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
Heard September 15, 2015 – Filed January 6, 2016

David M. Repko, ...Respondent,

v.

County of Georgetown,.....Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David M. Repko, Appellant,

v.

County of Georgetown, Respondent.

Appellate Case No. 2014-000156

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

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Heard September 15, 2015 – Filed January 6, 2016

REVERSED AND REMANDED

Ryan Patrick Compton, Stephen Lewis Goldfinch, Jr., and Thomas William Winslow, all of Goldfinch Winslow, LLC, of Murrells Inlet, for Appellant.

Robert L. Widener, of McNair Law Firm, PA, of Columbia, and David J. Mills, of McNair Law Firm, PA, of Pawleys Island, for Respondent.

LOCKEMY, J.: In this negligence action, David M. Repko appeals the trial court's granting of a directed verdict in favor of Georgetown County (the County). Repko argues the trial court erred in (1) construing Article V, Section 3-1 of the County Development Regulations (the Regulations) to preclude a "tort-like" duty when the plain language of that provision disclaims only a "financial-like"

obligation[1]; (2) relying on the Regulations' "sovereign immunity" provision when that provision is unenforceable because it is preempted by the South Carolina Tort Claims Act (TCA); (3) finding the Regulations did not create a special duty owed to him under the "special duty test"; (4) finding subsections 15-78-60(4), (5), and (13) of the TCA provided the County with immunity to his negligence claim; and (5) not recusing itself based upon prior business relationships concerning the transactions involved.

FACTS

Repko is the owner of two lots in Phase 2-D-1 of the West Stewart Subdivision of Harmony Township—a planned unit development in Georgetown County. In April 2012, he filed a civil action for damages against the County. He alleged the County's gross negligence in handling a financial guarantee posted by the developer, Harmony Holdings, LLC (the Developer), resulted in the loss of most of the funds that were to be used in building the subdivision's infrastructure. Repko asserted (1) the Developer failed to complete the infrastructure, (2) there were insufficient funds to complete the infrastructure (due to the County's gross negligence), and (3) the lack of infrastructure reduced his property value to "zero." As a result of the County's negligence, Repko sought to recover "past and future actual damages."

The County filed an answer, denying liability and raising several affirmative defenses. The County alleged (1) it did not owe a duty to Repko; (2) the TCA[2]—specifically, subsections 15-78-60(1), (2), (4), (5), (12), and (13) of the South Carolina Code (2005)—barred Repko's claims; and (3) the statute of limitations also barred the claims.

Repko's case proceeded to trial, where the following facts developed. Wesley Bryant, the County attorney, explained that in South Carolina, a developer is generally not allowed to sell lots that do not have the requisite infrastructure—

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[1] Our review of the record indicates Repko never raised this argument at trial, in his motion to reconsider, or at the motion to reconsider hearing, and the trial court never addressed these arguments in its orders. Therefore, we find this argument is unpreserved. *See In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Arguments raised for the first time on appeal are not preserved for our review.").

[2] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2015).

roads, water, and sewer—prior to their development. Under the Regulations, however, a developer could post cash, bonds, financial guarantees, or letters of credit in lieu of completing the infrastructure before selling the lots. Bryant stated the purpose of a financial guarantee is to ensure money is available to complete the subdivision's infrastructure "if the developer goes belly up." Bryant explained a letter of credit is "a document . . . from a financial institution to the County as a beneficiary that simply states that the development has a financial guarantee of . . . the proposed total cost of the infrastructure to be placed . . . in that development." Under a letter of credit, the bank is the issuer and the County is the beneficiary. Bryant testified property owners are not beneficiaries on a letter of credit but a letter of credit does protect the property owners. Bryant stated that, under the Regulations, the County is not required to accept a financial guarantee and may require the developer to complete the infrastructure before it is allowed to sell lots in a subdivision.

