RECEIVED
JUL 05 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 5374 (S.C. Ct. App. filed Jan. 6, 2016)

David M. Repko,..Respondent,

v.

County of Georgetown,..Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Robert L. Widener
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

David J. Mills
McNAIR LAW FIRM, P.A.
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 235-4100

ATTORNEYS FOR PETITIONER

Other Counsel of Record:

Stephen Goldfinch
Thomas W. Winslow
Ryan Patrick Compton
Goldfinch Winslow, LLC
Post Office Box 829
Murrells Inlet, South Carolina 29576
(843) 357-9301
ATTORNEYS FOR RESPONDENT

INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of Case 1

Summary of Argument 3

Argument 6

I. The Court of Appeals erred procedurally and substantively in reversing the trial court's ruling that County's Development Regulations do not create a private duty owed to Plaintiff 6

II. The Court of Appeals erred procedurally and substantively in reversing the trial court's ruling that the Tort Claims Act precluded the imposition of any liability upon County for any presumed violation of Article V, § 3 15

III. Assuming any error in the trial court's order, it should be affirmed on the additional sustaining ground that Plaintiff's claim is barred by the statute of limitations 22

Conclusion 24

Certificate of Counsel

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 20, 2016. (Appx. 43).

Questions Presented

1. Article V, § 3-1 demonstrates that County's land-use regulations do not create a private or special duty owed to Plaintiff.

2. The Tort Claims Act does not preempt Article V, § 3-1.

3. Plaintiff's claim is barred by the statute of limitations in the Tort Claims Act.

4. The Court of Appeals repeatedly erred in reversing the trial court on grounds never argued to the trial court and never argued to the Court of Appeals.

5. The Court of Appeals erred in ruling on grounds that were barred by the law of the case doctrine.

6. The Court of Appeals misconstrued and effectively overruled this Court's opinion in *Brady Dev. Co., Inc. v. Town of Hilton Head Island*, 439 S.E.2d 266 (S.C. 1993).

Statement of Case

This case presents the same basic fact pattern under the same legal principles that this Court addressed in *Brady Dev. Co., Inc. v. Town of Hilton Head Island*, 439 S.E.2d 266 (S.C. 1993), but the Court of Appeals reached the opposite result from this Court. The basic facts in this case are undisputed and summarized below:

1. County enacted a set of land use regulations that *inter alia* regulated the pre-sale of undeveloped lots by developers of residential subdivisions. (R. 281-286).

2. Developers could not sell undeveloped lots until all infrastructure was complete unless the developer posted a "financial guarantee" as security for the completion of the infrastructure. (R. 281, § 1-5; R. 284, § 3-1).

3. Developer posted a letter of credit with County as the required financial guarantee and began selling undeveloped lots prior to completing the infrastructure in the subdivision. The regulations permitted the developer to reduce the letter of credit as it completed the infrastructure. (R. 284-285, §§ 3-3 and 3-5).

4. Plaintiff purchased two undeveloped lots from the developer.

5. Viewing the evidence and inferences in the light most favorable to Plaintiff, County's employees mistakenly failed to comply with regulatory requirements for allowing the developer to reduce the letter of credit.

6. The developer went bankrupt, did not complete the infrastructure, and the reduced letter of credit was insufficient to complete the infrastructure.

Plaintiff sued County for negligently handling the letter of credit to his damage. He also sued for "intentional interference" and "violation of due process," but he abandoned these claims at trial. (R. 4, n.1). The fundamental question was whether the regulations created a private duty owed to Plaintiff such that Plaintiff could sue County for its alleged negligence in handling the letter of credit posted by the developer for completing the infrastructure.

County moved for a directed verdict at the close of the Plaintiff's case. (R. 224-251 *passim*). The trial court granted County's motion on independent and alternative grounds:

1. County's regulations did not create a private duty owed to Plaintiff and, therefore, Plaintiff had no tort claim against County. (R. 4).

2. Under this Court's ruling in *Brady Dev. Co., Inc. v. Town of Hilton Head Island*, 439 S.E.2d 266 (S.C. 1993), County's regulations did not create a private or special duty owed to Plaintiff. (R. 5-7).

