

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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SC SUPREME COURT

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

David M. Repko.....Appellant,

v.

County of Georgetown Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in construing Article V, Section 3-1 of the Georgetown County Improvement Standards Ordinance to preclude a *tort-like* “duty” even though the plain language of the Ordinance disclaims only a *financial-like* “obligation?”

2. Did the Circuit Court err in relying on the Ordinance’s Sovereign Immunity provision even though that provision is unenforceable because it is preempted by and inconsistent with the South Carolina Tort Claims Act?

3. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that Article V, Section 3-1 of the Ordinance did not create a “special duty” owed to Repko even though Repko presented evidence of all six elements of the “existence of a special duty” test?

4. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(4) provided the County with immunity to Repko’s negligence claim?

5. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(5) provided the County with immunity to Repko’s negligence claim?

6. Did the Circuit Court err in granting a directed verdict for Georgetown County on the ground that S.C. Code Section 15-78-60(13) provided the County with immunity to Repko’s negligence claim?

7. Did the Circuit Court Judge err by not recusing himself pursuant to Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, based upon prior business relationships concerning the transactions involved?

8. Did the Circuit Court Judge's failure to recuse himself deprive Repko of the right to due process guaranteed by the Constitutions of South Carolina and the United States?

STATEMENT OF THE CASE

On April 20, 2013, David M. Repko filed a civil action for damages against Georgetown County. He filed this suit in the Court of Common Pleas for Georgetown County. (R. pp. 17-24). Repko alleged that he was the owner of two undeveloped lots in Phase D-1 of the West Stewart Subdivision of Harmony Township, a planned development located in Georgetown County. He further alleged that the County's negligence and gross negligence in handling a financial guarantee posted by the subdivision's developer resulted in the loss of most of the funds that were to be used in building the subdivision's infrastructure. Repko also alleged that: (1) the developer failed to complete the infrastructure; (2) that there were insufficient funds to complete the infrastructure (due to the County's gross negligence); and (3) that the lack of infrastructure reduced his property value to "zero." Repko sought to recover "past and future actual damages." (R. p. 23, ¶ 16).

The County filed an Answer on May 18, 2012, denying liability and raising affirmative defenses that alleged, in relevant part, that Repko's claims were barred by six immunity provisions of the South Carolina Tort Claims Act ("SCTCA" hereinafter), specifically Sections 15-78-60(1), (2), (4), (5), (12), and (13) of the South Carolina Code. (R. p. 28, ¶ 19).

Two independent actions were merged into the Appellant's case in preparation for trial. Prior to trial, those above-captioned Plaintiffs settled and their cases were dismissed. As a result, Repko was the sole Plaintiff in the case which proceeded to trial before the Honorable Benjamin H. Culbertson on September 16, 2013. The County moved for a directed verdict at the close of the Plaintiff's evidence. Judge Culbertson

granted this motion from the bench and, by Order dated September 13, 2013, entered judgment in favor of the County and against Repko. (R. p. 249, lines 9-10).

Subsequently, Repko filed a Motion for Reconsideration and New Trial on October 9, 2013. Judge Culbertson heard this motion on December 19, 2013 and denied it without comment by Form 4 Order that same day. On January 15, 2014, Repko filed and served a Notice of Appeal.

STATEMENT OF THE FACTS

Georgetown County Improvement Standards Ordinances

Georgetown County regulates improvements to major subdivisions through the provisions of Article V of the Georgetown County Ordinances. (R. pp. 281-286). Those ordinances provide that “[f]inal 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.” (R. p. 281)(Ordinance, Art. V, § 1-5)(emphasis added). “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. Alternatively, the ordinances instruct that “financial guarantees:”

[M]ay 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 Georgetown 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 Georgetown County shall not be construed as an *obligation* to any other agency, utility or property owner within affected developments.

(R. p. 284)(Ordinance, Art. V, § 3-1)(emphasis added); *see* Statement of Issues on Appeal, No. 1.

If a developer seeks to post a financial guarantee, the following procedure must be followed as delineated in Section 3-2. First, the financial guarantee must be submitted to the Georgetown County Planning Department (“Planning Department” hereinafter) along with an “itemized cost estimate” for the improvements that 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. “Upon receipt of an itemized cost estimate, the Planning Department shall forward such estimate to the appropriate departments or agencies for review.” (R. p. 284)(Ordinance, Art. V, § 3-2).

The County may accept, *inter alia*, a letter of credit as a financial guarantee. An approved letter of credit must adhere to these six specific standards: (1) be equal to 125% of the approved cost estimate; (2) be issued for an initial coverage period not less than 12 months from the date the final plat is submitted for recording; (3) be irrevocable, unconditional and subject to presentation for drawing within the State of South Carolina; (4) be payable to Georgetown County; (5) be for no less than \$10,000 in construction; and (6) substantially conform to the format shown in Appendix B, Certificate 1. (R. pp. 284-85)(Ordinance, Art. V, § 3-3). An approved guarantee, however, “shall be independent of the development project’s construction loan” because “[p]ayment of monthly expenditures is the sole responsibility of the developer and does not affect the amount of money held by the Planning Department.” (R. p. 284)(Ordinance, Art. V, § 3-3).

If the County accepts a financial guarantee from the developer, the County normally holds the guarantee until all covered improvements are completed unless a reduction in the guarantee has been approved pursuant to the following procedure:

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 Georgetown County Department of Public Works for approval. Reductions of financial guarantees will not be allowed within 6-months of any previous reduction request and shall be no less than 125% of the revised construction cost estimate.

(R. p. 285)(Ordinance, Art. V, § 3-5).

At trial, the Planning Department's Chief Planner testified that the County required, in addition to the requirement of Section 3-5, "a letter from the engineer certifying that the work had been complete and certifying the number, the dollar amounts that were left to be done." (R. p. 101, lines 16-19; p. 116, lines 1-3). Likewise, the Planning Department's director testified that the County should receive an estimate from an engineer with a cost to complete before approval of a reduction in the guarantee. (R. p. 147, line 11; p. 162, lines 4-12 and 18-20).

Harmony Holdings, LLC Posts Letters of Credit in Lieu of Completing Required Improvements in Harmony Township.

In the early 2000's, Harmony Holdings, LLC ("Harmony Holdings" hereinafter) began developing the Harmony Township community within Georgetown County. Although roads, utilities, and other required improvements were not constructed in the community, Harmony Holdings sought permission from the Planning Department to begin selling the undeveloped lots to buyers. The County allowed Harmony Holdings to post letters of credit as a financial guarantee in lieu of completing the required

improvements. (R. p. 104, lines 10-13). Harmony Holdings posted a letter of credit for each phase of Harmony Township, including a letter of credit for Phase 2-D-1 of the West Stewart Subdivision. (R. p. 104, lines 17-19 and 20-23).

Harmony Holdings applied to Wachovia Bank, National Association to obtain a letter of credit for Phase 2-D-1. Upon granting the application, Wachovia issued a letter of credit on May 23, 2006 entitled Clean, Irrevocable Standby Letter of Credit Number SM220037W in the amount of \$1,301,705.63 ("Wachovia letter of credit" hereinafter). (R. p. 294). The letter of credit designated Georgetown County as beneficiary and Harmony Holdings, LLC as applicant.

Shortly thereafter, Harmony Holdings submitted the 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. Accordingly, the \$1,301,705.63 Wachovia letter of credit was 125% of the engineer's estimated amount. (R. p. 108, lines 18-24).

Upon acceptance of the submissions, the Planning Department permitted Harmony Holdings to sell undeveloped lots in Phase 2-D-1. The Plat for Phase 2-D-1 was recorded on May 24, 2006. An employee of the Planning Department certified on the Plat that the County held a letter of credit in the amount of \$1,301,705.63 to "ensure the completion of the remaining public improvements." (R. p. 113, lines 8-10); *see* (R. pp. 292-93).

The County Approves the Developer's Successive Requests for Reductions in the Letter of Credit.

First Request and Approval for Reduction

On July 20, 2006, Harmony Holdings submitted a request for reduction in the letter of credit to the County. (R. pp. 295-97). The request referenced "Pay Request # 3"

and included an Application and Certificate for Payment for Phase 2-D, which was signed by an Earthworks Group employee. The application described Earthworks as the architect for the project. (*Id.*).

In a letter to Wachovia dated July 26, 2006, the County advised that it approved a request to reduce the letter of credit by \$331,311.00. (R. p. 298); *see* (R. p. 114, lines 16-20). The reduction request was approved despite noncompliance with the Ordinances and the Planning Department's protocol. First, the County approved the request without the required letter of an engineer certifying that "the work had been complete[d]" and [the] dollar amounts that were left to be done." (R. 116, lines 1-3). 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 Section 3-3. Fourth, an engineer's cost of completion estimate made by Earthworks on December 6, 2006, showed that the County approved the request without retaining 125% of the funds needed to complete the infrastructure; the estimate showed that virtually no work was done at that time on the infrastructure of Phase 2-D-1. *See* (R. pp. 306-312). Pursuant to the County's letter, Wachovia released \$331,000 thereby reducing the letter of credit to \$970,394.63. (R. p. 114, line 24 – p. 115, line 3).

Second Request and Approval for Reduction

On September 25, 2006, the developer submitted its second request for reduction in the letter of credit. This request sought a reduction of \$117,024.42, and like the first request for a reduction, it included an Application and Certificate for Payment that was

signed by an Earthworks employee. (R. pp. 300-01); *see* (R. p. 118, line 25 – p. 119, line 8).

In fall 2006, Repko contracted with Harmony Holdings to purchase Lots 1077 and 1076, in Phase 2-D-1. Repko, who planned to build his retirement home on these lots, paid \$78,000.00 for Lot 1077 and \$77,000.00 for Lot 1076. (R. p. 186, lines 7-22). Harmony Holdings executed the deeds on October 3, 2006, thereby transferring both lots to Repko. (R. pp. 318-328). Repko knew that the developer had not yet installed infrastructure on the lots, but Repko was not concerned because he knew that the developer posted financial guarantees with the County. Repko testified that he would not have purchased the lots had the developer not posted financial guarantees with the County. (R. p. 192, lines 7-12).

On October 9, 2006, just six days after Repko closed on the lots, the County approved the second request for reduction and, by letter, advised Wachovia to reduce the letter of credit by \$117,024.42. (R. p. 299); (R. p. 117, lines 15-23). Accordingly, the County approved the 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, as shown in the engineer's cost of completion estimate, made by Earthworks on December 6, 2006; (4) even though the Application and Certificate for Payment indicated that the developer was seeking to use the letter of credit funds to pay his contractor; and (5) even though the reduction was requested within six months of the previous request, contrary to Section 3-5. Pursuant to the County's letter, Wachovia

released \$117,024.42 thereby reducing the letter of credit to \$853,370.21. (R. p. 117, line 7 – p. 118, line 1).

Third Request and Approval for Reduction

In a letter to the County dated November 7, 2006, Earthworks advised that it approved pay application number three for Phase 2-D, reflecting work completed as of October 25, 2006 and totaling \$300,000.00. (R. pp. 302-04); (R. p. 123, lines 5-6). The letter included an Application and Certificate for Payment apparently signed by the architect. (R. pp. 302-04).

On November 8, 2006, the County approved the third request for reduction and, by letter, advised Wachovia to reduce the letter of credit by \$300,000.00. (R. p. 305). At trial, the County's Chief Planner testified that the third reduction request was approved based upon Earthworks' "letter and approval of the \$300,000." (R. p. 124, lines 9-13). Accordingly, 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, as required in Section 3-5; (3) without retaining 125% of the funds needed to complete the infrastructure; (4) even though the Application and Certificate for Payment indicated that the developer was using letter of credit funds to pay its contractor, contrary to Section 3-3; and (5) even though the request was made within six months of the earlier two requests, in violation of Section 3-5. (R. p. 123, lines 11-13; p. 124, lines 16-18). Also, at the time of approval, virtually no work was done on the infrastructure of Phase 2-D-1. (R. p. 306). Pursuant to the County's letter, Wachovia released \$300,000.00 thereby further reducing the letter of credit to \$553,370.21. (R. p. 124, lines 23-25).

By letter dated December 6, 2006, Earthworks advised the County's Public Works Department that it "reviewed and accepted the following changes in price to Harmony 2D1 and 2D2." (R. p. 306). An "Opinion of Probable Cost" for Phase 2-D-1, attached thereto, provided an estimated cost of \$1,153,205.45 to complete: (1) the sewer and water systems; and (2) the roads, site, and drainage remaining improvements. (*Id.*); (R. p. 126, lines 13-15; p. 127, line 1). The cost of completing the infrastructure for Phase 2-D-1 was \$1,153,205.45. (R. p. 127, lines 10-12). Because the engineer's original estimate was \$1,040,000.00, this 2006 estimate shows that virtually no work was done on the infrastructure because the remaining estimated costs were actually *higher* than the original estimate.

Fourth Request and Approval for Reduction

On March 9, 2007, Harmony Holdings emailed the County a "revised pay request from February 7, 2007" covering pay application # 4 for Phase 2-D-1 and also requested reduction in the Wachovia letter of credit by an amount of \$396,666.18. (R. p. 313); (R. p. 129, lines 13-24; p. 130, lines 24-25). Then, by letter dated April 3, 2007, Earthworks advised the County that pay application 4 reflected work completed by February 28, 2006 and also included an Application and Certificate for Payment containing the contractor's request for payment of \$396,666.18. (R. pp. 314-15). The pay application had an illegible signature, however, the words "for Steve Strickland" were handwritten by the signature. Also, "Engineer" was handwritten in the signature block and the printed word "ARCHITECT" was marked through with two lines. (R. p. 315).

On April 5, 2007, the County approved the fourth request for reduction and, by letter, advised Wachovia to reduce the letter of credit by \$396,666.18. (R. p. 316); (R. p.

132, lines 16-24). The County approved this request: (1) without having sought approval from the Department of Public Works, as required in Section 3-5; (2) without retaining 125% of the funds needed to complete the infrastructure, contrary to Section 3-5; (3) even though the Application and Certificate for Payment indicated that the developer was using letter of credit funds to pay its contractor, contrary to Section 3-3; and (4) even though the request was made within six months of the earlier two requests, contrary to Section 3-5. (R. p. 123, lines 11-13; p. 124, lines 16-18). Pursuant to the County's letter, Wachovia released \$396,666.18 thereby further reducing the letter of credit to a mere \$156,704.03. (R. p. 317); (R. p. 133, line 2).