The County regulates improvements to major subdivisions through Article V of the Regulations. Article V, Section 1-5 provides, "Final plans shall not be approved for recording unless the [developer] has installed the required improvements as specified and required in this Article, or has provided a financial guarantee as specified in Section 3 of this Article." "Required improvements" include installation of monuments at street corners; a storm water management system; specified roadway improvements, including grading and paving; and utilities and services.

Article V, Section 3-1 states as follows:

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

The Regulations provide a procedure that must be followed if a developer wants to post a financial guarantee. First, the financial guarantee must be submitted to the County's Planning Department along with an "itemized cost estimate" for the improvements the financial guarantee will cover. The itemized cost estimate must (1) bear the original signature and seal of a licensed professional engineer, (2) be on company letterhead, and (3) be in a form acceptable to the Planning Department. Article V, Section 3-2 provides, "Upon receipt of an itemized cost estimate, the Planning Department shall forward such estimate to the appropriate departments or agencies for review."

Under the Regulations, the County may accept a letter of credit as a financial guarantee. Article V, Section 3-3 states an approved letter of credit must (1) be equal to 125% of the approved cost estimate; (2) be issued for an initial coverage period not less than twelve months from the date the final plat is filed for recording; (3) be irrevocable, unconditional, and subject to presentation for drawing within South Carolina; (4) be payable to the County; (5) be for at least $10,000 in construction; and (6) substantially conform to a required format.

If the County accepts a financial guarantee from the developer, it generally holds the guarantee until all covered improvements are completed unless a reduction in the guarantee has been approved pursuant to the following procedure set forth in Article V, Section 3-5:

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

Holly Richardson, the Planning Department's chief planner, stated the County was not required to reduce a financial guarantee or letter of credit. Richardson and the Planning Department's director, Boyd Johnson, both stated that before the County would agree to reduce a letter of credit, it required "a letter from the engineer certifying that the work had been complete[d] and certifying the number[and] the dollar amounts that were left to be done."

In the early 2000s, the Developer began developing the Harmony Township community within Georgetown County. Although roads, utilities, and other required improvements were not constructed in the community, the Developer sought permission from the Planning Department to begin selling the undeveloped lots to buyers. The County allowed the Developer to post letters of credit as financial guarantees in lieu of completing the required improvements. The Developer posted a letter of credit for each phase of Harmony Township, including Phase 2-D-1, the phase at issue in this appeal.

In 2006, the Developer applied to Wachovia Bank to obtain a letter of credit for Phase 2-D-1. Wachovia granted the application and issued a letter of credit on May 23, 2006, in the amount of $1,301,705.63 (Wachovia letter of credit). The Wachovia letter of credit designated the County as the beneficiary and the Developer as the applicant. Shortly thereafter, the Developer submitted the Wachovia letter of credit to the Planning Department. It also submitted an engineer's estimate of $1,040,000.00 as the cost of completing the required improvements. Thus, the $1,301,705.63 Wachovia letter of credit was 125% of the engineer's estimate as required under the Regulations. The Planning Department accepted the letter of credit and permitted the Developer to sell undeveloped lots in Phase 2-D-1.

On July 20, 2006, the Developer requested a reduction in the Wachovia letter of credit. The County approved a request to reduce the letter of credit by $331,311.00. Repko presented evidence that the County approved this request despite noncompliance with the Regulations and the Planning Department's protocol. First, the County approved the request without the required letter of an engineer certifying "the work had been complete[d] and . . . the dollar amounts that were left to be done." Second, the County approved the request without "forward[ing] the revised cost estimate to the Georgetown County Department of Public Works for approval." Third, the County approved the request even though it indicated that the Developer sought to use the letter of credit funds to pay its contractor, contrary to Article V, Section 3-3. Fourth, an engineer's cost of completion estimate made by Earthworks, the engineering firm hired by the Developer, showed the County approved the request without retaining 125% of the funds needed to complete the infrastructure; the estimate showed virtually no work was done at that time on the infrastructure for Phase 2-D-l. Pursuant to the County's letter, Wachovia released $331,000.00, thereby reducing the letter of credit to $970,394.63.