3. Assuming the "special duty" test applies here, the Plaintiff failed to satisfy the second element of that test. (R. 7-8).

4. Assuming the "special duty" test applies here, the Plaintiff failed to satisfy the third element of that test. (R. 7-8).

5. Assuming County owed and breached a duty to Plaintiff, the Tort Claims Act shields County from liability under § 15-78-60(4). (R. 8-10).

6. Assuming County owed and breached a duty to Plaintiff, the Tort Claims Act shields County from liability under § 15-78-60(5). (R. 8-9, 10).

7. Assuming County owed and breached a duty to Plaintiff, the Tort Claims Act shields County from liability under § 15-78-60(13). (R. 8-9, 10-11).

Plaintiff appealed, making numerous arguments that were not preserved for appeal. The Court of Appeals nevertheless reached these issues and reversed the trial court. The Court of Appeals denied County's petition for rehearing.

SUMMARY OF ARGUMENT

The Duty Issues: The fundamental question in this case is whether County's regulations created a private duty owed to Plaintiff when it allowed the developer to pre-sell lots under the "financial guarantee" provision of the regulations. This is a question of legislative intent. Article V, § 3-1 of the regulations ("Section 3-1") plainly states a legislative intent to not create a duty owed to Plaintiff: "Acceptance of a financial guarantee by Georgetown County *shall not be construed as an obligation to any* other agency, utility, or *property owner within affected developments*." (R. 284, § 3-1) (emphasis added). The trial court correctly held that, under the plain language of Section 3-1, the regulations did not create any private duty to Plaintiff. (R. 4). Thus, Plaintiff did not have a tort claim against County as a matter of law because, "[i]f there is no duty, then the defendant in a negligence action is entitled to a directed verdict." (R. 4, *quoting Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142, 149 (S.C. 1999)). The Court of Appeals reversed the trial court under an analysis riddled with procedural and substantive flaws, including those summarized below:

1. The Court of Appeals conflated the separate concepts of duty, liability, and immunity to conclude that Section 3-1 was a disclaimer of *liability* that was preempted by the Tort Claims Act. The question, however, is whether Section 3-1 establishes a legislative intent to create a private *duty* owed to Plaintiff, and it plainly establishes a legislative intent to not do so. The Tort Claims Act is irrelevant to this question of duty – the Tort Claims Act does not create any duty – rather, a duty exists only if imposed by other law, and there can be no liability absent a duty.

2. The Court ruled that the disclaimer of "obligation" in Section 3-1 meant only that "the County is not required to pay to the property owners the money made available through the letter of credit . . . and the County is allowed to complete the infrastructure and ignore the preferences of the property owners in doing so." The was error for

numerous reasons, including the following: (a) Plaintiff never made this argument to the trial court (R. 224-251 *passim*); (b) Plaintiff never made this argument to the Court of Appeals (App. Br. *passim*); and (c) nothing in Section 3-1, or the regulations generally, supports the Court of Appeals' narrow construction of "obligation."

3. The Court held that County's regulations created a private duty owed to Plaintiff under the "special duty" test. The fundamental flaw in the Court of Appeals' ruling is its treatment of the "special duty" test as a substantive rule of law. This test, however, is a rule of statutory construction for determining legislative intent on the question of creating a private duty. Like all statutory construction rules, it is subservient to the overriding question of legislative intent, and it is irrelevant if the legislative intent is stated plainly in the legislation itself. Section 3-1 plainly states a legislative intent to not create a private duty owed to Plaintiff, and the Court of Appeals erred in using a statutory construction rule to override this plainly stated intent.

4. The Court misconstrued this 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. The operative facts, regulations, claims, and question of duty in *Brady* were virtually identical to those in the present case, except that the *Brady* regulations did not include an express statement of legislative intent like that found here in Section 3-1. This Court nevertheless held that the *Brady* regulations did not create a private duty owed to the plaintiff, because the preamble to those regulations demonstrated a legislative intent that the regulations were for a public purpose, *i.e.*, the preamble implicitly demonstrated there was no legislative intent to create a private duty owed to the plaintiff. Here, the regulations do not include a *Brady*-type preamble that implicitly established legislative intent. Seizing upon this "distinction," the Court of Appeals limited this Court's ruling in *Brady* to situations involving a preamble of public purpose, leading to the absurd result that a legislative body can disclaim a duty implicitly, but it cannot do so expressly.