In an April 7, 2007 letter, Georgetown Water and Sewer District advised the County that an inspection of the water and sewer lines in Phase 2-D-1 was completed. (R. p. 365); (R. p. 141, lines 3-8). The letter advised that water and sewer lines were completed as indicated in the Earthworks letter, however, it failed to provide a cost to complete the infrastructure. (R. p. 144, lines 11-16; p. 141, lines 14-22).

At some point before the Wachovia letter of credit expired on May 23, 2007, the developer provided the County with a \$140,000.00 check. The County placed these funds in a segregated account to be used at Harmony but cashed in a letter of credit covering Phase 2-D-2. (R. p. 135, lines 11-13; p. 167, lines 14-23; p. 168, lines 1-2).

Aside from the water and sewer work described in the foregoing letters, virtually no other work on the infrastructure for Phase 2-D-1 was completed by this time. Furthermore, from May of 2007 until August of 2007, the developer failed to complete *any* meaningful progress on the infrastructure. In August of 2007, the developer met with County's planning staff and advised that "he no longer had the financial means to put any

infrastructure within any phase of Harmony” and that, because the letters of credit were about to expire, “to call all the letters of credit that were still in good standing.” (R. p. 61, lines 1-4 and 11-13).

Harmony Holdings subsequently declared bankruptcy. At that time, the developer failed to complete basic infrastructure, such as utilities or roads, within Phase 2-D-1. Although the letter of credit was originally a sufficient amount of \$1,301,705.63, the repetitive reductions approved by the County whittled the funds to \$140,000.00, an amount that is wholly insufficient to enable completion of the Phase’s infrastructure.

Thereafter, a new owner took over the project, hired his own contractor, and requested that the County release funds for payment to the contractor after work was completed. (R. p. 64, lines 14-20). 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. (R. p. 64, line 23 – p. 65, line 1 and lines 3-11). As a result, the new developer walked off the job. (R. p. 74, lines 16-22).

At trial, Repko testified that there is no prospect of anybody completing the infrastructure in Phase 2-D-1. (R. p. 200, line 25 – p. 201, line 1). Essentially, his lots are “woods” accessible by a path cleared out seven years ago, but inaccessible by road. (R. p. 201, line 15 and lines 17-21). Because of the missing infrastructure, he believes the value of his property is “zero.” (R. p. 201, lines 2-11). In fact, within the last 18 months, only one lot in the whole development sold. The sales price was \$500.00. (R. p. 201, lines 6-8).

Despite his having paid property taxes, the County has denied Repko the right to build on his property because of the absence of basic utilities. *See* (R. pp. 331-364). On

March 30, 2012, Repko received an email from a friend alerting him to the County's mishandling of the financial guarantees. (R. p. 194, lines 22-25). Shortly after being notified of the County's mishandling of the financial guarantees, Repko filed this lawsuit.

ARGUMENT

On appeal from an order granting a directed verdict motion, this Court must reverse the judgment when there is no evidence to support the ruling or when the ruling is governed by an error of law. *See Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005). In making this determination, this Court applies the same standard of review as the trial court and is required to "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). This Court may not weigh the evidence, but must determine if there is *any* evidence from which the jury is warranted in making a finding. *See Washington v. Whitaker*, 317 S.C. 108, 113-14, 451 S.E.2d 894, 897-98 (1994). The Court may grant the directed verdict only when the evidence yields but one inference. *See The Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2006). Accordingly, the Court must deny the motion when either the evidence yields more than one inference or the inferences are in doubt. *See Law v. South Carolina Dep't. of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

A directed verdict is also warranted when the case presents only questions of law. In this situation, a directed verdict motion should be granted only if the evidence would not be legally sufficient to sustain a verdict for the opposite party. *See McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).

When these standards are applied properly, they yield the conclusion that the Circuit Court erred in granting the County's directed verdict motion and in denying the Plaintiff's motion for reconsideration and for a new trial.

I. THE CIRCUIT COURT ERRED IN RULING THAT GEORGETOWN COUNTY DID NOT OWE A DUTY OF CARE TO REPKO.

A. The Circuit Court Misconstrued the Plain Language of Article V, Section 3-1.

In granting the County's directed verdict motion, the Court relied on a provision of Article V, Section 3-1, which states: "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. p. 4). The Court interpreted this provision as a Sovereign Immunity provision, as the Court effectively construed it to provide the County with sovereign immunity for accepting a financial guarantee. The Court read it to "expressly disclaim[] any 'private duty' to Plaintiff who is a 'property owner within the affected development' (i.e. Harmony Township)." (*Id.*).

In so ruling, the Court misinterpreted the plain language of the Sovereign Immunity provision because that provision does not *expressly* disclaim any private duty; the words "private" and "duty" do not even appear in the provision. Instead, the provision uses the word "obligation" without an indication as to whether "obligation" is intended to include the tort concept of duty or merely to prevent a property owner from arguing that he is an intended third party beneficiary of the financial guarantee. The more reasonable (and better) construction is that "obligation" refers only to a contractual obligation because, as discussed herein, the ordinance would be overridden and preempted by the SCTCA if "obligation" is construed to include a tort duty.

Moreover, the provision states only that *acceptance* of a financial guarantee shall not be construed as an obligation to a property owner. The provision says nothing about whether an obligation or duty will arise based on the County's *handling* of the funds secured by a financial guarantee *after* this acceptance. The provision is silent as to whether a duty may arise in tort when the County is grossly negligent in permitting a reduction in the guarantee or cashes the guarantee and then is grossly negligent in handling the funds.

This is supported by the trial testimony. The notion that the ordinance should be construed to disclaim any obligation by the County *after* it accepts a financial guarantee is contrary to the trial testimony of the County's own witnesses. The County Attorney testified that he advised another lot owner that the County owed that lot owner a fiduciary duty in managing the letter of credit funds:

Q. And then the language in this e-mail which really I want to focus on . . . says "We felt we had a good monitoring system in place and also had a fiduciary duty to the citizens who purchased property in Harmony to effectively manage this LOC money" being the letter of credit money, and not let Harmony throw it into the wind." Is that right?

A. Correct.

(R. p. 69, line 24 – p. 70, line 7). Although not controlling, the Court must accord "great deference" to the decisions of those charged with interpreting and applying ordinances. *See Mikell v. County of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). The record is strikingly void of the legislative intent underlying the Sovereign Immunity provision, and the Court appears to have afforded no deference—none—to the County Attorney's testimony. The judgment entered in favor of the County on the directed

verdict motion should be reversed. The ordinance does not support the Circuit Court's decision.

B. The Circuit Court Committed Reversible Error in Relying on the Sovereign Immunity Provision of the Ordinance Because this Provision is Unenforceable.

Even assuming, *arguendo*, that the Court properly construed the Sovereign Immunity provision of the ordinance as disclaiming any "duty" to Plaintiff, the judgment must still be reversed. By relying on the Sovereign Immunity provision to conclude that the County owed no duty to the Plaintiff, the Court committed reversible error because the provision is unenforceable. As Plaintiff argued in opposing the directed verdict motion, the SCTCA governs the County's tort liability and the County cannot overcome application of SCTCA by enacting an ordinance that waives liability for their negligent conduct. (R. p. 239, lines 21-24; p. 240, lines 6-8); *see also* (R. p. 263, lines 24-25)("[e]ssentially what the County has sought to do is circumvent the Tort Claims Act by including that language").

South Carolina case law supports Plaintiff's position. Determining whether a local ordinance is enforceable involves a two-step inquiry: "(1) Did the municipality have the power to enact the ordinance? and (2) Is the ordinance inconsistent with the Constitution or general law of the State?" *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 35, 530 S.E.2d 369, 372 (2000). For the following reasons, the Sovereign Immunity provision of the County's ordinance fails both of these steps.

1. The County Did Not Have the Power to Enact the Sovereign Immunity Provision in its Ordinances.

"[A] county lacks [the] power to enact an ordinance if the state has preempted the subject matter of the ordinance. If the state has preempted a particular area of legislation,

then the ordinance is invalid, and [i]f no such power existed, the ordinance is invalid and the inquiry ends.” *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 460, 716 S.E.2d 280, 284 (2011) (internal citations omitted).

There are three kinds of preemption: (1) express preemption; (2) implied field preemption; and (3) implied conflict preemption. “Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area.” *Id.* at 462, 716 S.E.2d at 286. Implied field preemption occurs “when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity.” *Id.* at 465, 716 S.E.2d at 287. Finally, implied conflict preemption occurs “when the ordinance hinders the accomplishment of the [state] statute’s purpose or when the ordinance conflicts with the [state] statute such that compliance with both is impossible.” *Id.* at 467, 716 S.E.2d at 288.

To the extent that the provision is construed as granting the County immunity for negligently mishandling a financial guarantee, the SCTCA preempts the ordinance under all three approaches. The SCTCA waives sovereign immunity subject only to the limitations and exemptions contained in the Act. Specifically, the Act provides that “a political subdivision . . . [is] 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(a). Further, the Act defines “political subdivision” as, *inter alia*, “the counties.” S.C. Code Ann. § 15-78-39(h). Thus, under the SCTCA,

Georgetown County is liable for its torts in the same manner and to the same extent as a private individual, subject to the limitations and exemptions contained in the Act.

- i. The Ordinance's Sovereign Immunity Provision is Unenforceable as it is Expressly Preempted by the SCTCA.

Counties are expressly preempted from altering their liability by ordinance because the General Assembly clearly stated its intent that counties be held liable "*only to the extent provided*" within the SCTCA:

(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein.

S.C. Code Ann. § 15-78-40(b). The legislature reaffirmed this principle with enactment of the SCTCA's exclusive remedy provision, which states that the Act is the *exclusive remedy* for a tort of a government employee "notwithstanding any other provision of law." S.C. Code Ann. § 15-78-200.

If a county injures a person through negligently mishandling funds entrusted to it by the county's own ordinance, the injured person's sole and exclusive remedy in tort is within the SCTCA. In granting the directed verdict motion, the Court construed the Ordinance to operate as an *additional* layer of protection. Under this erroneous construction, even when the County is liable under the SCTCA, the Ordinance's Sovereign Immunity provision effectively precluded the County's liability by disclaiming *any* creation of a duty to a person from the acceptance of a financial guarantee. The plain language of the SCTCA, however, expressly prohibits the Court's construction of the Sovereign Immunity provision in such a manner.

ii. The Ordinance's Sovereign Immunity Provision is Unenforceable as it is Impliedly Preempted by the SCTCA.

The SCTCA preempts the Ordinance's Sovereign Immunity provision by both implied field and implied conflict preemption thereby rendering the provision unenforceable. By covering the field of government liability so thoroughly and pervasively, the SCTCA impliedly preempts other laws to the extent they intrude into the field of government tort liability. The SCTCA provides that "a political subdivision, [is] liable for . . . [its] 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(a). But the Circuit Court construed the ordinance to say just the opposite. Under the Circuit Court's construction, the County is not liable if the tort arises from the County's negligent mishandling of financial guarantee funds, even if a private individual would be liable under such circumstances. The County lacked the power to enact the Sovereign Immunity provision of the ordinance to the extent it is construed as excluding any liability of the County for negligently mishandling the financial guarantee.

2. The Ordinance's Sovereign Immunity Provision is Unenforceable Because it is Inconsistent with the Constitution or General Law of this State.

With respect to the second step of the test governing enforceability of an ordinance, the Court must determine whether the ordinance is inconsistent with the Constitution or general law of this state. The Ordinance's Sovereign Immunity provision is unenforceable insofar as it is inconsistent with the SCTCA. As discussed, the SCTCA holds the County liable for its negligence in handling financial guarantee funds, subject to the limitations and exemptions in the Act. Contrariwise, the Circuit Court effectively

construed the Ordinance's Sovereign Immunity provision to *preclude* the County's tort liability for negligently handling the financial guarantee funds. As a result, either the Circuit Court erroneously interpreted the Ordinance's Sovereign Immunity provision or the provision is unenforceable as being inconsistent with the general law of the state.

C. The County's Improvement Standards Ordinance Created a Special Duty Owed by the County to the Plaintiff.

Independent of the Sovereign Immunity provision, the Court's directed verdict judgment should be reversed because the Ordinance created a special duty owed by the County to the Plaintiff thereby excepting application of the public duty rule. Although the public duty rule provides that public officials normally "are not liable to individuals of the public for negligence in discharging their statutory obligations," South Carolina courts have long recognized an exception to this rule where a special duty exists. *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 697 S.E.2d 575 (2010). A special duty exists if six elements are present:

(1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute 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 that class; (5) the public officers know or should know of the likelihood of harm to the class if he fails in 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.

Id. at 446, 697 S.E.2d at 577.

The Ordinance at issue created a special duty owed by the County to the Plaintiff. In part, the Ordinance provides that the County *will not* (a) approve a plat submitted by a developer, or (b) grant permits to allow for construction on a lot, *until* the developer has completed the infrastructure in the development or posted financial guarantees in lieu of

completing the improvements. Because all six elements of the special duty exception to the public duty rule exist, the County's Ordinance created a special duty owed to the Plaintiff, as a lot purchaser, with respect to the County's management of the financial guaranty which allowed the sale of lots to the Plaintiff.

The essential purpose of this ordinance "was to ensure that if someone like Mr. Repko purchased raw land in a development to be built that the monies would be there to ensure that the infrastructure would be there if the developer failed to go forward." (R. p. 242, lines 15-19). As this testimony indicates, this Ordinance exists precisely to protect lot buyers from developers who sell lots to them, but then fail to complete basic infrastructure necessary to make the lot suitable for building. Even the County's own witnesses testified that this is the Ordinance's essential purpose. The County Attorney admitted that, in a 2008 email to Harmony Holdings, he stated that "the whole point behind the letter of credit . . . is to protect owners who purchase property and are made promises that are not kept." (R. p. 76, line 23 – p. 77, line 1 and lines 9-12). The County Attorney also testified that he advised another lot owner in 2009 that, with respect to the management of letter of credit funds, the County owed the lot owner a fiduciary duty. (R. p. 69, line 24 – p. 70, line 7). Another County witness admitted that the ultimate beneficiaries of the letter of credit were "the people living on the road who purchased the property." (R. p. 152, lines 20-22).

Furthermore, the County seems to have conceded this point. In arguing that the Court should grant a directed verdict, the County's counsel did not dispute that the essential purpose of the ordinance was to protect lot buyers, nor did he present any other purpose underlying the ordinance. Instead, County's counsel based the "no duty" part of

his motion solely on the Sovereign Immunity provision and *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 77-78, 439 S.E.2d 266, 268 (1993). (R. p. 224, line 11 – p. 227, line 19). However, as discussed below, the court in *Brady* found that the essential purpose of the ordinance in question was to prevent overbuilding, not to protect lot owners. Accordingly, the County has conceded that the first element was satisfied.

