

First, Repko never made this argument to the trial court (R. 224-251) and, therefore, this Court erred in reversing the trial court on this ground *McClurg*, 716 S.E.2d at 887. Second, Repko never argued to this Court that the reductions in the letter of credit were a "renewal" of any permit or that a jury could find sub § (12) applicable under the evidence in this case. (App. Br., *passim*). Thus, this Court erred in reversing the trial court on a ground never argued to this Court. *Id.* at 888 n.2; *Bickerstaff*, 670 S.E.2d at 662 n.2.

Third, Repko argued to the trial court, and the trial court agreed, that sub § 12 does not apply to this case. (R. 240-241, 243). Repko, therefore, could not (and did not) argue the exact opposite position on appeal, *i.e.*, that sub § (12) applied to the facts of this case and that a jury could find immunity in the absence of gross negligence. *State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (an appellant cannot make one argument at trial and then make a different argument on appeal for reversing the trial court).

Fourth, as noted earlier, neither party appealed the trial court's ruling that sub § (12) was not "applicable" to this case. Thus, the trial court's ruling, right or wrong, is the law of this case that requires affirmance and precludes this Court's contrary analysis and ruling. In any event, this Court erred in holding that sub § (12) applies to this case as shown below.

E. This Court erred in holding that § 15-78-60(12) applies to this case.

Section 15-78-60(12) grants immunity for "licensing functions" absent a showing of gross negligence, and it provides in full as follows:

> The governmental entity is not liable for a loss resulting from . . .licensing powers or functions including, but not limited to, the issuance, denial, suspension, <u>renewal</u>, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any <u>permit</u>, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner

(Emphasis added). This Court held that sub § 12 applied here because: "The County approved reductions of the letter of credit and, in doing so, allowed the <u>renewal</u> of the <u>permit</u> to sell lots even though the letter of credit had been improperly reduced." (Op. at 35) (emphasis added). This ruling was error, because nothing in the regulations provides that a reduction in the letter of credit is a "renewal" of any permit or other authority, and this Court's ruling hinges upon this "renewal" issue. (R. 285, § 3-5; see generally R. 281-286). In any event, as noted earlier, this Court erred in

reversing the trial court on this basis because *inter alia* this argument was never made to the trial court, and it was never made to this Court.

III. Respectfully, this Court erred in not affirming the trial court's judgment upon the additional sustaining ground that the County is entitled to a directed verdict on its statute of limitations defense.

The Tort Claims Act required Repko to bring this action "within two years after the date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110 (Rev. 2005). The trial court denied the County's directed verdict motion on this defense (R. 11), and the County argued it on appeal as an additional sustaining ground. (Resp. Br. 29-31). This Court summarily rejected this argument: "Viewing the evidence in the light most favorable to Repko, a question of fact existed as to *when Repko should have discovered he had a claim against the County*." (Op. at 37, n.7) (emphasis added).

The controlling question is not a subjective inquiry into "when Repko should have discovered he had a claim against the County." Rather, it is an objective inquiry into whether the particular circumstances would alert a reasonable person that *some claim* against another party *might exist* and he should make inquiry about the matter. *Hackworth v. Greenville County*, 637 S.E.2d 320, 322 (S.C. App. 2006). This Court did not identify the conflicting evidence that created a question of fact on this controlling inquiry (Op. at 37, n.7), so it is not possible to make a "pointed" rehearing petition. Absent an amended opinion otherwise affirming the trial court, the County respectfully requests this Court to identify this conflicting evidence so that the County may address it directly.

Repko commenced this action on April 20, 2012, so the controlling inquiry is whether the particular circumstances that existed on or before April 19, 2010, would alert a reasonable person that some claim against another party might exist and he should make inquiry about the matter.

As demonstrated below, this inquiry notice arose no later than November 3, 2008, under the undisputed circumstances of this case as *established by Repko's own testimony*:

1. Repko is a financial planner with 22 years of experience, and he had past experience in purchasing real estate as an investment. (R. 182, 205-206). He learned about the property from his best friend, who had moved to Georgetown and become a salesman for the developer. (R. 183-185, 206-207).

2. Repko purchased the property in October 2006, sight unseen but knowing that no infrastructure was in place, on the recommendation of his real estate agent friend, who closed the sale for him under a power of attorney. (R. 186-187, 210-211).