Reversing the Court of Appeals and reinstating the trial court's judgment on the question of duty moots all other issues in this case.

The Tort Claims Act Issues: Assuming no error in the Court of Appeals' rulings on the question of duty, there remains the separate and independent question of whether the Tort Claims Act (TCA) grants immunity to County for Plaintiff's claim. The TCA contains 40 immunity provisions – some of these provisions contain a "gross negligence exception" but most do not. See generally § 15-78-60. In *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142 (S.C. 1999), this Court held that when an immunity provision in § 15-78-60 containing a gross

negligence exception applies to a case, that exception is read into any other applicable subsections of § 15-78-60, even if those subsections do not contain a gross negligence exception.

Here, the trial court held that County was immune from liability for Plaintiff's claim under subsections (4), (5), and (13) of § 15-78-60, none of which contain a gross negligence exception. The trial court also held that, *as argued by Plaintiff to the trial court*, subsection (12) did not apply to this case. Subsection (12) contains a gross negligence exception. The Court of Appeals reversed the trial court upon the single ground that, pursuant to *Steinke, supra*, the gross negligence exception in subsection (12) applied to the immunity granted by subsections (4), (5), and (13). This ruling, like the Court's ruling on the duty question, is riddled with procedural and substantive flaws, including those summarized below:

1. The Court of Appeals overlooked the single-most fundamental rule of appellate practice, to-wit: an issue not raised to the trial court cannot be raised on appeal. Here, Plaintiff never argued to the trial court that subsection (12) contained a gross negligence exception and, more importantly, never argued that this "gross negligence exception" was transported into subsections (4), (5), and (13) under this Court's ruling in *Steinke, supra.* (See R. 224-251 *passim*).

2. Plaintiff successfully argued to the trial court that subsection (12) did not apply here. An appellant cannot make one argument at trial and the opposite argument on appeal.

3. The trial court ruled that subsection (12) did not apply here. Neither party appealed this ruling. Thus, it is the law of the case and binding on appeal.

4. The Court of Appeals held that subsection (12) applied here, because it grants immunity for the "renewal" of a "permit," and allowing a reduction in the letter of credit was a "renewal of the permit to sell lots." The was error for several reasons, including: (a) Plaintiff never made this argument to the trial court, see R. 224-251 *passim*; (b) Plaintiff never made this argument to the Court of Appeals, see App. Br. *passim*; and (c) nothing in County's regulations supports or permits a conclusion that a reduction in the letter of credit was a *renewal* of any permit.

Reversing the Court of Appeals and reinstating the trial court's judgment on the question of immunity under the Tort Claims Act moots all other issues in this case.

The Statute of Limitations Issue: The trial court denied Plaintiff's directed verdict motion on the statute of limitations. County argued it as an additional sustaining ground on appeal, but the Court of Appeals summarily rejected it without discussion.

The TCA contains a two-year statute of limitations measured by "the date the loss was or should have been discovered." Plaintiff 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 by the undisputed facts of this case, which come solely from Plaintiff's own testimony, Plaintiff knew or should have known of his "loss" no later than November 3, 2008. Thus, his claimed is barred by the two-year statute of limitations. Reinstating the trial court's judgment on this basis moots all other issues in this case.

ARGUMENT

I. The Court of Appeals erred procedurally and substantively in reversing the trial court's ruling that County's Development Regulations do not create a private duty owed to Plaintiff.

A. When considered under the proper analytical framework, Section 3-1 plainly precludes a finding of any private duty owed to Plaintiff.