On October 9, 2006, the County approved a second request for reduction and advised Wachovia to reduce the letter of credit by $117,024.42. The County

approved the second request for reduction (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate; (2) without forwarding a cost of completion estimate to the Department of Public Works for completion; (3) without retaining 125% of the funds needed to complete the infrastructure; (4) even though the request indicated the Developer was seeking to use the letter of credit funds to pay its contractor; and (5) even though the reduction was requested within six months of the previous request, contrary to Article V, Section 3-5. Wachovia released $117,024.42, thereby reducing the letter of credit to $853,370.21.

On November 8, 2006, the County approved a third request for reduction and advised Wachovia to reduce the letter of credit by $300,000.00. Richardson testified the third reduction request was approved based upon Earthworks' "letter and approval of the $300,000." The County again approved the request (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate, (2) without having sought approval from the Department of Public Works, (3) without retaining 125% of the funds needed to complete the infrastructure, (4) even though the request indicated that the Developer was using letter of credit funds to pay its contractor, and (5) even though the request was made within six months of the earlier two requests. Pursuant to the County's letter, Wachovia released $300,000.00, thereby reducing the letter of credit to $553,370.21.

In December 2006, Earthworks advised the County's Public Works Department that it "reviewed and accepted the following changes in price to [Phase 2-D-1 and Phase 2-D-2]." An "Opinion of Probable Cost" for Phase 2-D-l provided an estimated cost of $1,153,205.45 to complete the sewer and water systems and the remaining improvements for the roads, site, and drainage. Thus, the cost of completing the infrastructure for Phase 2-D-l in December 2006 was higher than the original estimate of $1,040,000.00.

On March 9, 2007, the Developer requested a fourth reduction in the Wachovia letter of credit by an amount of $396,666.18. On April 5, 2007, the County approved the request and advised Wachovia to reduce the letter of credit by $396,666.18. The County approved this request (1) without having sought approval from the Department of Public Works, (2) without retaining 125% of the funds needed to complete the infrastructure, (3) even though the Application and Certificate for Payment indicated that the Developer was using letter of credit funds to pay its contractor, and (4) even though the request was made within six months of the earlier two requests. Pursuant to the County's letter, Wachovia released $396,666.18, thereby reducing the letter of credit to $156,704.03.

In April 2007, the County Water and Sewer District advised the County that an inspection of the water and sewer lines in Phase 2-D-1 was completed. The letter stated, "Based upon this inspection, it appears that construction of the sewer mainlines, manholes[,] and sewer service laterals as permitted for the project have been completed." The letter did not give an estimate of the cost to complete the infrastructure.

At some point before the Wachovia letter of credit expired on May 23, 2007, the Developer gave the County a $140,000.00 check. The County placed these funds in a separate account to be used at Harmony. The County cashed in a letter of credit covering Phase 2-D-2, but it did not cash in the letter of credit for Phase 2-D-1. In August 2007, the Developer informed the County that it "no longer had the financial means to put any infrastructure within any phase of Harmony," and because the letters of credit were about to expire, the Developer advised the County "to call all the letters of credit that were still in good standing."

The Developer subsequently declared bankruptcy. At that time, the Developer had failed to complete basic infrastructure, such as utilities or roads, within Phase 2-D-1. A new owner later took over the project, hired his own contractor, and requested the County release funds for payment to the contractor after work was completed. The County released funds "quite a few times and maybe for a year after that"; however, the County ultimately deemed the new owner untrustworthy and stopped the release of funds. As a result, the new developer quit. Bryant testified the County does not have enough money to complete the infrastructure for Phase 2-D-1.

Repko testified there is no prospect of anybody completing the infrastructure for Phase 2-D-1. He described his lots as "woods" accessible by a path cleared out seven years ago but inaccessible by road. Because of the missing infrastructure, Repko believes the value of his property is "zero." He claimed that within the last eighteen months, only one lot in the development has sold and the sale price was $500. Repko has paid the property taxes for his lots, but the County will not allow him to build on his property because of the absence of basic utilities.