3. Repko was not concerned about the absence of infrastructure, apparently because someone in the developer's sales office had told him about the financial guarantee filed with County. (R. 191-192, 207).

4. Repko never contacted County at any time to confirm the existence, amount, or validity of the financial guarantee, *i.e.*, this is not a case of the government making representations that estop it from denying the existence of a duty or right. (R. 211-212, 214-215). Despite never contacting the County about the financial guarantee, Repko relied on its existence in buying the property – he would not have bought the property if the financial guarantee had not been in place. (R. 192).

5. By December 2007, Repko believed the property had little or no value, because the infrastructure was not completed. (R. 212-213). As early as December 2007 (R. 213) but no later than September 2008, Repko knew that the developer was in bankruptcy when he signed a ballot from the bankruptcy court as a creditor of the developer. (R. 215-216). He stopped paying HOA dues because of the bankruptcy (R. 196), but he did not contact County about the financial guarantee. (R. 214-215).

6. By November 3, 2008, nineteen months after buying the property, Repko knew the infrastructure had not been put in place, knew the developer was in bankruptcy, and believed the property had no value due to the absence of infrastructure. (R. 213-216; 370-371). He therefore knew or had reason to know of his "loss" on this date.

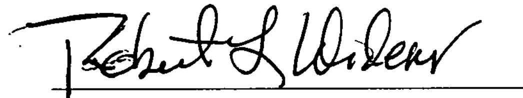
Under these circumstances, Repko knew or should have known of his "loss" no later than November 3, 2008. See S.C. Code Ann. § 15-78-110 (plaintiff must commence action "within two years after the date the loss was or should have been discovered"). Also under these circumstances, any reasonable person would have made inquiry about the existence, status, and continued validity of the financial guarantee no later than November 2008, particularly any person who, like Repko,

had relied heavily on the existence of the financial guarantee in buying the property but had never contacted the County to confirm its existence. Had Repko done so, he would have discovered the matters of which he now complains. Thus, the statute of limitations began to run on or before November 3, 2008, and long before April 19, 2010. Repko commenced this action on April 20, 2012 and, therefore, his claim is barred by the two-year statute of limitations in § 15-78-110.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court erred in reversing the trial court. It is therefore respectfully requested that this Court grant rehearing and issue a substitute opinion that affirms the trial court based on one or more of the following grounds: the "duty" issue as set forth in Argument I, *supra*; the "immunity" issue as set forth in Argument II, *supra*; or the "statute of limitations" issue as set forth in Argument III, *supra*. Affirmance on any one of these grounds would moot all other issues.

Respectfully Submitted,



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Columbia, SC
February 5, 2016

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

RECEIVED
FEB 05 2016
SC Court of Appeals

Benjamin H. Culbertson, Circuit Court Judge

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

David M. Repko, ...Appellant,

v.

County of Georgetown,..Respondent.

CERTIFICATE OF SERVICE

I, Dana L. Miller, an employee of McNair Law Firm, certify that I served the Petition for Rehearing on the ____ day of February, 2016, via email and by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to the parties listed below at the following addresses:

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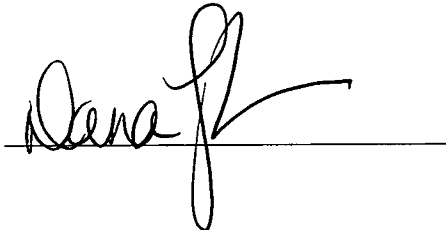

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FEB 05 2016
SC Court of Appeals

Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
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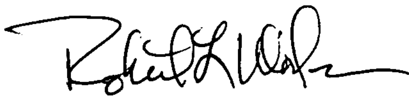
Re: David M. Repko v. County of Georgetown
Appellate Case No. 2014-000156
Opinion No. 5374
Heard September 15, 2015 - Filed January 6, 2016

Dear Madam Clerk:

Enclosed for filing, please find the original and seven copies of the Respondent's Petition for Rehearing, along with our check in the amount of $25.00. Please file the original in your office, and return the file stamped extra copy to me via our courier. By copy of this letter, we are serving counsel for the Appellant with a copy of the petition via e-mail and U.S. Mail.

Respectfully yours,

McNAIR LAW FIRM, P.A.



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RLW/as
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