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 516, 518 (S.C. 2013). 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, 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). Here, Section 3-1 plainly states a controlling legislative directive that a financial guarantee "*shall not* be *construed* as an *obligation*

to any . . . property owner." (Emphasis added).[1] Thus, Plaintiff has no claim against County and, as shown later, the "public duty rule" and "special duty test" do not change this. Reversing the Court of Appeals and reinstating the trial court's judgment on this ground moots all other issues.

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

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

1. Section 3-1 does not create a private duty owed to Plaintiff.

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

> We find that disclaiming an "obligation" to property owners when the County accepts a financial guarantee means 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.

(Appx. 9-10) (emphasis added). This ruling was in error for several reasons.

First, it is axiomatic that 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). Plaintiff never made the above-

[1] 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, Section 3-1 precludes any construction of it as imposing or creating any private duty to a property owner.

quoted argument to the trial court during the directed verdict proceedings. (R. 224-251). Thus, this issue is not preserved for appeal and the Court of Appeals erred in reversing on this ground.

Second, it is also axiomatic that 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, Plaintiff did not make the above-quoted argument to the Court of Appeals (App. Br. *passim*) and, therefore, the Court erred in reversing the trial court on this ground.

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

Fourth, Section 3-1 specifically precludes any construction creating an obligation that is owed to a property owner, but that is precisely what the Court of Appeals did by construing it as creating a private duty with respect to managing the financial guarantee. When the legislative intent is clear, however, as it is here, judicial inquiry ends and the court must enforce the legislation as written. *Sloan*, 762 at 688 n.3; *Quigley,* 593 S.E.2d at 479; *Nemeth*, 481 S.E.2d at 185.

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). It would be an absurd result for Section 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" (Appx. 9-10 (emphasis added)), but it is nevertheless required to pay money to property owners through some other source.

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.

The Court of Appeals held that the TCA preempted the legislative intent to not create a duty in Section 3-1. (Appx. 14-15). This was error for several reasons.

First, the 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 plaintiff, even if it was undisputed that the plaintiff had proven the duty-breach-causation-damages paradigm for imposing tort liability. With the abolition of sovereign immunity in *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985), governmental entities became liable under this paradigm. The TCA preempted this field of post-*McCall* liability, principally to limit governmental liability by imposing numerous immunities.

Second, the TCA 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*. The TCA does not create any "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. The Court of Appeals 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, [and only] if a duty is found . . . will it ever be necessary to reach the TCA immunities issue." (Appx. 10) (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, the Court of Appeals' erroneous conclusion of TCA preemption was driven by two analytical errors: (1) the Court failed to keep separate the completely different concepts of "duty"

and "liability" in its analysis; and (2) the Court erroneously treated Section 3-1 as a "disclaimer" of duty and as "disclaiming" or "waiving" liability when, to the contrary, Section 3-1 expresses a legislative intent to not create a private duty.

In the opening paragraph of its discussion, the Court of Appeals agreed with the following argument by Plaintiff:

> [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.

(Appx. 8) (emphasis added). The 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.

(Appx. 9) (emphasis added). As shown by the emphasized language in the two quotes above, each time the Court mentioned "duty," the 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, the 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 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. The "shall not be construed as an obligation" language in Section 3-1 plainly demonstrates a legislative intent to not create a private duty.

To "disclaim" or "waive" something, that something must first exist. By analyzing Section 3-1 in terms of "disclaiming" a duty and "disclaiming" or "waiving" liability, the Court of Appeals skipped the first and most critical inquiry, to-wit: do the regulations create a private duty owed to Plaintiff? The "shall not be construed as an obligation" language in Section 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 is irrelevant to the controlling question of whether there is a private duty.

C. <u>The Court of Appeals erred in applying the "special duty test."</u>

In Part I(B) of its opinion (Appx. 10-12), the Court of Appeals considered the "public duty rule" and the related "special duty test." The 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 TCA. The Court, however, erred in failing to recognize that, like the "public duty rule," the meaning of the "shall not be construed as an obligation" language in Section 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 TCA. As to the application of the special duty test, the Court erred as set forth below.