Second, although the Court found that the “ordinance neither directly or indirectly imposed on a specific public officer of Georgetown County a duty to guard against or not cause a specified harm,” this finding was based solely on the unenforceable Sovereign Immunity provision. (R. pp. 7-8). Further, the Court’s finding ignores the express language of the ordinance as the County’s decision to accept a financial guarantee in lieu of requiring completion of the infrastructure is imposed on the employees of the County’s Planning Department. *See* Section 3-1; *see also* (R. p. 243, line 24 – p. 244, line 8). Under Section 3-5, the decision to grant a reduction in the financial guarantee is imposed in the first instance on the County’s Planning Department and then entrusted to the Department of Public Works for the final decision. The ordinance seeks to prevent the harm that would be caused if the developer sold lots to buyers, accepted their money, and then never finished the required infrastructure. It prevents this harm by requiring the developer to post the financial guarantee and tasking the Planning Department and the Department of Public Works with the duty of overseeing any reduction in these funds. *See* (R. p. 285).

Third, the class of persons the statute intends to protect is identifiable before the fact. The ordinance intends to protect a specific class of persons: those persons who buy a lot in the development *after* the County’s acceptance of financial guarantees from the

development. (R. p. 244, lines 9-13). As soon as a putative buyer closes on the property, he or she becomes a member of the identifiable class of lot purchasers. The Court held that “the class of persons the statute intends to protect was not identifiable before the fact.” (R. p. 8). However, the Court’s holding is clearly erroneous as all lot buyers are identifiable as a class *before* the County agrees to accept a financial guarantee; in fact, that class would not exist unless and until the County agrees to accept the guarantee. Further, the persons of that class are identifiable as individuals as soon as they close on their property. The Court reasoned that the ordinance “specifically disclaim[s] any obligation on the part of the County as a result of its acceptance of a financial guarantee.” (*Id.*). However, as discussed above, this provision of the ordinance is unenforceable if construed in this manner. Accordingly, the Court’s finding regarding the class of persons that the statute intends to protect is clearly erroneous.

Fourth, it is undisputed that the Plaintiff is a member of this class, as Plaintiff purchased two lots in the development.

The fifth element of the special duty test is also satisfied by the evidence. (R. p. 244, line 15 – p. 245, line 8). The County Attorney admitted knowing that, if the County failed to properly apply or enforce this ordinance, lot purchasers would have no remedy if the developer failed to complete the infrastructure and filed for bankruptcy. The public officers know or should know of the likelihood of harm to the lot-purchasing class should the officers fail in their duty. There is no other way to read this testimony.

Finally, the testimony shows that two County employees, Boyd Johnson and Holly Richardson, had *de facto* authority to prevent any drawdowns of the letter of credit until the infrastructure was completed. Johnson testified that every time the developer

sought a reduction, the other Planning Department employees would consult him on the decision to grant the request. (R. p. 161, lines 3-6). Thus, Johnson not only had the authority to prevent letter of credit drawdowns, he had an actual opportunity to do so. (R. p. 244, line 15 – p. 245, line 8). Assuming that the Planning Department employees lacked statutory authority to approve the reductions, the ordinance vested this authority in the Department of Public Works. Nevertheless, the sixth element of the special duty test is satisfied for directed verdict purposes.

In ruling that the County owed no special duty to Plaintiff, the Court erroneously concluded that *Brady* “compels the conclusion that the County owed no private duty to Plaintiff.” (R. p. 5). In *Brady*, however, the Supreme Court held that there was no special duty because the essential purpose of the ordinance at issue in that case was to prevent the “dangers of overdevelopment,” rather than to protect lot purchasers. *Brady*, 312 S.C. at 77-78, 439 S.E.2d at 268.

The present case is different. In the present case, the testimony of both the County Attorney and the Director of the Planning Department show that the essential purpose of the County’s ordinance was to protect lot buyers, not to prevent overbuilding. The record is devoid of any other purpose underlying the ordinance. The reasoning in *Brady* has no application to this case.

Further, the court in *Brady* also based its holding on public policy considerations. The court explained that “[t]o 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 78, 439 S.E.2d at 268-69. The policy concern in *Brady*, however, is not

implicated in the present case. Imposition of a duty owed by the County to Repko, and other lot owners in Harmony Township, would not make the County an insurer of all developments it undertook to inspect and control. Instead, the duty would only apply when the County exercises its discretion to permit a developer's posting of financial guarantees, in lieu of completing required infrastructure, and subsequent management and reduction thereof.

The holding of *Brady* did not "compel" the Circuit Court to grant the directed verdict motion. To the contrary, *Brady* is inapplicable because: (1) the essential purpose of the County's ordinance, unlike the ordinance in *Brady*, is for the protection of lot owners; and (2) the public policy concerns of *Brady* are not implicated. Because *Brady* is inapposite, the satisfaction of all six elements of the special duty test establishes that the ordinance created a special duty owed by the County to the Plaintiff which was not barred by virtue of the public duty rule. Because the evidence compels the recognition of such a duty, the judgment of the Court must be reversed and the case remanded for trial.

II. THE CIRCUIT COURT ERRED IN RULING THAT THE SCTCA PROVIDES GEORGETOWN COUNTY WITH IMMUNITY FROM REPKO'S NEGLIGENCE CLAIM.

The County alternatively moved for a directed verdict on the grounds that Sections 15-78-60(4), (5), (12) and (13) provided the County with immunity as a matter of law. (R. p. 232, line 6 – p. 233, line 16). The Court denied the County's claim that § 15-78-60(12) entitled it to immunity. However, the Court granted the County's claim that § 15-78-60(4), (5), and (13) entitled the County to immunity as a matter of law. (R. p. 11). Viewing the evidence in the light most favorable to the Plaintiff, however, Sections

15-78-60(4), (5), and (13) of the SCTCA do not provide the County with immunity as a matter of law.

A. Section 15-78-60(4) Does Not Provide Immunity to the County as a Matter of Law.

With respect to the SCTCA's exceptions to waiver of immunity, subsection (4) provides that a "governmental entity is not liable for a loss resulting from . . . adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any . . . provision, ordinance . . . or written policies." S.C. Code Ann. § 15-78-60(4). Although this subsection does not contain a gross negligence exception on its face, subsection (12), which was raised by the County in its Answer and motion for a directed verdict, does contain a gross negligence exception. Because subsection (12) was raised by the County, South Carolina law mandates that a similar gross negligence exception be read into subsections (4), (5), and (13).

Subsection (12) provides that a "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." S.C. Code Ann. § 15-78-60(12). South Carolina case law provides that "[w]hen an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 319-20, 743 S.E.2d 109, 115 (Ct. App. 2013) (citing *Steinke v. South Carolina Dep't of Labor, Licensing and Reg.*, 336 S.C. 373, 520 S.E.2d

142 (1999)). The justification for this principle is that “[o]therwise, portions of the [SCTCA] would be a nullity, which the Legislature could not have intended.” *Steinke*, 336 S.C. at 398, 520 S.E.2d at 155. Accordingly, if a governmental entity may be liable for its gross negligence pursuant to subsection (12), it may also be liable for its gross negligence in other applicable subsections even though those subsections do not expressly provide a gross negligence exception.

Because the County raised subsection (12) as a defense, the Court was required to construe the remaining immunity provisions as also containing a gross negligence exception. *See* (R. p. 266, lines 5-13). In finding subsection (4) entitled the County to immunity, the Court stated that the “gravamen of Plaintiff’s Complaint and his trial evidence was that Georgetown County failed to comply with or enforce its own regulation regarding the acceptance and reduction of a financial guarantee.” (R. p. 9). The Court concluded that “Plaintiff’s allegations of failure to enforce the Development Regulation fall squarely within exception § 15-78-60(4) and the County is not liable for any loss resulting from that conduct.” (R. p. 10).

The Court completely overlooked that subsection (4) is subject to a gross negligence exception. Under South Carolina law, gross negligence is “the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). It is the failure to exercise slight care. It has also been defined as a relative term meaning the absence of care that is necessary under the circumstances. Ordinarily, gross negligence is a mixed question of law and fact. *Id.*

Viewing the evidence in the light most favorable to the Plaintiff, a jury could reasonably find that the County and its employees intentionally and consciously: (1) failed to follow their own ordinance and professional standards; (2) failed to exercise the care necessary under the circumstances; or (3) failed to exercise even slight care in allowing reductions in the \$1.3 million financial guarantee posted by the developer. For purposes of the directed verdict, the Plaintiff's evidence established that the County's Planning Department and its employees: (1) allowed the reductions without obtaining both a certification from an engineer that the work had been completed and an estimate of completion cost of the required improvements, in violation of their own standards; (2) allowed multiple reductions in the Wachovia letter of credit within six months of the first reduction allowed, in flagrant violation of Section 3-5; (3) allowed multiple reductions in the letter of credit without obtaining approval of the Department of Public Works, in flagrant violation of Section 3-5; (4) continued to allow reductions in the letter of credit even after receiving the December 6, 2006 certification from the Earthworks engineer that the cost of completing the required improvements had not been reduced at all and, in fact, had actually increased; (5) allowed reductions in the letter of credit to pay the developer's contractor, in flagrant violation of Sections 3-3; and (6) allowed reductions without retaining 125% of the funds needed to complete the infrastructure, in flagrant violation of Sections 3-3 and 3-5. Because the gross negligence exception of subsection (12) applies to subsection (4), the Court should have submitted the question of subsection (4) immunity to the jury to determine if the County was grossly negligent in its management of the letter of credit funds.

B. Section 15-78-60(5) Does Not Provide Immunity to the County as a Matter of Law.

The Court also erred in ruling that Section 15-78-60(5) provided the County with immunity as a matter of law. In relevant part, subsection (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.” S.C. Code Ann. § 15-78-60(5).

In granting the County immunity under this subsection, the Court correctly noted that the County’s decisions to accept the financial guarantee and to subsequently authorize reductions in the letter of credit were all discretionary acts. The Court then reasoned that the County was entitled to discretionary immunity under subsection (5) as a matter of law because “Chief Planner Richardson testified that she could have denied the developer’s requested reductions to the letter of Credit but she had no reason to do so after considering the submission of engineering certifications and confirmation of completed infrastructure from the Georgetown County Water and Sewer District.” (R. p. 10).

In so ruling, the Court made three clear and reversible errors. First, as Plaintiff’s counsel argued, 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. (R. p. 246, lines 5-13). Second, the Court failed to recognize that the County bears the burden of proving discretionary immunity and must therefore prove both that: (1) the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice;

and (2) in weighing the competing considerations and alternatives, the government utilized accepted professional standards appropriate to resolve the issue before them. *See Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). The County failed to present any evidence whatsoever of accepted professional standards for deciding reduction requests pursuant to the ordinance. And while the County's own ordinance provides minimum (and mandatory) professional standards, the County Planning Department's employees flagrantly violated these standards when they approved these reductions.

Third, even assuming that the Chief Planner's reliance on the "submission of engineering certifications and confirmation of completed infrastructure from the Georgetown County Water and Sewer District" conformed with applicable professional standards, that agency advised the Planning Department that the water and sewer had been completed, but only on one occasion – by a single letter dated April 7, 2007. (R. p. 141, lines 3-8 and 14-22); *see* (R. p. 365). By this time, the Chief Planner had already authorized the developer's final request for a reduction by a letter *dated April 5, 2007*—two days earlier. The Chief Planner did not rely on the April 7, 2007 letter when she decided to authorize the reduction. She authorized the reduction *before* the letter existed. Moreover, the Georgetown County Water and Sewer District letter did not contain a cost to complete the infrastructure, which was required pursuant to Section 3-5 before permitting a cost reduction. (R. p. 144, lines 11-16). Furthermore, the ordinance did not vest the Chief Planner with the power to authorize the reduction, as the ordinance required her to forward the request to the Department of Public Works. She did not to forward the request. Finally, regardless of the merits of the April 7, 2007 letter to the

County's claim of discretionary immunity, the letter bears no relevance whatsoever to the County's approval of letter of credit reductions on July 26, 2006, October 9, 2006, or November 8, 2006. One letter cannot have justified four reductions.

The Court failed to recognize that the County, in exercising discretion, was grossly negligent as discussed above. Such a finding would have required denial of the directed verdict motion on subsection (5)'s discretionary immunity grounds. Therefore, the Court's judgment entered on the directed verdict motion cannot be sustained under Section 15-78-60(5).

C. Section 15-78-60(13) does not Provide Immunity to the County as a Matter of Law.

Finally, the Court also erred in ruling that Section 15-78-60(13) provided immunity to the County as a matter of law. In relevant part, that Section provides that 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." S.C. Code Ann. § 15-78-60(13). Subsection (13) has no application to the Plaintiff's negligence claim. The Plaintiff never contended that the County had a duty to make its own inspection. The Plaintiff's claim was solely based on how the County handled the letter of credit funds. (R. p. 247, lines 14-21).

The Plaintiff's negligence claim is that his loss was caused by the County's failure to comply with its own ordinance, particularly Section 3-5 regarding authorizing reductions in the letter of credit. Section 3-5 does not require the County to make physical inspections of the property, however, under that Section, the County *is* required

to obtain and submit a cost of completion estimate to the Department of Public Works. The County repeatedly failed to satisfy these requirements before authorizing the reduction requests. Furthermore, the County failed to obtain a certification from an engineer that the work had been completed and an estimate from an engineer of the cost of completion, as required by the County Planning Department's own standards.

Therefore, subsection (13) is not relevant or applicable to the cause of Plaintiff's loss in this case. Accordingly, Court's judgment entered on the directed verdict motion cannot be sustained under Section 15-78-60(13).

III. THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF WHERE HE PERSONALLY WAS INVOLVED AS AN ATTORNEY WITH A KEY PARTY AND CONDUCTED THE TRANSACTIONS IN QUESTION.

The Appellant requested that Judge Culbertson recuse himself during the Motion for Reconsideration hearing on December 19, 2013, after learning that his Honor had previously been hired by the development in question, Harmony Holdings, to handle real estate transactions. (R. p. 269, lines 3-11). Judge Culbertson should have recused himself pursuant to Canons 2 and 3 of the South Carolina Code of Judicial Conduct in order to ensure that the trial of this case was litigated in a fair and impartial forum.