The County moved for a directed verdict at the close of Repko's case. The trial court directed a verdict in favor of the County on the following grounds: (1) the Regulations did not create a private duty owed to Repko and (2) the County was

immune from liability under subsections 15-78-60(4), (5), and (13) of the TCA.[3] Repko filed a motion to reconsider, which the trial court denied by form order.

STANDARD OF REVIEW

"The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Jones v. Lott*, 379 S.C. 285, 288-89, 665 S.E.2d 642, 644 (Ct. App. 2008), *aff'd*, 387 S.C. 339, 692 S.E.2d 900 (2010). "In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Id.* "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Id.*

In a negligence action, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Id.*

LAW/ANALYSIS

I. Duty

A. Role of Article V, Section 3-1

Repko argues the 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. Specifically, Repko asserts the 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. We agree. "[S]overeign immunity historically acted to protect a governmental entity from all liability for loss in a negligence action." *Adkins v. Varn*, 312 S.C. 188, 190, 439 S.E.2d 822, 823 (1993). In *McCall v. Batson*, 285 S.C. 243, 244, 329 S.E.2d 741,

[3] The trial court rejected the County's argument that it was immune from liability under subsection 15-78-60(12) of the TCA.

741 (1985), our supreme court abolished sovereign immunity, and as a result, the General Assembly enacted the TCA. *Adkins*, 312 S.C. at 190, 439 S.E.2d at 823.

Under the TCA, "[t]he State, an agency, a political subdivision, and a governmental entity 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." S.C. Code Ann. § 15-78-40 (2005). Notwithstanding any provision of law, the TCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (2005).

"Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006).

We find the County cannot avoid application of the TCA by disclaiming a duty through Article V, Section 3-1 for two reasons. First, the 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, which the General Assembly expressly stated "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." *See* § 15-78-200; *see also* § 15-78-40 (stating a governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances"); *S.C. State Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 ("Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area."). 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 was erroneous because Article V, Section 3-1 is preempted by the TCA.

The second reason the County cannot avoid application of the TCA hinges on our interpretation of the term "obligation" under Article V, Section 3-1. *See* Article V, Section 3-1 ("Acceptance of a financial guarantee by [the] County shall not be construed as an obligation to any other agency, utility or property owner within affected developments."). We find that disclaiming an "obligation" to property owners when the County accepts a financial guaranty means the County is not

required to pay to the 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 preferences of the property owners in doing so.

B. The Public Duty Rule and Special Duty Exception

Repko also argues that, under Article V, Section 3-1, the County owed a special duty to him, as a lot purchaser, with respect to the County's management of the financial guaranty that allowed the Developer to sell lots to him. We agree.

"In a negligence cause of action, it is the plaintiff's burden to establish that a duty of care is owed to him by the defendant." *Trask v. Beaufort Cty.*, 392 S.C. 560, 566, 709 S.E.2d 536, 539 (Ct. App. 2011). "Although a statute may impose a duty to act upon a public official, the official may also be immune from a private right of action under the public duty rule." *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006). "This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually." *Id.* (quoting *Steinke*, 336 S.C. at 388, 520 S.E.2d at 149).

> 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. It is a negative defense which denies the existence of a duty of care owed to the individual. The public duty rule should not be confused with the affirmative defense of immunity. Therefore, the dispositive issue is not whether [the statute] creates a duty, but rather whether the statute was intended to provide an individual a private right of action thereunder.

Id. at 442, 635 S.E.2d at 634 (citations omitted). "Since the public duty rule is not grounded in immunity but rather in duty, . . . it has not been affected by enactment of the TCA." *Arthurs ex rel. Estate of Munn v. Aiken Cty.*, 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001) (citations omitted). "Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue." *Id.*

Our supreme court has carved out a narrow exception to the public duty rule and found a statute imposes a "special duty" on a governmental entity if the following six-part test is met:

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

Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 291-92, 688 S.E.2d 125, 129 (2010) (quoting *Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 200, 403 S.E.2d 615, 617 (1991)).