First, the 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. The "shall not be construed as an obligation" language in Section 3-1 plainly expresses a legislative intent "to foreclose" a special private duty. Thus, the "special duty test" is irrelevant and cannot be used to override the plainly expressed legislative intent. *Id.*

Third, in considering the "third element" of the "special duty test," the Court held in part that the trial court erred because the TCA preempted Section 3-1. The TCA, however, is irrelevant to the existence of any duty. Thus, the TCA does not and cannot preempt the "shall not be construed as an obligation" language in Section 3-1.

Fourth, as to the "merits" of the "special duty test," the Court erred in finding that Plaintiff satisfied the second and third elements of that test. As noted by the Court, the second element requires a duty imposed on a "*specific* public officer." (Appx. 11) (emphasis added). The 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, the 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." (Appx. 12) (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. The Court of Appeals Court misconstrued this 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 (Appx. 12-14), the Court of Appeals held that *Brady* was distinguishable and therefore not controlling in this case. This was error.

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

[2] The 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." (Appx. 11-12). The Court never explained this "further support," so it was not possible to address it in any meaningful way on rehearing. Thus, County requested an amended opinion that provided this explanation but the Court of Appeals denied this request.

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 the Court of Appeals here, held "that the Town owed [Brady] a special duty in the administration of its [regulations]." *Id.*

In *Brady*, this Court reversed the trial court's "special duty" ruling on two different grounds: (1) there was no "special duty," because the preamble to the regulations demonstrated a legislative intent that the regulations were for a public purpose, *i.e.*, the preamble demonstrated there was no legislative intent to create a "special duty" to the plaintiff; and (2) imposing such a duty would make the town an insurer of regulated developments and likely discourage all regulation efforts. *Id.* at 268

Although *Brady* did not involve an express statement of legislative intent like that found here in Section § 3-1, this Court's analysis focused on legislative intent. In reciting the elements of the "special duty" test, this Court cited its prior decision in *Bellamy, supra.* 439 S.E.2d at 268. There, this Court rejected the "special duty" claim 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." *Bellamy*, 408 S.E.2d at 221 (emphasis added). Immediately thereafter, this Court considered the "preamble" in *Brady* and found that it implicitly demonstrated there was no legislative intent to create a "special duty." 439 S.E.2d at 268 Here, there is no need to search the regulations for an implicit statement of legislative intent, because Section 3-1 expressly states that there is no duty to Plaintiff.

As to this Court's "insurer" ruling in *Brady*, which the trial court also specifically relied upon in this case, the Court of Appeals 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 the Court of Appeals. Thus, the "special duty test," standing alone, cannot 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. Here, Section 3-1 clearly shows there was no legislative intent to become the insurer of the development.

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

II. The Court of Appeals erred procedurally and substantively in reversing the trial court's ruling that the Tort Claims Act precluded the imposition of any liability upon County for any presumed violation of Article V, § 3.

In *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985), this Court abolished the long-standing, common law rule of sovereign immunity but delayed the effect of this ruling so that the General Assembly could address the questions of governmental liability and immunity. In response, the General Assembly enacted the Tort Claims Act (TCA), which provides generally that government entitites "are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." § 15-78-40. Section 15-78-60 of the TCA grants immunity under 40 subsections creating exceptions to this general rule. Most of these subsections

contain no exception to the immunity granted therein, but some contain a "gross negligence exception," *i.e.*, the immunity granted by the subsection is overcome by a showing of gross negligence. *Compare, e.g.*, § 15-78-60 (4), (5), and (13) (no gross negligence exception) *with* § 15-78-60 (12) (containing gross negligence exception).

As noted by the trial court (R. 8-9), the General Assembly specifically declared in its legislative findings that, as a matter of public policy, the "limitations on and exemptions to the liability" set forth in the TCA "*must* be *liberally* construed in favor of *limiting* the liability" of a political subdivision like County. § 15-78-20(f) (emphasis added). As also noted by the trial court (R. 9), the General Assembly also emphasized that the TCA was the "exclusive and sole remedy" for governmental torts and that the "limitations on and exemptions to the liability of the governmental entity" established by the TCA "*must* be *liberally* construed in favor of *limiting* the liability of the governmental entity." § 15-78-200 (emphasis added). However, in *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142 (S.C. 1999), this Court held that when an immunity subsection of § 15-78-60 containing a gross negligence exception applies to a case, the gross negligence exception must be read into any other applicable subsections of § 15-78-60, even if those subsections do not contain a gross negligence exception.