A. Judge Culbertson Should Have Recused Himself Pursuant to Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR.

Canon 2 of the Code of Judicial Conduct requires that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(A), Rule 501, SCACR. The Commentary to the Canon further explains that a "judgment must avoid all impropriety and appearance of impropriety." *Id.*

Canon 3(E)(1) requires, in part, that:

[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it.

As the Commentary thereto notes, “[u]nder this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific rules in [Canon 3(E)(1)] apply.” Canon 3(E), Rule 501, SCACR.

Applying the plain language, commentary, and intent of both Canons 2 and 3 to the present case, this Court should find that Judge Culbertson should have recused himself and, accordingly, should remand this case for a new trial before an impartial judge.

1. Under Current South Carolina Law, Judge Culbertson’s Impartiality Might Reasonably be Questioned Because His Findings Are Not Supported by the Record.

Under current South Carolina law, the applicable standard of review for a judge’s failure to disqualify himself requires some evidence of actual bias or prejudice of the judge. *See Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct. App. 2008); *see also Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984). While an appellate court accords great weight to a trial judge’s assurances of his own impartiality, a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record. *Simpson*, 377 S.C. at 523, 660 S.E.2d at 277; *Patel*, 359 S.C. at 524, 599 S.E.2d at 118 (2004); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996).

2. Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, Should be Interpreted by Application of an Objective Test for Recusal and the Issue of Recusal Should be Reviewed *De Novo*.

The Appellant believes that the objective “appearance of impropriety” test is the proper test to determine recusal issues and asks that this Court adopt such a standard. In applying Canon 3(E), the Supreme Court previously considered adopting the objective test for recusal and review *de novo*, which is applied by federal courts in interpreting 28 U.S.C. § 455(a) after the United States Supreme Court’s opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). See *Patel*, 359 S.C. at 524, 599 S.E.2d at 118. Indeed, the “federal status is similar to Canon 3(E)(1)(a).” *Patel*, 359 S.C. at 525, 599 S.E.2d at 119. Although the issue was not ultimately decided in *Patel*, our Supreme Court indicated that the issue remains viable. *Id.*

In *Liljeberg*, the United States Supreme Court considered the construction of 28 U.S.C. § 455(a), which provides: “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The issue in *Liljeberg* was whether Section 455(a) could be violated based on the appearance of impartiality. The court held that Section 455(a) requires recusal, even when there is no evidence of bias, if a reasonable person who knows all of the circumstances would expect that the judge is biased. This is known as the objective test. See *Liljeberg*, 486 U.S. at 860-61. The relevant question “is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.” *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998) (applying 28 U.S.C. § 455(a)).

When the Supreme Court of South Carolina previously considered application of *Liljeberg*'s objective test in South Carolina, the court declined to rule on the policy arguments supporting the federal rule and *de novo* standard of review because, *at that time*, the record in question did not demonstrate that the movant would prevail under the *Liljeberg* test. *See Patel*, 359 S.C. at 524, 599 S.E.2d at 118. Appellant submits that the objective test from *Liljeberg* should be applied in the case at bar for the reasons considered by our Supreme Court in *Patel*. Under an objective view, Judge Culbertson's disclosure that he knew some of the parties professionally and had worked for them is sufficient to raise question as to his impartiality in the case.

The "appearance of impropriety" test, employed by the Judicial Merit Selection Commission, embraced by the Code of Judicial Conduct, and mandated by the United States Supreme Court, is the proper test for determining disqualification or recusal issues. The proof of actual bias or prejudice should not be required. Under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers. Theoretically, judges who act in accordance with Canon 2 or 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality. If the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge. In practice, however, it is extremely rare that judges' *sua sponte* disqualify themselves. Therefore, it becomes even more important that judges honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality. This will permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal.

Due to these imposing requirements, most lawyers refrain from requesting recusal for fear of the Court. Furthermore, motions to recuse in this State are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted. It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists. Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal. An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *cf.*, *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E.2d 590 (Ct. App. 1984); *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993); *Simpson*, 377 S.C. at 519, 660 S.E.2d at 274; and *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008).

Unfortunately, the use of the "no evidence of bias or prejudice" standard by our appellate courts on a near universal basis for affirmation of trial judges' refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely what evidence of bias or prejudice, or what degree of proof of such evidence, would warrant disqualification or recusal.

In the present case, the record is clear with evidence that Judge Culbertson's findings are not supported by the record, such that his impartiality "might reasonably be questioned," and thereby rendering his disqualification mandatory. The evidence includes

not only evidence of bias or prejudice against Appellant, but also evidence of partiality and bias in favor of counsel for the Respondents. Judge Culbertson made it clear that he was hired and worked directly with Harmony Holdings involved in these transactions. (R. p. 269, lines 22-25). Further, his personal and professional interactions could have resulted in his being called as a witness in the trial of this case.

Pursuant to the plain language, commentary, and the intent of Canon 3, Judge Culbertson should have recused himself because these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned. Furthermore, the circumstances are certainly such as to create in the mind of a reasonable person at least a suspicion of bias. Since Judge Culbertson did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

Having failed to disqualify himself or to reveal any information concerning his qualifications on the record, the judge should have granted Appellant's recusal motion.

B. Judge Culbertson Failed to Ensure that Appellant's Claims were Being Litigated in a Fair and Impartial Forum, Thereby Resulting in Deprivation of the Right to Due Process of Law Under the Constitutions of the State of South Carolina and the United States of America.

The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question. "Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case." 46 Am. Jur. 2d, *Judges*, § 146. "The right to disqualify a judge for bias and prejudice is substantive . . . and it is included within the right to a fair trial guaranteed by

the due process clause of the . . . United States Constitution.” *Id.* The constitutional guarantee of a fair and impartial judge and forum is recognized in this State. *Mallett, supra* (“the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process.”).

In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to South Carolina’s current standard requiring a “showing of actual prejudice,” is the proper procedure to be followed. *See Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009) (*cf. Simpson*, 377 S.C. at 525, 660 S.E.2d at 277 (applying current South Carolina standard requiring a “showing of actual prejudice”)). As recently analyzed and stated by Professor John P. Freeman:

Caperton, of course, rejects any requirement that a party present on appeal some proof of actual bias or prejudice in order to win a reversal premised on a lower court judge’s failure to recuse . . . Since proof of a serious *risk* of judicial bias establishes a due process violation under *Caperton*, the need for a showing of *actual* prejudice in order to win a recusal case in South Carolina is a requirement that in effect has been overruled . . . After all, why should a litigant whose trial has been tainted by the judge’s violation of the appearance of impropriety standard have to prove something more than that in order to prevail on appeal?

John P. Freeman, *Appearance of Impropriety, Recusal, and the Segars-Andrews Case*, 62 S.C. L. Rev. 485, 495 (2011). In other words, the *Caperton* decision is particularly relevant to the case at bar because it squarely calls into question the constitutionality of South Carolina’s currently applied “showing of actual prejudice” standard. *Id.*, p. 487.

First, part of the alleged bias claimed in *Caperton* involved the judge’s personal and professional relationships with a party, and his receipt of benefits derived from those

relationships; specifically, donations to his campaign for election. In this case, Judge Culbertson's professional relationship with Harmony Holdings is at issue, together with his loyalty to a former client and the benefits received for work done. Importantly, Canon 3(E)(1) does not distinguish between "a party or a party's lawyer" where bias is alleged.

Second, the court's finding in *Caperton* that a judge's refusal to disqualify or recuse himself was a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1). The court discarded the judge's assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias. Instead, the court adopted the "appearance of impropriety" and reasonableness language of the Code. This is wholly consistent with Appellant's position in the case at bar and is congruent to plain language of South Carolina's current Canon 3 and the commentary thereto.

Third, the case at bar amply demonstrates the concern expressed by the court in *Caperton* regarding the focus upon proof of evidence to show bias in fact, rather than a reasonable perception of bias. The court stated that:

there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias . . . Objective standards may also require recusal whether or not actual bias exists or can be proved. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.*

Caperton, 129 S.Ct. at 2252.

The case at bar is not merely a case where the former lawyer is now presiding over a field that he used to practice involving two parties wholly unrelated to his former position. In the present case, Judge Culbertson is presiding over legal claims asserted

regarding his former client, against the County in which he now sits as judge, concerning transactions that he conducted and with which he was directly involved. Further, Judge Culbertson and his clients owed each other fiduciary duties which required a high degree of fidelity, good faith, and absolute and undivided loyalty. To a reasonable person, Judge Culbertson's former fiduciary relationship with Harmony Holdings, which required absolute and undivided loyalty, would create a reasonable basis to question the judge's impartiality.

The professional relationships involving Judge Culbertson and his former clients create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring his disqualification and recusal pursuant to the Code of Judicial Conduct and the applicable laws. These relationships, coupled with the evidence that the judge was involved in these transactions, and that his rulings are not supported by the record, result in denying the Appellant a fair and impartial forum. This violates the Appellant's right to due process under the Constitutions of the State of South Carolina and the United States.

CONCLUSION

For the foregoing reasons, the judgment granting the County of Georgetown a directed verdict, denying the Appellant's motion to recuse, and denying Appellant's Motion for Reconsideration and for New Trial should be reversed. This case should be remanded for trial.

(Signature Page Follows)

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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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the **Final Brief of Appellant** complies with the provisions of Rule 211(b), SCACR, and with the April 15, 2014, Supreme Court Order regarding personal identifying information and other sensitive information.



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STATEMENT OF ISSUES

1. Article V, Section 3 of Georgetown County's Development Regulations does not create a private or special duty owed to Plaintiff.
2. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(4) (Rev. 2005)
3. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(5) (Rev. 2005)
4. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(13) (Rev. 2005), but that issue is now moot because Plaintiff has abandoned any claim for failure to inspect.
5. Georgetown County's immunity from Plaintiff's claim is not subject to an exception for gross negligence.
6. There is no basis for requiring the trial judge to recuse himself from this matter or to grant a new trial.
7. Plaintiff has not suffered any prejudice from any refusal of the trial judge to recuse himself or grant Plaintiff a new trial.
8. Plaintiff's appellate arguments are not properly before this Court for appellate review.
9. As an additional sustaining ground and reason to affirm, the trial court should have granted Georgetown County's directed verdict motion based on the statute of limitations.

STATEMENT OF THE CASE

The Appellant (Plaintiff) sued the Respondent (County) in negligence for alleged violations of the requirements in Article V, Section 3 of County's Development Regulations. This was the only claim made by Plaintiff – he abandoned all other claims at trial. (R. 231). The trial court directed a verdict in favor of County at the close of Plaintiff's case upon the following grounds: (1) Article V, Section 3 of County's Regulations did not create a private duty owed to Plaintiff; and (2) County was immune from liability under subsections (4), (5), and (13) of S.C. Code Ann. § 15-78-60 (Rev. 2005) in the Tort Claims Act. (R. 4-8, 8-11).

Plaintiff filed a motion to reconsider, which sought a new trial upon reconsideration of the foregoing rulings. (R. 381-382). At the hearing on the motion to reconsider, Plaintiff raised two issues for the first time: (1) the immunity granted by § 15-78-60(4), (5), and (13) was subject to an exception for "gross negligence"; and (2) the trial judge should have recused himself.¹

The trial court denied Plaintiff's post-trial motions in a single-sentence order that stated: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "gross negligence" and "recusal" issues until the hearing on his motion to reconsider, this was the first order on those issues. The order did not mention nor rule on these issues specifically. (Id.). Plaintiff did not file a motion seeking a ruling on these issues before appealing.

¹ Plaintiff did not raise these issues at trial. (See R. 224-251, *passim*). He did not raise these issues in his motion to reconsider. (R. 381-382, *passim*). He raised the "gross negligence" issue for the first time at the hearing on the motion to reconsider (R. 265-267) and in a memorandum that he handed up at the hearing. (See R. 255, 405-408). Plaintiff orally raised the recusal issue for the first time at the motions hearing. (R. 268-270).

ARGUMENT

The fundamental question presented in this appeal is whether Article V, Section 3 of County's Regulations created a special or private duty owed to Plaintiff. The trial court correctly held that it did not because, *inter alia*, Section 3-1 of those Regulations expressly disclaimed any legislative intent to create any private duty. (R. 4). Section 3-1 provides:

Acceptance of a financial guarantee [Letter of Credit] by Georgetown County *shall not be construed as an obligation to any other agency, utility or property owner within the affected developments.*

(County Reg. at Art. V, § 3.1) (emphasis added). On appeal, Plaintiff makes three basic arguments. First, he argues that the trial court misconstrued § 3-1, because it does not disclaim a "private duty." (Init. App. Br. 15-17). This argument is not preserved for appeal, and it is manifestly without merit. Second, Plaintiff mixes the concepts of duty, liability, and immunity to construct an erroneous argument that the Tort Claims Act "preempts" § 3-1 and renders it void. (Init. App. Br. 17-21). This argument is not preserved for appeal, and it is manifestly without merit. Third, Plaintiff argues that application of the six-part "special duty test" created by the courts to construe statutes mandates a conclusion that the Regulations created a private duty to him. (Init. App. Br. 21-26). This argument is not preserved for appeal, and it is manifestly without merit.

The trial court also ruled correctly that, assuming the Regulations created any duty owed to Plaintiff, County was immune from liability under three subsections of the Tort Claims Act. (R. 8-11). On appeal, Plaintiff presents myriad arguments on each of the three subsections. (Init. App. Br. 26-33). These arguments are not preserved for appeal, and they are manifestly without merit.

The trial court granted a directed verdict to County on several independent grounds. Under the two-issue rule, the trial court must be affirmed if any one of these grounds is correct, regardless of any presumed error in any of the other grounds. *Dropkin v. Beachwalk Villas Condo. Ass'n, Inc.*, 644 S.E.2d 808, 811 (S.C. App. 2007); *Weeks v. McMillan*, 353 S.E.2d 289, 292 (S.C. App. 1987).

In his final argument, Plaintiff argues he is entitled to a new trial, because the trial judge should have recused himself from this matter. (Init. App. Br. 33-41). This argument is frivolous, and it is not preserved for appeal.

I. The trial court correctly held that Article V, Section 3 of Georgetown County's Development Regulations did not create a private duty owed to Plaintiff, and Plaintiff's contrary arguments are not preserved for appeal and have no merit.