The trial court found Repko failed to satisfy elements two and three of the "special duty test."[4] Concerning element two, the trial court found the Regulations did not impose on any specific public officer of Georgetown County a duty to guard against or not cause a specified harm. Because the Regulations state that both the Planning Department and the Department of Public Works have the duty to oversee any reduction of the financial guarantee, the trial court erred in finding the second element unsatisfied. The Regulations state, "A request to reduce the financial guarantee shall be submitted to the Planning Department . . . . The Planning Department will forward the revised cost estimate to [the] County Department of Public Works for approval." Our appellate courts have found the "specific public officer" element satisfied by statutory language identifying a specific agency or specific employees of that agency. *See Steinke*, 336 S.C. at 390, 520 S.E.2d at 151 (finding the "specific public officer" element met when "[the] Department's director *and his designees*" were "charged with the affirmative duty of administering and enforcing" a statute (emphasis added)); *Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 203, 403 S.E.2d 615, 619 (1991) (finding the element satisfied when a statute imposed a duty to act on "the local child protection agency and its social workers"). The language of the second element

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[4] The trial court did not address elements one, four, five, and six of the special duty test, and the County does not argue these four elements are not met. Therefore, these elements are essentially conceded. Regardless, based on our review of the record and relevant law, we find these four elements were satisfied.

stating that a statute may impose a duty on a specific public officer "directly or indirectly" further supports our finding that the second element is satisfied here.

In addition, the trial court found element three was not satisfied because Article V, Section 3-1 "specifically disclaim[s] any obligation on the part of the County as a result of the acceptance of a financial guarantee." As stated previously, Article V, Section 3-1 is preempted by the TCA. Therefore, the trial court's construction of Article V, Section 3-1 as disclaiming all liability resulting from the County's acceptance of a financial guarantee is unenforceable. Consequently, we find the trial court erred in relying on Article V, Section 3-1 in finding the class of persons the Regulations intended to protect was not identifiable before the fact.

We also find the third element was satisfied because the class of persons the statute intended to protect was identifiable before the fact. When considering the Regulations as a whole, the purpose was to protect the property owners in Phase 2-D-1. 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. Furthermore, the property owners were identifiable as a class before the County agreed to reduce the financial guarantee. Therefore, we find the class of persons the statute intended to protect was identifiable before the fact.

Based on the foregoing, we find Repko satisfied the six-element special duty test.

C. *Brady Development Co. v. Town of Hilton Head Island*

Repko next argues the trial court erred in relying on *Brady Development Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), to find the County did not owe him a special duty. We agree.

In *Brady*, the developers of a 244-lot subdivision applied for approval of their final development plan in accordance with the Hilton Head Development Standards Ordinance. *Id.* at 74, 439 S.E.2d at 267. The preamble of the Development Standards Ordinance stated, "The town council finds that the health, safety and welfare of the public is in actual danger . . . if development is allowed to continue without limitation." *Id.* at 77, 439 S.E.2d at 268 (alteration in original). To obtain a permit to sell lots before the completion of required infrastructure, the Development Standards Ordinance required the developer to post a letter of credit to guarantee the completion of the development. *Id.* at 74-75, 439 S.E.2d at 267. The Town allowed the developer to "draw down" on the letter of credit as the improvements were completed. *Id.* at 75, 439 S.E.2d at 267. The Department of

Health and Environmental Control and the Town Engineer eventually approved the completed water and sewer infrastructure; however, the Public Service District refused to approve the systems for operation because the developer went bankrupt without paying the construction fee. *Id.* A contractor for Brady, a property owner in the development, was later required to stop construction on Brady's house because water and sewer infrastructure had not been approved. *Id.* The house was vandalized and eventually burned. *Id.*