Here, County pled four subsections of § 15-78-60 in defense to Plaintiff's claim: subsections (4), (5), and (13), which do not contain a gross negligence exception, as well as subsection (12), which does contain a gross negligence exception. At the close of Plaintiff's evidence, County moved for a directed verdict on all four subsections. The trial court granted the motion with respect to subsections (4), (5), and (13), specifically finding that these subsections were applicable to the misconduct alleged by Plaintiff. (R. 243; see also R. 8-11). As to subsection (12), Plaintiff argued that it did not apply to Plaintiff's claims, because his claim had nothing to

do with the type of "licensing" functions protected by subsection (12). (R. 246-247). The trial court agreed with Plaintiff, finding that subsection (12) was not applicable to this case. (R. 249; see also R. 11). Neither party appealed this ruling and, therefore, it is the law of this case that subsection (12) does not apply to this case. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998).

Importantly, Plaintiff never argued to the trial court that subsection (12) contained a "gross negligence exception" and never argued that this exception therefore applied to subsections (4), (5), and (13) under this Court's ruling in *Steinke, supra.* (R. 224-251 *passim*). Moreover, Plaintiff never argued on appeal that subsection (12) "applied" to this case. (App. Br. *passim*). Rather, he argued on appeal that the gross negligence exception applied to subsections (4), (5), and (13), because County "raised" subsection (12) in its answer, another argument that Plaintiff never made to the trial court. (App. Br. 27-29; R. 224-251 *passim*). County responded that Plaintiff's arguments were not properly before the Court of Appeals because:

1. Plaintiff's "gross negligence exception" arguments were not preserved for appeal, because Plaintiff never made these arguments to the trial court. *In re Michael H.*, 602 S.E.2d 729, 732 (S.C. 2004) (issue not raised at trial cannot be raised on appeal).

2. Plaintiff's argument was not properly before the Court, because Plaintiff successfully argued at trial that subsection (12) did not apply here, and he could not change positions on appeal. *State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (cannot make one argument at trial and a different argument on appeal).

3. Plaintiff's argument was barred by the law of the case doctrine, because the trial court ruled that subsection (12) did not apply to this case and neither party had appealed this ruling. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) (unappealed ruling is the law of the case).

(See Resp. Br. 14-16, 17 n.7, 18). Nevertheless, the Court of Appeals reversed the trial court's immunity rulings upon the sole ground that the gross negligence exception in subsection (12)

applied to this case and, therefore, the trial court erred in not applying it to subsections (4), (5), and (13). (Appx. 14-15). This was error for the reasons noted above and the reasons noted below.

Plaintiff's only argument on appeal was that County "raised" subsection (12) in its answer, thereby importing the "gross negligence exception" into the other subsections. The Court of Appeals agreed with this argument in the opening paragraph of its discussion of the TCA issues:

> [Plaintiff] 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.*

(Appx. 14) (emphasis added). Plaintiff never made this argument to the trial court during the directed verdict proceedings (R. 224-251) and, therefore, it was not available on appeal. *McClurg*, 716 S.E.2d at 887. 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, supra*, this 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). This 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, the Court of Appeals erred in agreeing with Plaintiff's "pleading" argument which, in any event, was not

properly before the Court because: Plaintiff never made this argument to the trial court; Plaintiff argued the exact opposite position to the trial court, and he cannot change positions on appeal; and the trial court's ruling that subsection (12) does not apply here is the law of this case.

Moreover, the Court of Appeals' ruling hinged upon its holding that subsection (12) applied to this case because:

> Subsection 15-78-60(12) grants immunity for losses resulting from the *"renewal" of a permit*. The County approved reductions of the letter of credit and, in doing so, *allowed the renewal of the permit* to sell lots even though the letter of credit had been improperly reduced. Based on this evidence, a jury could have found subsection 15-78-60(12) applied.