The trial court held that the Regulations did not create any special duty owed to Plaintiff for three independent reasons:

1. The plain language of § 3-1 demonstrated a clear legislative intent to not create a special or private duty. (R. 4).
2. The Regulations should not be read as imposing a special duty on the County, because doing so would make the County an insurer of developments and would likely discourage efforts to regulate developments. (R. 5-7).
3. Assuming the "special duty" test was applicable, Plaintiff failed to satisfy two elements of this test. (R. 7-8).

As demonstrated below, the trial court's rulings were correct, and Plaintiff's contrary arguments are not properly before this Court for review. Affirmance on any one of these grounds moots all other issues. *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 598 (S.C. 1999) (when ruling on one issue is dispositive of the appeal, the appellate court need not address any other issues).

- A. **Section 3-1 of County's Regulations plainly states a legislative intent that the Regulations in Article V, Section 3 do not create any special or private duty to any person and, therefore, Plaintiff's claim is barred by the public duty rule.**

South Carolina adopted the "public duty rule" in 1940, and it remains the law of South Carolina today. *Edwards v. Lexington County Sheriff's Dept.*, 688 S.E.2d 125, 129 (S.C. 2010). Under this rule, statutes that create or define a public officer's duties do not create a private duty owed to individuals. *Id.* South Carolina recognizes a limited exception to this rule, that exception being whether the legislative body intended to create a private right of action for an alleged violation of the duty imposed by the statute, *i.e.*, a "special" or "private" duty. That intent is determined by applying a six-factor test under the public duty rule if, and only if, the statute does not express a legislative intent on the creation of a special duty:

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.

Vaughan v. Town of Lyman, 635 S.E.2d 631, 634 (S.C. 2006) (emphasis added), *quoted with approval and applied in Edwards v. Lexington County Sheriff's Dept.*, 688 S.E.2d 125, 129 (S.C. 2010). There can be no special or private duty if the legislative body "has spoken directly to its intent to foreclose" any special or private duty. *Edwards*, 688 S.E.2d at 129.

Here, § 3-1 of the Regulations specifically and plainly states that "[a]cceptance of a financial guarantee [Letter of Credit] *shall not be construed as an obligation to any . . . property owner* within affected developments." (County Reg. at Art. V, § 3.1) (emphasis

added). It is thus clear that the legislative body did not intend to create any special or private duty to any property owner. Thus, the six-factor “special duty test” is irrelevant. *Edwards*, 688 S.E.2d at 129; *Vaughan*, 635 S.E.2d at 634. Accordingly, the trial court correctly held that the Regulations did not create any duty to Plaintiff. (R. 4). Affirmance on this ground moots all other issues in this appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

On appeal, Plaintiff refers to § 3-1 as a “sovereign immunity provision.” (Init. App. Br. 15). Section 3-1, however, goes to the existence of a duty – it has nothing to do with immunity. Plaintiff has confused the question of duty with the defense of immunity.

Plaintiff also argues that the trial court misconstrued § 3-1 for three reasons and therefore mistakenly found there was no duty owed to Plaintiff:

1. Section 3-1 does not disclaim any “private duty” because it does not use the words “private” or “duty.” Rather, § 3-1 uses the term “obligation” without indicating whether it includes the tort concept of duty or merely negates any contractual obligation claim such as a property owner claiming to be a third-party beneficiary of the financial guarantee.
2. Section 3-1 addresses only the “acceptance” of a financial guarantee but does not address whether there is a private claim for mishandling the financial guarantee after it is accepted.
3. The county attorney testified that County owed a duty to property owners under the Regulations to effectively manage the financial guarantee after its acceptance, which negates the notion the § 3-1 precludes any private duty, and this testimony should be accorded deference as a decision by those charged with interpreting and applying ordinances.

(Init. App. Br. 15-17). Plaintiff did not make any of these arguments at trial (R. 224-251, *passim*) and, therefore, he cannot make them on appeal. *In re Michael H.*, 602 S.E.2d 729,

732 (S.C. 2004) (issue not raised at trial cannot be raised on appeal).² In any event, Plaintiff's arguments are manifestly without merit.

As to the absence of "private" and "duty" from § 3-1, the cardinal rule of statutory construction, to which all other rules are subservient, is to determine and give effect to the intent of the legislative body. *State v. County of Florence*, 749 S.E.2d 516, 518 (S.C. 2013). In determining this intent, the words used by the legislative body must be given their plain and ordinary meaning. *Id.* at 518. Here, the concept of "private," *i.e.*, a private person like Plaintiff, is fully set forth in and captured by the phrase "any ... property owner within affected developments." As to "duty," § 3-1 expressly disclaims any "obligation," which 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, Plaintiff's argument on the failure to mention "private" or "duty" is without merit.

As to Plaintiff's "acceptance v. mishandling" argument, the acceptance of a financial guarantee is a condition precedent to and trigger for any "handling" of the guarantee. By disclaiming any obligation from the acceptance of a financial guarantee, the

² Plaintiff also did not make these arguments to the trial court in his Rule 59 motion, his memorandum in support of that motion, or at the hearing on that motion. (See R. 381-396, 397-408, 255-279, all *passim*). Thus, Plaintiff is making these arguments for the first time on appeal, and it is axiomatic that an argument cannot be made for the first time on appeal. *In re Michael H.*, 602 S.E.2d at 732.

legislative body manifestly captured and disclaimed any obligation related to any subsequent “handling” of the guarantee. Moreover, it would make no sense and be absurd for a legislative body to disclaim any obligation arising from the “acceptance” of a financial guarantee but *intend to assume* an obligation for the subsequent “handling” of that same guarantee – and a fundamental rule of statutory construction is to avoid absurd results. *State v. County of Florence*, 749 S.E.2d at 518 (court will not interpret a statute in a manner that produces an absurd result). The only logical reading of § 3-1 is that the legislative body intended that it would have no obligation or duty to any property owner for anything arising from or related to the acceptance of a financial guarantee, including but not limited to any subsequent “handling” of that same guarantee.

Finally, as to the testimony of the county attorney, Plaintiff correctly notes the general rule that courts give deference to bodies charged with the administration of ordinances. (Init. App. Br. 16). That deference, however, is not absolute as noted in the authority cited by Plaintiff:

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 there was a duty to property owners, but his belief is irrelevant, because the plain language of the § 3-1 disclaims any such duty. *Brown*, 560 S.E.2d at 415. Moreover, 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). Plaintiff does not complain about County’s actions after it received the cash from the letter of credit – rather, he complains about the reductions in the letter of credit before County received any cash from it.

In summary, Plaintiff’s arguments about the meaning of § 3-1 are not preserved for appellate review and, in any event, his arguments have no merit. The plain meaning of § 3-1 is that the County owed no private or special duty to Plaintiff. Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

B. The Tort Claims Act does not negate the disclaimer of duty in § 3-1.

Plaintiff argues that any disclaimer of duty in § 3-1 is unenforceable, because: (1) the General Assembly has preempted the field of sovereign immunity with the Tort Claims Act; (2) the “Sovereign Immunity provision” in § 3-1 conflicts with the Tort Claims Act; and (3) therefore, the “Sovereign Immunity provision” in § 3-1 is unenforceable. (Init. App. Br. 17-21). Plaintiff’s argument is based on a false premise. Section 3-1 is not a sovereign immunity provision – it goes to the existence of a duty, not an immunity from the breach of a duty. The trial court’s ruling was based on the public

duty rule, not any notion of sovereign immunity. Thus, Plaintiff has fallen prey to the confusion that the Supreme Court warned against in *Vaughn*: “The public duty rule *should not be confused with the affirmative defense of immunity.*” *Vaughn*, 635 S.E.2d at 634 (emphasis added). In short, Plaintiff’s pre-emption argument is without merit and irrelevant. The issue presented here is one of duty, not immunity. Moreover, Plaintiff misperceives the impact and purpose of the Tort Claims Act. It does not create or impose any duty – it simply limits liability for the breach of an existing duty, and § 3-1 precludes the existence of any special or private duty in this case.³

C. Section 3-1 does not create a “special duty” owed to Plaintiff.

Plaintiff argues that § 3-1 created a “special duty” to him under the six-part special duty test for identifying exceptions to the public duty rule. (Init. App. Br. 21-26). Plaintiff ignores the essential purpose of this “special duty test,” which is to determine whether the legislative body intended to create a private duty. As shown earlier, § 3-1 plainly expresses a legislative intent to not create a private duty and, therefore, the six-part special duty test is irrelevant. In any event, the trial court also made two additional independent rulings that application of the “special duty test” did not yield any private or special duty owed to Plaintiff.

³ It is questionable whether Plaintiff’s pre-emption argument is preserved for appeal. At trial, Plaintiff argued that the Tort Claims Act made governmental entities liable for their negligence just as any other person or entity, and this liability could not be avoided by waiving it in a statute. (R. 238-241). Plaintiff never mentioned pre-emption and never argued specifically that § 3-1 was a “sovereign immunity provision” that was “pre-empted” by the Tort Claims Act. (Id.). An argument not raised at trial is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732.

1. Imposing liability on County in this case would make it an insurer of developments and discourage regulation of developments.

The trial court held that finding a private duty was precluded by the Supreme Court's ruling in *Brady Dev. Co., Inc. v. Town of Hilton Head*, 439 S.E.2d 266 (S.C. 1993), to-wit: recognizing a private duty would make County an insurer of developments in the county and discourage regulation of developments. (R. 7). On appeal, Plaintiff argues that the "public policy concerns" in *Brady* are not present here. (Init. App. Br. 25-26). Plaintiff never made this argument to the trial court⁴ and, therefore, this argument cannot be made on appeal. *In re Michael H.*, 602 S.E.2d at 732. Affirmance on this ground moots all other issues on appeal. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292. In any event, the trial court ruled correctly. This case, like *Brady*, involves the public policy concern of not making County an insurer of developments. That is precisely what Plaintiff seeks to do here, and the trial court properly rejected it. Affirmance on this ground also moots all other issues on appeal, including all recusal issues. *Id.*

2. Plaintiff fails to satisfy two elements of the "special duty test" for imposing liability on County in this case.

The trial court ruled that Plaintiff failed to satisfy two elements of the "special duty test." (R. 7-8). That test has the following six elements:

- (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 Plaintiff did not make this argument at trial. (See R. 224-251, *passim*). He did not make this argument in his motion to reconsider. (See R. 381-382, *passim*). He did not make this argument in his memorandum in support of his motion to reconsider. (See R. 397-408, *passim*). He did not make this argument at the hearing on his motion to reconsider. (See R. 255-279, *passim*).

- (4) the plaintiff is a person within the protected class;
- (5) the public officer knew 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.

Steinke v. South Carolina Dep't of Labor, Licensing, and Reg., 520 S.E.2d 142, 150 (S.C. 1999). (emphasis added). The trial court found that the second element had not been met, because Article V, § 3 of County's regulations did not impose any duty on "any *specific* public officer of Georgetown County." (R. 7-8) (emphasis added). On appeal, Plaintiff first argues that this ruling was "based solely on the unenforceable Sovereign Immunity provision," *i.e.*, § 3-1 of the regulations. (Init. App. Br. 23). This is simply wrong – the trial court specifically ruled: "Specifically, the Georgetown County Development Regulations at issue here neither directly nor indirectly imposed on any *specific* public officer of Georgetown County a duty to guard against or not cause a specified harm." (R. 7-8) (emphasis added). Moreover, as shown earlier, § 3-1 is not a "sovereign immunity provision"

Plaintiff next argues that the regulation imposes a duty on employees of County's Planning Department and Department of Public Works. (Init. App. Br. 23). This does not and cannot satisfy the requirement of imposing a duty on a "*specific* public officer." Moreover, as Plaintiff concedes on appeal, responsibility under the ordinance is divided amongst several departments and employees: the decision to accept a financial guarantee "is imposed on employees of the County's Planning Department" and the ordinance then tasks "the Planning Department *and* the Department of Public Works with the duty overseeing any reduction in these funds." (Init. App. Br. 23) (all emphasis added). Thus, there is no "*specific* public officer" charged with a duty to guard against or not cause harm.

Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

The trial court also found that the third element of the “special duty test” had not been met, because the class of persons that the statute “intends” to protect is not identifiable before the fact. (R. 8). On appeal, Plaintiff argues that “[t]he ordinance *intends* to protect” persons who purchase a lot in a development covered by a financial guarantee. (Init. App. Br. 23) (emphasis added). The ordinance clearly had no such “intent” – it specifically disavowed any obligation to any “property owner within affected developments.” (Cnty. Reg. § 3-1). Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

II. County is immune from liability under the Tort Claims Act, and Plaintiff’s contrary arguments are not preserved for appeal and have no merit.

The trial court held that County was immune from liability under three subsections (4), (5), and (13) of § 15-78-60 in the Tort Claims Act. (R. 8-11). As demonstrated below, Plaintiff’s contrary arguments are not preserved for appeal and have no merit.

A. County is immune from liability pursuant to § 15-78-60(4), and Plaintiff’s contrary arguments are without merit and not preserved for appeal.

The trial court held that § 15-78-60(4)⁵ granted immunity to County under the following analysis and ruling:

The gravamen of the Plaintiff’s Complaint *and his trial evidence* was that [County] failed to comply with or enforce its own regulation regarding the acceptance and reduction of a financial guarantee. Simply put, Plaintiff

⁵ Section 15-78-60(4) provides that 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.”

contended that [County] adopted the Development Regulation relating to financial guarantees and the *failed to enforce it against itself* Plaintiff's allegations of failure to enforce the Development Regulations fall squarely within exception § 15-78-60(4)

(R. 9-10) (emphasis added). Plaintiff never challenges this ruling on appeal. It is therefore the law of this case. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998). Moreover, the trial court was manifestly correct – subsection (4) grants immunity from any claim based on a failure to enforce a regulation, and Plaintiff's entire claim rests upon County's alleged failure to abide by the Regulations. (See R. 247, where Plaintiff asserts that County was "negligent as to how they handled the funds, which is the *whole basis of our negligence claim* in this case.") (emphasis added).

At trial, Plaintiff's only argument against immunity under subsection (4) was made in response to the trial court's question regarding the "failure to enforce any law including an ordinance." (R. 245). Plaintiff's entire argument is set forth below:

At that point, Your Honor, they're not, they're not failing to enforce this ordinance. They actually in their enforcement mechanism they're required to make sure that they administer the reductions in the letter of credit properly. They're not looking to enforce an ordinance. They have an administrative function at that point to ensure that these monies are not improperly reduced or spent and that's what's happened in this case. This isn't – this doesn't go to adoption or enforcement of a law or statute. It goes directly to the handling of their own functions within the, within the County offices.