Brady sued the Town, claiming it had negligently administered its Development Standards Ordinance. *Id.* The Town moved for a directed verdict, arguing the Development Standards Ordinance did not create a special duty owed to Brady as an individual lot owner. *Id.* The trial court denied the Town's motion, finding the Town owed a special duty to Brady under the ordinance. *Id.* The jury returned a verdict for Brady, and the Town appealed. *Id.* at 76, 439 S.E.2d at 267. In reversing the trial court, our supreme court relied on the public duty rule in holding the trial court erred in ruling the ordinance created a special duty. *Id.* at 76-78, 439 S.E.2d at 268. Specifically, the supreme court stated,

> We hold that the Development Standards Ordinance does not create a special duty to Brady. The essential purpose of the ordinance is to protect the public from the dangers of overdevelopment on the Island of Hilton Head. Brady argues that the essential purpose of the ordinance is to protect those who buy lots, building sites[,] and buildings because the ordinance requires improvements and services agreements to be in existence or a surety guaranteeing these services for a development permit to be granted. To recognize such a duty would make the Town substantially an insurer of all developments it undertook to inspect and control through its Development Standards Ordinance and would likely discourage all efforts at such control.

Id. at 77, 439 S.E.2d at 268.

Here, the court found no duty existed under *Brady* because "[t]o recognize such a duty would make the [County] substantially an insurer of all developments it undertook to inspect and control through its Development [Regulations] and would likely discourage all efforts at such control." This finding was error because this case is distinguishable from *Brady*.

Unlike the Regulations, the *Brady* ordinance was enacted to protect the public at large rather than to protect a specific group of people. Specifically, the purpose of the Regulations is not to "protect the public from the dangers of overdevelopment," as was the purpose of the *Brady* ordinance. *See id.* at 77, 439 S.E.2d at 268 (noting the preamble of the Development Standards Ordinance stated "[t]he town council finds that the health, safety and welfare of the public is in actual danger . . . if development is allowed to continue without limitation" (alteration in original)). The Regulations contain no express language declaring their purpose; however, reviewing the Regulations as a whole, the purpose of the Regulations is to protect property owners in the subdivision in the event the developer does not complete the required infrastructure.

At oral argument, the County's attorney asserted the Regulations did not need a preamble like the one in *Brady* because Article V, Section 3-1 stated the County's acceptance of a financial guarantee "shall not be construed as an obligation to any . . . property owner within affected developments." However, our interpretation of the term "obligation" in Article V, Section 3-1, as discussed above, does not obviate the need for language like that found in the ordinance preamble in *Brady*. Accordingly, we find the trial court erred in relying on *Brady* to find the County did not owe a special duty to Repko.

II. Tort Claims Act

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.

Under subsection 15-78-60(12),

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

(emphases added). "Generally, this exception is applied where a governmental agency actually engages in licensing functions." *Plyler v. Burns*, 373 S.C. 637, 652, 647 S.E.2d 188, 196 (2007). The supreme court has held that "when an

exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. Otherwise, portions of the Act would be a nullity, which the Legislature could not have intended." *Steinke*, 336 S.C. at 398, 520 S.E.2d at 155.

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. When subsection 15-78-60(12) applies, the gross negligence standard can be extended to apply to any other applicable immunity subsection. *Plyler*, 373 S.C. at 651, 647 S.E.2d at 196 ("When a governmental entity asserts an exception to the waiver of immunity and any other applicable exception contains a gross negligence standard, the Court must read the gross negligence standard into all of the exceptions under which the entity seeks immunity.").

Repko also argues the trial court erred in finding subsections 15-78-60(4), (5), and (13) of the TCA provided the County with immunity to his negligence claim.[5] Because the trial court erred in failing to read the gross negligence standard into the exceptions in subsections (4), (5), and (13), an error of law controlled the directed verdict in the County's favor. *See Jones*, 379 S.C. at 288-89, 665 S.E.2d at 644 ("The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law."). On remand, the trial court should reexamine the applicability of subsections (4), (5), and (13) under a gross negligence standard.