(Appx. 15) (emphasis added). This was error for the same reasons noted earlier, to-wit: Plaintiff never made this argument to the trial court; Plaintiff argued the exact opposite position to the trial court, and he cannot change positions on appeal; and the trial court's ruling that subsection (12) does not apply here is the law of this case. More importantly, Plaintiff never made this "permit renewal" argument to the Court of Appeals (App. Br. *passim*), and it is axiomatic that appellate courts will not reverse on grounds not argued to the appellate court. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011); *Bickerstaff v. Prevost*, 670 S.E.2d 660, 662 n.2 (S.C. App. 2009). In any event, the Court of Appeals' ruling is erroneous on its merits.

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). Nothing in the County's regulations provides that a reduction in the letter of credit is a "renewal" of any permit or other authority. (R. 285, § 3-5; see generally R. 281-286).

Thus, the Court of Appeals' ruling was erroneous on its merits and, in any event, the Court of Appeals reached this issue in violation of axiomatic rules of appellate practice and procedure.

A. County is immune from liability under § 15-78-60(4).

Section 15-78-60(4) grants immunity for any claim based on *inter alia* the failure to enforce or comply with any law, ordinance, or regulation. The trial court held that the "gravamen of Plaintiff's [claim] was that [County] failed to comply with or enforce its own regulation regarding the acceptance and reduction of a financial guarantee." (R. 9). The trial court concluded that Plaintiff's claim fell "squarely within exception § 15-78-60(4), and the County is not liable for any loss allegedly resulting from that conduct." (R. 10).

On appeal, Plaintiff never challenged the merits of the trial court's ruling. (App. Br. 27-29; see also App. Br. *passim*). Indeed, Plaintiff admitted on appeal that his "negligence claim is that his loss was caused by the County's *failure to comply* with its own ordinance, particularly Section 3-5 authorizing reductions in the letter of credit [*i.e.*, the financial guarantee]." (App. Br. 32) (emphasis added). It is therefore the law of this case that subsection (4) grants immunity to County for Plaintiff's claim. *Soden*, 511 S.E.2d at 378.

Plaintiff's only challenge to the trial court's ruling on § 15-78-60(4) was that it was subject to a "gross negligence exception," *i.e.*, the immunity could be overcome by proof of gross negligence in County's failure to comply. (App. Br. 27-29). As demonstrated earlier, the Court of Appeals erred in considering this argument, because it was not properly before the Court for appellate review and, in any event, the Court of Appeals' ruling was erroneous on its merits.

B. County is immune from liability under § 15-78-60(5).

Section 15-78-60(5) provides that a governmental entity is not liable for a loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or

the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." The trial court held that § 15-78-60(5) granted immunity to County, because the decision to accept and reduce a financial guarantee was a discretionary act. (R. 10). On appeal, Plaintiff conceded the correctness of this ruling: "the Court *correctly* noted that the County's decisions to accept financial guarantees and *to subsequently authorize reductions* in the letter of credit *were all discretionary acts*." (App. Br. 30) (emphasis added).

Plaintiff nevertheless argued that: (1) County failed to show it had weighed competing alternatives under accepted professional standards; and (2) County did not rely on proper documentation or otherwise adhere to the regulations. (App. Br. 30-31). Plaintiff did not make these arguments to the trial court (R. 246) and, therefore, could not make them on appeal. *In re Michael H.*, 602 S.E.2d at 732. Plaintiff also argued that the "gross negligence exception" in subsection (12) applied to subsection (5). (App. Br. 31-32). As shown earlier, this argument was not preserved for appeal and has no merit.

Finally, Plaintiff argued in a single sentence that "subsection (5) does not entitle the County to immunity because the requirement that the County always retain 125% of the outstanding completion costs is mandatory and is not subject to discretion." (App. Br. 30). This single-sentence argument is too conclusory to present any issue on appeal and is therefore an abandonment of this issue. *Bean v. South Carolina Cent. R. Co., Inc.*, 709 S.E.2d 99, 113 (S.C. App. 2011).