(R. 245). In short, Plaintiff argued only that subsection (4) did not apply, because it did not include County's failure to follow the ordinance, *i.e.*, County's failure to enforce the ordinance against itself. Plaintiff never pursues this argument on appeal. (Init. App. Br. 27-29, *passim*). Thus, Plaintiff has abandoned this argument.

Plaintiff's only argument on appeal is that the immunity granted by subsection (4) is subject to an exception for "gross negligence." (Init. App. Br. 27-29). Plaintiff did not

make this argument at trial. (See R. 224-251, *passim*). Therefore, he cannot make this argument on appeal. *In re Michael H.*, 602 S.E.2d at 732 (issue not raised at trial is not preserved for appeal). Plaintiff also did not make this argument in his Rule 59 motion. (See R. 381-382, *passim*).

Seventy-nine (79) days after the trial court's order, and seventy-one (71) days after Plaintiff filed his motion to reconsider, the trial court held a hearing on Plaintiff's motion. At this hearing, Plaintiff handed up a memorandum and argued for the first time that the immunity granted by subsection (4) was subject to an exception for "gross negligence." (R. 255, 265-267, 397-408). It is axiomatic that an issue cannot be raised for the first time in a motion to reconsider. *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). It is therefore equally axiomatic that an issue cannot be raised for the first time at oral argument on a motion to reconsider. Thus, this issue is not preserved for appeal.

The trial court summarily denied Plaintiff's motion to reconsider as follows: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "gross negligence" issue until the motions hearing, this order was the trial court's first opportunity to address the issue. This order did not mention or rule specifically on the "gross negligence" issue. Plaintiff did not file a motion to obtain a ruling. Thus, his appellate arguments are not preserved for appeal. *Johnson v. Lloyd*, 757 S.E.2d 705, 706 (S.C. 2014).

In short, Plaintiff's only argument against immunity under subsection (4) is not preserved for appellate review and, therefore, this Court should affirm the trial court's ruling. This affirmance would moot all other issues, because the trial court's ruling under § 15-78-60(4) was an independent ground for directing a verdict against Plaintiff. *Dropkin*

v. Beachwalk Villas Condo. Ass'n, Inc., 644 S.E.2d 808, 811 (S.C. App. 2007); see also *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 598 (S.C. 1999) (when ruling on one issue is dispositive of the appeal, the appellate court need not address any other issues).

Plaintiff's "gross negligence" argument is also not properly before this Court for other reasons. It rests upon the Supreme Court's ruling in *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142 (S.C. 1999) that when an exception to liability containing a gross negligence standard applies to a case, the gross negligence standard is read into any other applicable exceptions. Plaintiff argues that the immunity granted by § 15-78-60(12) was raised by the County and, since it contains a "gross negligence" standard, that standard also applies to the subsection (4) immunity found by the trial court in this case. As noted earlier, this argument is not preserved for appeal, because Plaintiff did not make this argument at trial. It also not properly before this Court for two other reasons. First, Plaintiff successfully argued at trial that subsection (12) did not apply here. (R. 246). He cannot 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). Second, the trial court ruled that subsection (12) did not apply to this case. (R. 11; see also R. 249, where trial court rules that subsection (12) is not "applicable"). Neither party has appealed this ruling, so it is the law of the case. *First Union*, 511 S.E.2d at 378. Thus, Plaintiff's "gross negligence" arguments fails, because the premise of the argument – the applicability of subsection (12) – is barred by the law of the case doctrine and Plaintiff cannot argue on appeal that subsection (12) applies. In any event, Plaintiff's argument has no merit.

In *Steinke*, 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 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). Here, Plaintiff’s entire claim rests solely upon how County handled the letter of credit (See R. 247, where Plaintiff asserts that County was “negligent as to how they handled the funds, which is the *whole basis of our negligence claim* in this case.”) (emphasis added). Subsection (12) clearly does not apply to this claim, because this case does not involve any “licensing” decision by County.⁶ Since subsection (12) does not apply to Plaintiff’s claim, the “gross negligence” standard in subsection (12) does not apply to any other exceptions, *i.e.*, it does not apply to the exceptions in subsections (4), (5), and (13).⁷ Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

⁶ Section 15-78-60(12) provides that a 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.”

⁷ Plaintiff never argues that subsection (12) applies to his claim. (Init. App. Br. 27-29, *passim*). Rather, he argues only that County asserted subsection (12) as a defense and this assertion itself made the “gross negligence” standard applicable to the other exceptions. (See Init. App. Br. at 27, stating that gross negligence applied “[b]ecause subsection (12) was *raised* by the [County]”; and at 28, stating that “[b]ecause the [County] *raised* subsection (12) as a defense . . .” (Emphasis added). The question, however, is whether subsection (12) *applies* to this case, not whether it was *raised*. Plaintiff never argues that subsection (12) applies, and it clearly does not apply. Thus, the gross negligence standard in subsection (12) does not apply to subsections (4), (5), or (13) in this case.

B. County is immune from liability pursuant to § 15-78-60(5), and Plaintiff's contrary arguments are without merit and not preserved for appeal.

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).⁸ On appeal, Plaintiff concedes 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*." (Init. App. Br. 30) (emphasis added).

Plaintiff nevertheless argues 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. (Init. App. Br. 30-31). Plaintiff did not make these arguments to the trial court (R. 246) and, therefore, these arguments cannot be made on appeal. *In re Michael H.*, 602 S.E.2d at 732.

Plaintiff also argues that the gross negligence standard from subsection (12) applies to subsection (5). (Init. App. Br. 31-32). As shown earlier, this argument is not preserved for appeal and has no merit. (See Arg. II(A), *supra*).

Finally, Plaintiff argues 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." (Init. 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

⁸ 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."

S.E.2d 99, 113 (S.C. App. 2011). Affirmance on the foregoing grounds moots all other issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

In any event, the trial court ruled correctly. County had discretion to reduce the letter of credit – Plaintiff concedes this. There is evidence from which one could infer the letter of credit was reduced below 125% of the costs to complete the infrastructure, but this was simply a mistake by County, *i.e.*, negligence, and subsection (5) provides immunity for such negligence. Thus, the trial court correctly found that subsection (5) provided immunity to County. Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

C. The question of immunity pursuant to § 15-78-60(13) is now moot, because Plaintiff concedes 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). Plaintiff concedes on appeal that he is not seeking recovery under any “failure to inspect” theory. (Init. App. Br. 32-33). Thus, this issue is now moot.

III. Plaintiff’s “recusal” issue is frivolous, and it is not preserved for appeal.

Plaintiff orally raised the recusal issue for the first time at the hearing on his motion to reconsider and for new trial. (R. 268-270). It is axiomatic that an issue cannot be raised for the first time in a motion to reconsider. *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). It is therefore equally axiomatic that an issue cannot be raised for the first

time at oral argument on a motion to reconsider. Thus, Plaintiff's recusal arguments are not preserved for appellate review.

The trial court summarily denied the motion as follows: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "recusal" issue until the motions hearing, this order was the trial court's first opportunity to address the issue. This order did not mention or rule specifically on the "recusal" issue. Plaintiff did not file a motion to obtain a ruling. Thus, his appellate arguments are not preserved for appeal. *Johnson*, 757 S.E.2d at 706. As shown below, Plaintiff's recusal issue is also not preserved for other reasons. More importantly, Plaintiff's recusal issue is frivolous.

Since Plaintiff accuses the trial judge of impropriety, it is worthwhile to quote the entire transcript on this matter:

MR. MOODY [plaintiff's attorney]: ... Finally, Your Honor, one last argument not in my Brief that I have to raise for the Court. Your Honor, *since the trial in this case*, and this is on my request for a new trial as well, since the trial of this case my client is [sic] come into information that Your Honor actually did work out at Harmony *to the extent of which I do not know* - - I believe that *perhaps there were some real estate transactions that you may or may not have handled for the developer* to the extent that *that may or may not have weighed on your decision*, making my clients believe that it probably should've been proper for you to, sua sponte, recuse yourself from the hearing of this case at the trial. So, I race [sic] that for the record.

THE COURT: Did I represent your clients in their closing?

MR. MOODY: I don't believe that you did sir, no sir.

THE COURT: Did I represent any party in this action?

MR. MOODY: *You did not represent my client and I don't know that you have ever represented Georgetown County. Those were the only parties in this action.*

THE COURT: In this action, okay. But I'll admit I did some closings out there. I did a bunch of closings out there *for people that purchased lots out there* but that was basically the extent of my involvement out there. Is there - - the fact that I just did closings out there, is that what they're saying is the conflict?

MR. MOODY: Your Honor, I think my clients *don't know the extent to which you were involved. So, to the extent that that raises that issue, my clients would raise the issue for the record.*

(R. 268-270) (emphasis added). The above-quoted colloquy is the only evidence and only argument on the recusal issue.

A. Plaintiff's entire recusal argument hinges on an inference drawn from a "fact" that has no evidentiary support.

The fallacy in Plaintiff's argument begins with the first sentence of his argument, where he asserts the trial judge "had previously been *hired by the development* in question, Harmony Holdings, to handle real estate transactions." (Init. App. Br. 33) (emphasis added). This "fact" is the linchpin for Plaintiff's entire recusal argument – he relies on it throughout his arguments to infer that the judge was biased against him or in favor of County. (See Init. App. Br. 36 – 41, *passim*). This "fact" has no evidentiary support and, therefore, Plaintiff's appeal should be denied.

To show this "fact," Plaintiff cites page 17, lines 3-11 of the hearing transcript on Plaintiff's motion to reconsider. (Init. App. Br. 33). Those lines, however, are statements by Plaintiff's attorney. (R. 269 at lines 3-11). It is axiomatic that counsel's statements are not evidence of anything. *E.g., Gilmore v. Ivey*, 348 S.E.2d 180, 183 (S.C. App. 1986).

The only "evidence" of the trial judge's involvement with anything comes from the following statement by the judge: "But I'll admit I did some closings *out there*. I did a bunch of closings *out there* for people that purchased lots out there but that was basically

the extent of any involvement *out there*.” (R. 269, ll. 22-25) (all emphasis added).⁹ Plaintiff cites this statement for the following argument: “Judge Culbertson made it clear that he was hired and worked directly with Harmony Holdings involved in these transactions.” (Init. App. Br. 37). The trial judge said nothing like this. (See earlier-quoted colloquy, *supra*). The only reasonable inference to be drawn from the judge’s statement is that he represented the buyers.

In summary, no evidence supports the linchpin “fact” for Plaintiff’s entire recusal argument. Thus, Plaintiff has failed to show any error in denying the motion to recuse. Affirmance on this ground moots all other recusal issues. *Futch*, 518 S.E.2d at 598.¹⁰

B. Assuming the trial judge represented the developer in some past residential real estate closings, there was no error in denying the motion to recuse.

Judge Culbertson was elected to the bench in May 2007.¹¹ Thus, any presumed representation of the developer ended more than six years before the trial of this case in September 2013. This presumed representation involved nothing more than closing residential real estate sales – there is no evidence and no argument that the trial judge had any other “relationship” with the developer, who is not a party to this action in any event. It is undisputed that the judge was not involved in the closing on Plaintiff’s property, and there is no evidence that the judge ever represented County. There is no evidence that the judge was aware of or involved in the “financial guarantee” transactions in this case or any

⁹ The phrase “out there” refers to the entire development, and it is unknown whether the judge closed any sales that were in the same phase as Plaintiff’s property. It is undisputed that the judge did not represent anyone in the closing for Plaintiff’s property.

¹⁰ This remains true even if one were to accept Plaintiff’s argument that this Court should change South Carolina’s law on recusal to the federal “objective appearance of impropriety standard.” The “appearance” upon which Plaintiff relies hinges on the linchpin “fact” that has no evidentiary support, *i.e.*, Plaintiff draws an inference from a “fact” that has no evidentiary support.

¹¹ See S.C. Judicial website at www.sccourts.org/circuitCourt/displaycirjudge.cfm?judgeid=2148.

other matter related to any “financial guarantee.” No reasonable person would believe that any bias was born of these facts, and Plaintiff never explains how or why any reasonable person would believe otherwise.

C. Plaintiff cannot be prejudiced by the denial of his recusal motion, because the appeal from the trial court’s final judgment raises only questions of law that are subject to *de novo* review by this Court.

This appeal does not involve any issue that resided in the trial court’s discretion, nor does it involve any issue in which the trial court resolved factual questions under conflicting evidence. Rather, every issue on appeal involves a question of law that is subject to *de novo* review without any deference to the trial court’s reasoning or ruling. Thus, Plaintiff was not and cannot be prejudiced by the denial of the recusal motion.

Throughout his argument, Plaintiff repeatedly and mistakenly argues that the trial court’s “factual findings” are not supported by the record, and this is evidence of bias against him or in favor of County. (Init. App. Br. 34-41, *passim*). There are no “factual findings” in this case, because a directed verdict motion presents questions of law, not fact. *Estate of Haley ex rel. Haley v. Brown*, 634 S.E.2d 62, 68-69 (S.C. App. 2006); *McEntire v. Mooregard Exterminating Servs., Inc.*, 578 S.E.2d 746, 748 (S.C. App. 2003). Moreover, a trial court’s directed verdict rulings, like all rulings on questions of law, are subject to a *de novo* review by the appellate court. *Id.*; see also *Town of Summerville v. City of N. Charleston*, 662 S.E.2d 40, 41 (S.C. App. 2008) (also holding that construction of a statute is question of law subject to *de novo* review on appeal). Thus, if the trial court erred in any of its rulings, this Court can reverse under a *de novo* review without any deference to the trial court’s reasoning. Accordingly, there can be no prejudice to Plaintiff from the denial of his recusal motion.

D. Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, did not require recusal of the trial judge.

Plaintiff makes two arguments that the trial judge should have recused himself under Canons 2 and 3. First, he argues the trial judge's "impartiality might reasonably be questioned because his findings of fact are not supported by the record." (Init. App. Br. 34). There simply are no findings of fact at issue here.

Second, Plaintiff argues this Court should change existing law, apply the federal "objective appearance of impropriety" test, undertake a *de novo* review of the trial judge's denial of the recusal motion, and find that the judge should have recused himself. (Init. App. Br. 34-38). These arguments have no merit and are not preserved for appeal.