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[5] Subsection 15-78-60(4) provides a governmental entity is not liable for a loss resulting from the "adoption, enforcement, or compliance with any law or any failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." Subsection 15-78-60(5) states 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." Subsection 15-78-60(13) provides a governmental entity is not liable for a loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety."

III. Recusal

Repko argues the trial judge, Judge Culbertson, erred in not recusing himself because he had previously been hired by Harmony Holdings to handle real estate transactions. Because this issue was raised for the first time at the hearing on the motion to reconsider, it is unpreserved. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").[6]

CONCLUSION

For the foregoing reasons, the trial court's decision is

REVERSED AND REMANDED.[7]

FEW, C.J., concurs. KONDUROS, J., concurs in result only.

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[6] We note that Judge Culbertson stated at the motion to reconsider hearing that he handled several closings for people who purchased lots at the Harmony development but that was the extent of his involvement with the Harmony development. The record contains no evidence that he was involved in any transaction in this case.

[7] As an additional sustaining ground, the County asserts the trial court erred in denying its directed verdict motion on the grounds that the statute of limitations barred this action. 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. Therefore, the trial court did not err in denying the County's directed verdict motion on this ground. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.").

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
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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ATTORNEYS FOR RESPONDENT

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Respondent respectfully submits this Petition for Rehearing pursuant to Rule 221(a), SCACR. For the reasons set forth below, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the trial court. **Note:** Citations to this Court's opinion are to the page numbers in Shearouse Advance Sheet Number 1 for 2016.

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 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.

(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 not required to pay to property owners the money made available through 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

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[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.

[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, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner

(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 renewal of the permit 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.

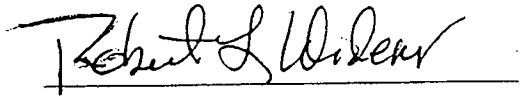
Under these circumstances, Repko knew or should have known of his "loss" no later than November 3, 2008. See S.C. Code Ann. § 15-78-110 (plaintiff must commence action "within two years after the date the loss was or should have been discovered"). Also under these circumstances, any reasonable person 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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

David M. Repko.....Appellant,

v.

County of Georgetown .....Respondent.

APPELLANT'S RETURN TO RESPONDENT'S PETITION FOR REHEARING

This Return is filed by Appellant, pursuant to Rule 221 and Rule 240(e) of the South Carolina Appellate Court Rules (SCACR). In compliance with this Court's correspondence to Appellant, dated February 19, 2016, received on February 23, 2016, Appellant timely files this requested Return within the 10 day period allotted by the Court's correspondence. Rule 221 governs petitions for rehearing. Rule 240(e) governs returns to motions and petition generally.

Rehearing is not needed. This Court's decision filed on January 6, 2016 reaches the correct result. The following is a brief response to Respondent's Petition for Rehearing as requested by this Court.

This Court did not err in reversing the trial court. Appellant submits that the many points argued by the Respondent in its Petition for Rehearing were not misapprehended

and were not overlooked by the Court through its opinion, through briefing, and through oral arguments of the parties to this appeal. Because this Court's opinion correctly decides the matter without misapprehending or overlooking any points argued, the Appellant respectfully requests that this Court: (1) deny Respondent's request for a rehearing; (2) deny the Respondent's request that this Court issue a new, substitute opinion affirming the trial court as to the "duty" issue, the "immunity" issue, and the "statute of limitations" issue that Respondent re-argues through its petition; and (3) deny Respondent's Petition for Rehearing so that this case can proceed towards a final resolution in accordance with the Court's January 6, 2016 opinion.

Respectfully submitted,

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February 29, 2016
Murrells Inlet, South Carolina

The South Carolina Court of Appeals

David M. Repko, Appellant,

v.

County of Georgetown, Respondent.

Appellate Case No. 2014-000156

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

May 20, 2016

cc:
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