In any event, the trial court ruled correctly. County had discretion to reduce the letter of credit – Plaintiff concedes this. There is evidence that the letter of credit was reduced below the 125% minimum, but this was simply a mistake by County, *i.e.*, negligence, and subsection (5) provides immunity for such negligence. Thus, the trial court ruled correctly on subsection (5).

C. The question of immunity pursuant to § 15-78-60(13) is now moot, because Plaintiff conceded on appeal that he is not pursuing any "duty to inspect theory" or any violation of that duty.

The trial court held that § 15-78-60(13) granted immunity to County, because Plaintiff elicited testimony that County had not inspected the property before reducing the letter of credit, and subsection (13) granted immunity for any failure to inspect. (R. 11). On appeal, Plaintiff did not challenge this ruling on its merits. Rather, Plaintiff disavowed any "failure to inspect" theory and conceded that he is not seeking recovery under any "failure to inspect" theory. (App. Br. 32). Thus, this issue is now moot, and Plaintiff never contended otherwise in his Reply Brief. (Reply Br. *passim*). Inexplicably, the Court of Appeals nevertheless reversed the trial court under its erroneous "gross negligence exception" ruling.

III. Assuming any error in the trial court's order, it should be affirmed on the additional sustaining ground that Plaintiff's claim is barred by the statute of limitations.

The Tort Claims Act required Plaintiff to bring this action "within two years after the date the loss was or should have been discovered." § 15-78-110. 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). The Court of Appeals summarily rejected this argument: "Viewing the evidence in the light most favorable to [Plaintiff], a question of fact existed as to *when [Plaintiff] should have discovered he had a claim against the County*." (Appx. 16 n.7) (emphasis added).

The controlling question is not a subjective inquiry into "when [Plaintiff] 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).

Plaintiff 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 Plaintiff's own testimony*:

1. Plaintiff 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. Plaintiff 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. Plaintiff 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. Plaintiff 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, Plaintiff 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, Plaintiff 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, Plaintiff 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, Plaintiff 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 Plaintiff, 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 Plaintiff 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. Plaintiff 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 should grant certiorari, reverse the Court of Appeals, and reinstate the judgment of the trial court.

Respectfully Submitted,

Robert L. Widener
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

David J. Mills
McNAIR LAW FIRM, P.A.
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 235-4100

July 5, 2016
Columbia, SC

ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 05 2016
SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5374
Heard September 15, 2015 – Filed January 6, 2016

David M. Repko,..Respondent,

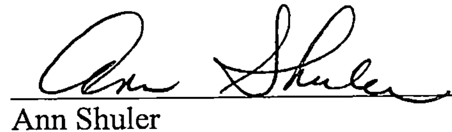
v.

County of Georgetown,..Petitioner.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Petition for a Writ of Certiorari and Appendix, by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to Appellant's counsel at the addresses shown below, on July 5th, 2016:

Thomas W. Winslow, Esquire
Stephen Goldfinch, Esquire
Ryan Patrick Compton, Esquire
GOLDFINCH & WINSLOW
Post Office Box 829
Murrells Inlet, SC 29576



Ann Shuler

MCNAIR

ATTORNEYS

Robert L. Widener
SC Bar No. 6089

rwidener@mcnair.net
T 803.799.9800
F 803.753.3278

July 5, 2016

Via Courier

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
JUL 05 2016
SC Court of Appeals

Re: David M. Repko -v- County of Georgetown
Appellate Case No. 2014-000156
S.C. Ct. App. Opinion No. 5374 (filed January 6, 2016)

Dear Mr. Shearouse:

Enclosed for filing, please find the original and seven (7) copies of the County of Georgetown's Petition for Writ of Certiorari, along with three copies of the Appendix, and our check in the amount of $100.00 Please return the extra file stamped copies of the Petition and Appendix to us via our courier. By copy of this letter, we are serving counsel for David M. Repko with a copy of the Petition and Appendix.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

RLW/as
Enclosure

cc: Honorable Jenny Abbott Kitchings
Ryan Patrick Compton Esquire
Thomas W. Winslow, Esquire
Stephen Goldfinch Esquire

McNAIR LAW FIRM, P.A.
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net