1. Plaintiff's recusal argument must be rejected under South Carolina's settled law on recusal.

Plaintiff acknowledges that South Carolina's current law requires him to show some evidence of actual prejudice by the judge. (Init. App. Br. 34). In an apparent attempt to satisfy this burden, Plaintiff implies that the trial judge's factual findings lack support in the record. (Id.). Plaintiff, however, never identifies any factual finding by the trial court, much less any factual finding not supported by the record. (Id.).¹² Again, there simply are no factual findings at issue in this case – it presents question of law only. Plaintiff also never identifies any evidence showing actual bias. (Id.). Thus, Plaintiff has failed to meet his burden under current South Carolina law and, therefore, his appeal must be denied. Affirmance on this ground moots all other recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

¹² In later arguing for changing South Carolina's law on recusal motions, Plaintiff asserts: "In the present case, the record is clear with evidence that [the judge's] findings are not supported by the record . . ." (Init. App. Br. 37). Here again, however, Plaintiff never identifies any factual finding not supported by the record, and there simply are not factual findings in this case.

2. Plaintiff's argument for a change in the law regarding recusals is not preserved for appeal and ruling on it is unnecessary under the circumstances of this case.

Plaintiff argues that this Court should change South Carolina's law on recusal, shifting from a standard that requires some evidence of bias to the federal "objective standard." Plaintiff then argues this Court should reverse the trial court under this new standard. (Init. App. Br. 34-38).

Plaintiff's argument is not preserved for appeal. He never argued to the trial court that existing South Carolina law on recusal should be discarded in favor of the federal "objective standard." (R. 268-270, *passim*). Thus, he cannot make this argument for the first time on appeal. *In re Michael H.*, 602 S.E.2d at 732.

Moreover, there is no need for this Court to consider changing South Carolina's law. As noted earlier, all issues on appeal present questions of law that are subject to *de novo* review by this Court without any deference to the trial court's reasoning or ruling. Accordingly, Plaintiff cannot demonstrate any prejudice from the denial of the recusal motion, including the failure to apply "new law" to the recusal question. Thus, there is no reason for this Court to consider the requested change in South Carolina law. See *Patel v. Patel*, 599 S.E.2d 114, 119 (S.C. 2004) (court not reaching issue of adopting federal standard because it would not affect the outcome of the appeal).

3. Plaintiff's argument for a change in the law suffers from numerous flaws in logic and in fact.

Plaintiff uses a classic "writer's trick" in presenting his argument for changing South Carolina's recusal law. He first correctly states the advocated federal standard of whether a trial judge's impartiality might reasonably be questioned under all of the circumstances in the case. (Init. App. Br. 35). By the end of his argument, however,

Plaintiff changes the test to whether there is “at least a *suspicion* of bias.” (Init. App. Br. 38) (emphasis added). The federal test is not “suspicion.” Rather, the test is whether an average judge in the same position is likely to remain neutral or whether there is a serious risk of actual bias given human weaknesses and psychological tendencies. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2262-2264 (U.S. 2009).

Here, the only known circumstance is that, at some point in his legal career, the trial judge was a small town lawyer that closed some residential real estate sales in the development. All of this happened at least six years before the trial of this case. Without more, any reasonable person who knows the nature of residential real estate closings could not reasonably conclude that the judge would be biased against Plaintiff or in favor of County. It is uncontested that the judge was not involved in the closing of Plaintiff’s property. There is no evidence that the trial judge had any involvement in anything related to the financial guarantee at issue here or financial guarantees generally. There is no evidence that the judge ever represented either party in the present case. In short, there is no reasonable basis for concluding the judge would be biased in any manner in this case.

During the course of his argument, Plaintiff makes several factual assertions that have no basis in the record. First, Plaintiff asserts: “Under an objective view, Judge Culberston’s disclosure that he *knew some of the parties professionally* and had *worked for them* is sufficient to raise question [sic] as to his impartiality in this case.” (Init. App. Br. 36) (emphasis added). There is no evidence that the judge knew or worked for any party to this action.

Second, Plaintiff again asserts that “the record is clear with evidence that Judge Culbertson’s findings are not supported by the record, such that his impartiality ‘might

reasonably be questioned,' and thereby rendering his disqualification mandatory." (Init. App. Br. 37). Again, there simply are no factual findings in this case. Again, Plaintiff never identifies any findings, much less any findings not supported by the record.

Third, Plaintiff asserts that "[t]he evidence includes not only evidence of bias against Appellants (sic) [Plaintiff], but also evidence of partiality in favor of counsel for the Respondents (sic) [County]." (Init. App. Br. 37). Again, there is no evidence of bias against Plaintiff, and Plaintiff cites none. Plaintiff never identifies any evidence of partiality by the judge in favor of County's attorney, and there is none. Moreover, Plaintiff never raised this issue to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Finally, and for the record, County's attorneys categorically deny this completely false accusation.¹³

Fourth, Plaintiff asserts that the trial judge's "personal and professional interactions could have resulted in his being called as a witness in the trial of this case." (Init. App. Br. 37). Plaintiff never identifies how the judge would have any relevant information, or what that information might be, such that he could be called as a witness. Moreover, Plaintiff never raised this issue to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732.

In short, Plaintiff strings together several assertions that have no evidentiary support to advocate changing South Carolina law under an argument that is not preserved for appeal.

¹³ Plaintiff later states: "Importantly, Canon 3(E)(1) does not distinguish between 'a party or a party's lawyer' where bias is alleged." (Init. App. Br. 39). This appears to be a reference back to Plaintiff's false assertion of the judge having "partiality in favor of counsel for the Respondents (sic)." Plaintiff's appellate counsel (who were not trial counsel) make this false accusation for the first time on appeal – they have several cases pending against County on the same "financial guarantee" issue.

In closing his argument, Plaintiff argues that Judge Culbertson “should have at least timely and fully disclosed the relationships and circumstances on the record.” (Init. App. Br. 38). This appears to be an argument that the trial judge, prior to trial, should have revealed his alleged representation of the developer in real estate closings. (See also Init. App. Br. 36). Plaintiff never made this argument to the trial court (R. 268-270), so it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Moreover, this argument (like all of Plaintiff’s recusal arguments) is based on an inference of bias drawn from a “fact” that has no evidentiary support. And again, Plaintiff never explains how or why any presumed representation of the developer in residential real estate closings over six years before trial would cause the judge to be biased against Plaintiff or in favor of County.

E. Plaintiff’s “due process” argument on recusal is not preserved for appeal and has no merit.

Plaintiff argues that the due process clauses of the state and federal constitutions required the judge to recuse himself, and Plaintiff also seems to argue that the U.S. Supreme Court has overruled South Carolina’s recusal law under the federal due process clause. (Init. App. Br. 38-41). Plaintiff did not make these arguments to the trial court (R. 268-270) and, therefore, these arguments are not preserved for appeal. *DuRant v. South Carolina Dep’t of Health & Envtl. Control*, 604 S.E.2d 704, 709 (S.C. App. 2004) (constitutional issues not raised at trial are not preserved for appeal).

Here, as in his prior argument, Plaintiff makes the same factual assertions that, as demonstrated earlier, have no basis in the record. He also makes some new yet still unfounded and frivolous assertions.

First, Plaintiff complains that the trial judge presided over claims “against the County in which he now sits as a judge.” (Init. App. Br. 40). Plaintiff would have this

Court rule that no resident judge in Georgetown County can preside over any claim against Georgetown County. Plaintiff did not make this “argument” to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Moreover, this argument is frivolous on its face.

Second, Plaintiff asserts that the judge presided over claims “concerning transactions that he conducted and with which he was directly involved.” (Init. App. Br. 40). It is undisputed that the judge was not involved in the Plaintiff’s closing. There is no evidence that the trial judge had any knowledge of or involvement with the “financial guarantee” transactions at issue here. This assertion is simply frivolous.

In short, Plaintiff’s “due process” arguments are not preserved for appeal and are manifestly without merit.

IV. As an additional sustaining ground and reason to affirm, the trial court erred in denying County’s directed verdict motion on 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.” S.C. Code Ann. § 15-78-110 (Rev. 2005). The date on which discovery should have been made and, therefore, the date on which the statute of limitations begins to run, is an objective test. *Hackworth v. Greenville County*, 637 S.E.2d 320, 322 (S.C. App. 2006). The question is not when a plaintiff actually knows he has a claim – rather, the question is whether the particular circumstances would alert a reasonable person some claim against another party might exist and he should make inquiry about the matter. *Id.*

Plaintiff commenced this action on April 20, 2012, so the question is whether the circumstances existing on or before April 19, 2010, put Plaintiff on inquiry notice to

determine whether he might have a claim against someone. As demonstrated below, Plaintiff should have made inquiry no later than November 3, 2008, and this inquiry would have revealed the matters about which Plaintiff sues in this case. The undisputed circumstances in this case are summarized below:

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).
2. Plaintiff 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).
3. Plaintiff bought the property sight unseen on the recommendation of his friend – his friend closed the sale for him under a power of attorney. (R. 210-211).
4. Plaintiff purchased the property in October 2006, knowing that no infrastructure was in place. (R. 186-187).
5. He was not concerned about the absence of infrastructure, because he knew about the financial guarantee filed with County. (R. 191). He apparently learned about it from the salespeople in the developer's sales office. (R. 207).
6. Plaintiff never contacted County at any time to confirm the existence, amount, or validity of the financial guarantee. (R. 211-212, 214-215). He nevertheless relied on the existence of the financial guarantee in buying the property – he would not have bought the property if the financial guarantee had not been in place. (R. 192).
7. By December 2007, Plaintiff believed the property had little or no value, because the infrastructure was not yet in place. (R. 212-213).
8. 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).

9. 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 of his “loss” no later than November 3, 2008. 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”). 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 had relied completely and absolutely on the existence of the financial guarantee in buying the property without first contacting 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 did not commence this action until April 20, 2012 and, therefore, his claim is barred by the two-year statute of limitations. Affirmance on this ground moots all issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

CONCLUSION

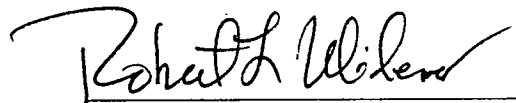
The sole purpose of the “special duty test” is to determine whether the legislature intended that a statute create a private duty enforceable by individuals. That test is irrelevant here, because the statute expressly states that it does not create any special or private duty enforceable by Plaintiff. Thus, Plaintiff has no claim against County. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

It is uncontested that the immunity afforded by § 15-78-60(4) applies here. Plaintiff's only argument against this immunity is that it is subject to a "gross negligence" exception. That argument has no merit, because subsection (4) does not have a "gross negligence" exception, and no subsection with the exception applies to this case. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

Plaintiff was on inquiry notice no later than November 3, 2008, and reasonable inquiry at that time would have led him to discover the matters of which he now complains. Plaintiff commenced this action in April 2012 and, therefore, this action is barred by the two-year statute of limitations. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

For these reasons, and for all of the reasons set forth herein, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,



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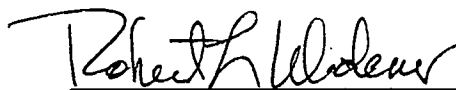
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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THE STATE OF SOUTH CAROLINA
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SC SUPREME COURT

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.

FINAL REPLY BRIEF OF APPELLANT

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The Defendant-Respondent County of Georgetown ("the County") has filed its Initial Brief of Respondent. In its initial brief, the County contends that the Circuit Court's judgment should be affirmed: (1) for the reasons given by the Circuit Court in its orders; and (2), as an additional sustaining ground, because this action purportedly was filed following the expiration of the statute of limitations. Pursuant to Rule 208(a)(3), SCRAP, Plaintiff-Appellant David M. Repko submits this Appellant's Initial Reply Brief for purposes of replying to County's arguments and clarifying the County's various misconstructions of Appellant's arguments on appeal.

ARGUMENT

I. The County's Initial Brief has failed to rebut the Appellant's argument that the challenged provision of Article V, Section 3-1 is unenforceable given this State's Tort Claims Act.

The Tort Claims Act provides that a county is "liable for . . . [its] 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(a). However, the County has attempted to limit its liability for torts far beyond the limitations and exemptions contained in our State's Tort Claims Act. The ordinance at issue, Article V, Section 3-1 of the Georgetown County Improvement Standards Ordinance, provides in pertinent part:

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.

In granting the County's motion for a directed verdict, the Circuit Court *effectively* construed this language as providing sovereign immunity for the County with respect to its clear mishandling of financial guarantees provided by the developer. A

private person, under like circumstances as the County, would be liable for to the Appellant for negligently handling financial guarantees. In direct contradiction to the foregoing, the Circuit Court's construction of Section 3-1 finds that the County is *not* liable to the Appellant, or anyone for that matter, for such tortious conduct. Importantly, the Tort Claims Act does not provide counties any specific immunity or exemption for this conduct. Appellant has argued and currently argues, as is briefed before this Court, that the Circuit Court's construction¹ of Section 3-1 in this way is erroneous as such a construction and effect is preempted by our State's Tort Claims Act.

In response to Appellant's preemption argument, the County argues (1) that the Appellant "mixes the concepts of duty, liability, and immunity to construct an erroneous argument that the Tort Claims Act 'preempts' §3-1 and renders it void" and (2) that said argument is not preserved for appeal and "manifestly without merit." (Initial Brief of Respondent at 3).

A. The Appellant's preemption argument is properly preserved for appellate review.

Initially, the County baldly asserts that Appellant's preemption argument is not preserved for appeal. (Initial Brief of Respondent at 3). However, the County subsequently asserted that "it is *questionable*" whether Appellant's preemption argument is preserved for appeal. (Initial Brief of Respondent at 10, fn. 3). Both assertions by the County are misguided.

At trial, Appellant's counsel raised and argued the substance of Appellant's preemption argument in opposition to the County's directed verdict motion:

¹ The ordinance may be enforceable when construed to simply limit the County's contract liability – viz., to prevent any landowner from claiming he is a third party beneficiary of a financial guaranty accepted by the County.

MR. MOODY: Clearly, the governmental – a, a county is not allowed to just wipe away, waive any of its liability based upon the Tort Claims Act. The Tort Claims act is applicable to all government entities.

What I'm saying is the County cannot override South Carolina law with regards to their liability for their negligent conduct just by writing an ordinance that "We don't owe a duty to anybody."

(R. p. 239, lines 21-24; p. 240, lines 6-8). After the Circuit Court's ruling, Appellant again reiterated his argument in support of his motion to reconsider. (R. p. 262, lines 13-14; p. 263, lines 24-25) ("South Carolina Tort Claims act is the exclusive remedy to deal with claims against a government entity . . . Essentially what the County has sought to do is circumvent the Tort Claims Act by including that language"). Accordingly, Appellant raised this preemption argument twice.

Although unsupported, the County's argument appears to rest upon Appellant's trial counsel having used *different terminology* than it has used in its brief. Instead of using the words "preemption" or "sovereign immunity," Appellant's trial counsel used the similarly effective word "override" and the phrase "a county is not allowed to just wipe away, waive any of its liability based upon the Tort Claims Act." (R. p. 239, lines 21-24; p. 240, lines 6-8). However, this argument is not waived or wanting of preservation merely because Appellant's trial counsel did not use the more formal legal terminology of "preemption" and "sovereign immunity." The substance and nature of Appellant's preemption argument at trial was that the County could not waive, by way of this ordinance, its tort liability beyond the specific provisions of the Tort Claims Act. Use of the word "override" in this context is the substantial equivalent of the word "preempt."

Interestingly, South Carolina appellate courts repeatedly find an issue is preserved for appellate review when the nature of the issue is clear from the argument made in the

record, even upon failure to use correct legal terminology. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding argument in motion for directed verdict preserved for appeal even though movant omitted “corpus delicti” from argument); *State v. James*, 362 S.C. 557, 562, 608 S.E.2d 455, 458 (Ct. App. 2004) (finding argument in motion for directed verdict as preserved for appeal even though movant argued “insufficient evidence” instead of “substantial circumstantial evidence”); *State v. Guillebeaux*, 362 S.C. 270, 274 n.1, 607 S.E.2d 99, 101 n.1 (Ct. App. 2004) (finding argument improperly stated as “motion for mistrial” nevertheless preserved a “motion for a new trial” for appellate review). It seems clear that no specific or “magic language” is required to preserve an issue for appellate review. Therefore, the County’s argument that Appellant’s preemption argument is not preserved for appeal is contrary to relevant South Carolina case law and meritless.

Appellant’s argument is preserved for appeal, especially upon view of *why* Appellant continued to argue the Tort Claims Act in vehement opposition to the Circuit Court’s construction of the ordinance’s “sovereign immunity” language. The legal nature and substance of Appellant’s argument to the Circuit Court is manifest: the Tort Claims Act renders the “sovereign immunity” language of the ordinance unenforceable. Whether Appellant’s trial counsel presented that issue as “preemption” or an attempt to “override” the Tort Claims Act is irrelevant, as the nature of the argument is manifest. Therefore, the County’s contention that Appellant’s preemption argument is not preserved for appellate review must be rejected as unfounded and incorrect.

- B. The County has failed to make any credible legal argument that the ordinance's language can permissibly disclaim and limit the County's tort liability beyond the provisions of the Tort Claims Act.

The County offers only two arguments in response to the Appellant's argument that the "sovereign immunity" provision of the ordinance is unenforceable. First, the County contends that Appellant's argument is based on a "false premise." According to the County, Section 3-1 is "not a sovereign immunity provision - it goes to the existence of a duty and does not provide an immunity from breach of a duty." (Initial Brief of Respondent at 9). This argument is not only meritless, but is disingenuous. The Appellant's brief clearly explained that Appellant would, throughout its brief, *refer* to the challenged ordinance language as a "sovereign immunity provision," because the Circuit Court's construction effectively provides the County with sovereign immunity for accepting and handling a financial guarantee thereunder. Clearly, the Appellant is simply using the phrase "sovereign immunity provision" as a shorthand reference for the portion of Article V, Section 3-1 that the Appellant contends is unenforceable as construed. To be clear, Appellant is *not* arguing or asking this Court to decide whether the ordinance is indeed a grant of sovereign immunity. Instead, Appellant argues that the Circuit Court's construction of the challenged provision is simply unenforceable as construed given this State's Tort Claims Act.²

Second, the County argues that the ordinance does not involve immunity, but only the existence of a duty. The County's argument not only confuses Appellant's argument, but also confuses the legally distinct "sovereign immunity" and "statutory immunity." As the existence of a duty is required for the tort of negligence, the Circuit Court's

² This is another reason the failure of counsel to characterize the ordinance using these words is irrelevant to whether the preemption issue is preserved for appeal.

construction of the ordinance stating “no obligation” is owed has effectively conferred sovereign immunity to the County. Unlike statutory immunity, which is waived if not pleaded and is usually subject to a gross negligence exception, sovereign immunity insulates the County from tort liability in *all* situations. Accordingly, given the Circuit Court’s construction, the Appellant’s characterization of the challenged language as a “sovereign immunity provision” is an accurate description of the ultimate net effect as it has been construed. The County’s claim that Appellant’s preemption argument is based on a “false premise” is manifestly incorrect.

In response to Appellant’s preemption argument, the County contends that Appellant “misperceives the impact and purpose of the Tort Claim Act. It does not create or impose any duty – it simply limits liability for breach of an existing duty, and § 3-1 precludes the existence of any special or private duty in this case.” (Initial Brief of Respondent at 10). Again, to be clear, Appellant is *not* arguing that the Tort Claims Act imposes a duty. Instead, Appellant argues that the Tort Claims Act renders the challenged “no obligation” language of Section 3-1 unenforceable when construed, as the Circuit Court has, to completely disclaim any tort duty. As argued in Appellant’s initial brief, this Court should find that the “sovereign immunity” provision of Section 3-1 is unenforceable as overridden, waived, or preempted by this State’s Tort Claims Act.

II. The County failed to rebut Appellant’s arguments that the “special duty” test is satisfied and the Circuit Court’s holding to the contrary should be reversed.

The County argues that the Circuit Court correctly found that Appellant failed to satisfy elements two and three of the “special duty” test. (Initial Brief of Respondent at 10). With respect to element two test – “the statute imposes on a specific public officer a

duty to guard against or not cause that harm.” *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 443, 697 S.E.2d 575 (2010). Appellant argues that the County’s decision to accept a financial guarantee is imposed on a specific public officer of the Planning Department as provided in the ordinance. (R. p. 243, line 24 – p. 244, line 8). Additionally, as provided in Section 3-5, the County’s granting of reductions of a financial guarantee is imposed on the Planning Department, subsequently, to the Department of Public Works.

Contrary to the County’s argument and Circuit Court’s finding, South Carolina case law shows that element two can be satisfied when the statute identifies a specific agency or specific employees of that agency. In *Jensen v. Anderson County Dep’t of Social Services*, social workers employed by Anderson County Department of Social Services failed to properly investigate a child abuse complaint that the mother’s boyfriend was beating her child. *Jensen*, 297 S.C. 323, 377 S.E.2d 102 (Ct. App. 1988), *aff’d*, 304 S.C. 195, 403 S.E.2d 615 (1991). The child subsequently was beaten to death by the mother’s boyfriend. The child’s family thereafter filed a wrongful death action against a county agency. The statute then at issue, The Child Protection Act, designated each county’s Department of Social Services as the “local child protection agency” and imposed a duty upon it to conduct “an appropriate and thorough” investigation to determine whether a report of abuse is “indicated” or “unfounded.” If indicated, the social worker was required to petition the Family Court for the removal of the child from the home. The Court of Appeals, affirmed by our Supreme Court, found that the statutory language imposed a duty on *specific* public officers in satisfaction of element two of the “special duty” test. *Jensen*, 297 S.C. at 331. Accordingly, the *Jensen* case shows that element two is satisfied by statutory language identifying a specific agency or specific

employees of that agency. Here, the ordinance's language identifies a specific agency or employees of that agency by imposing a duty in the first instance upon the Planning Department and, subsequently, the Department of Public Works.

With respect to element three of the "special duty" test, requiring that a class of persons the statute intends to protect is identifiable before the fact, Appellant argues that property owners in the development at issue here are the obvious class *intended* to be protected. Further, the Circuit Court's ruling that element three is unsatisfied rests upon its erroneous finding that the "no obligation" language is not only enforceable, but also expansively disclaims any duty sounding in tort, and altogether show a *lack of intent* to protect property owners. As briefed, Appellant reiterates that the "sovereign immunity" language is unenforceable as construed by the Circuit Court.

Finally, the County opposes the existence of a "special duty" based upon policy concerns. Relying on *Brady Dev. Co. v. Town of Hilton Head Island*, the County argues that imposing upon it a duty in this case would make it an insurer of developments and discourage regulation of developments. However, the policy concerns espoused in *Brady* are simply not invoked in this case as the nature of the duty and the essential purpose of the ordinance at issue in *Brady* are incongruent to those in this case. Imposing a duty on the County running to Appellant and other lot owners in this development would not make the County an insurer of all developments. Instead, the County's grant of a financial guarantee in lieu of infrastructure completion, as a condition precedent to selling lots, would then impose a duty in handling such a guaranty. The duty would be self-imposed by the County, as intended by the ordinance, only when the Planning Department determined it necessary to accept a bond to be held in trust for the

completion of a development. Therefore, the County's arguments are without merit and misplaced and the Circuit Court's judgment to that end must be reversed and the case remanded for trial.

III. The County has failed to show that it was entitled to a directed verdict on immunity grounds.

Initially, the County contends that Appellant has abandoned his argument that S.C. Code Ann. § 15-78-60(4) has no application to this case. Contrary to this assertion, Appellant's trial counsel's argument is quoted verbatim within Appellant's Initial Brief. (at 33). As quoted in the brief, subsection (4) has no application because, at the time of negligence in handling the financial guaranty, the County was acting in an administrative capacity rather than an enforcement capacity, and subsection (4) applies only when the County acts in an enforcement capacity.

Additionally, as Appellant argued at the motion for reconsideration, the Circuit Court completely overlooked that subsection (4) is subject to a gross negligence exception. The jury could have found that the County employees were grossly negligent – i.e., that they intentionally and consciously failed to follow their own ordinance and own professional standards, failed to exercise the care necessary under the circumstances, or failed to exercise even slight care in allowing reductions in the \$1.3 million financial guarantee posted by the developer. Accordingly, this is reversible error.

With respect to discretionary immunity under S.C. Code Ann. § 15-78-60(5), the Appellant has argued this immunity subsection did not apply, as a matter of law, because the ordinance did not give the County discretion to reduce the letter of credit to less than 125% of the amount needed to complete the infrastructure.

MR. MOODY: With regards to Number Five, Your Honor, there is no discretion in the statute with regard- the ordinance with regards to how much monies are to be retained going forward. The . . . ordinance requires that 125% percent of the cost to complete is supposed to be retained. There is no discretionary function to go below that. The employees decided or the County decided to allow that to happen. So that's not a discretionary matter.

(R. p. 246, lines 5-13). The County has no response to this argument other than to claim it is somehow "too conclusory" to present an argument for appeal. The County's argument does not have a basis in reality. Subsection (5), by its very terms, provides immunity only for losses caused by acts or omissions when the government entity exercises discretion *and* "which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5). Once the financial guaranty has been accepted, it is mandatory that the financial guarantee stay at 125% of the cost to complete – any reduction of the guaranty below that amount is simply not "in the discretion or judgment of the governmental entity or employee." No additional amplification of this argument is necessary.

The County complains that Appellant's trial counsel did not formally argue gross negligence as exceptions to subsection (4) and (5) in response to the directed verdict. Again, it is clear from the record that Appellant's trial counsel argued that the County had acted in a grossly negligent manner and this argument was sufficient to apprise the Circuit Court that the subsections (4) and (5) did not apply as a matter of law. *See, e.g., Russell*, 345 S.C. at 132, 546 S.E.2d at 204; *James*, 362 S.C. at 562, 608 S.E.2d at 458; *Guillebeaux*, 362 S.C. at 274 n.1, 607 S.E.2d at 101 n.1 (all supporting proposition that "magic language" and proper legal terminology are unnecessary to preserve an issue for appeal so long as nature of issue raised on record). Also, Appellant's trial counsel raised

gross negligence as an exception at the hearing on his Rule 59 motion. *See* (R. p. 266, lines 5-13) (Plaintiff's counsel argued to the Circuit Court that, because the County has raised subsection (12) as a defense, the court was required to construe the remaining immunity provisions as also containing a gross negligence exception).

The County, alternatively, argues that there is no applicable gross negligence exception to subsection (4) and (5) because the Appellant successfully persuaded the Circuit Court that the County was not entitled to a directed verdict under subsection (12).³ This argument is meritless. The South Carolina Supreme Court has ruled that, when a government entity *asserts* various exceptions to the waiver of immunity, a gross negligence standard is read into all immunity provisions. There is no requirement that the plaintiff must *lose* on his subsection (12) argument before he gets the benefit of this rule. *See Steinke v. S.C. Dep't Labor, Licensing and Reg.*, 336 S.C. 373, 395-96, 520 S.E.2d 142 (1999)(emphasis added) (“[t]his Court and the Court of Appeals previously have recognized that the correct approach, when a governmental entity *asserts* various exceptions to the waiver of immunity, is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard”).

The County's argument that gross negligence exceptions are read into all immunity provisions *only* when subsection (12) “applies” to the case is also incorrect. If subsection (12) applies to the case, then the government entity has complete immunity under that subsection and it is unnecessary to even consider other immunity sections raised by the government entity. The County's argument, accordingly, should be summarily rejected.

³ The Circuit Court denied the County's claim that S.C. Code Ann. § 15-78-60 (12) entitled it to immunity. (Order at 10).

IV. The Circuit Court may not be affirmed on the statute of limitations ground.

The County argues the Circuit Court's judgment should be affirmed on statute of limitations ground as an additional sustaining ground. After the Circuit Court denied the County's motion for summary judgment on statute of limitations grounds, the County renewed its argument in support of its directed verdict motion. Again, the Circuit Court denied the County's motion on limitations at the directed verdict stage. Ruling from the bench, the Court explained that "I am not granting the directed verdict motion on the statute of limitations argument . . . I'm kind of inclined to believe that that might have been a factual issue to be determined by the . . . jury." (R. p. 250, lines 17-18 and 21-23); *see also* (R. p. 11).

Viewing the evidence in the light most favorable to the Appellant, the Circuit Court correctly denied the County's motion for directed verdict on statute of limitations grounds. An action against a government entity is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered. *See* S.C. Code Ann. § 15-78-110. The "loss" at issue here is the County's loss of a substantial sum from the financial guarantee for Phase 2-D-1 of the Harmony Township project, without these sums being applied to the infrastructure for this phase. Appellant testified that he first determined that he potentially had a claim against the County for improperly disbursing the financial guarantee in March of 2012 when a friend forwarded an email to him that alerted him to the County's mishandling of the financial guarantees:

Q. Okay, at what point did you ever determine that you might potentially have a claim against Georgetown County?

A. It was in March of 2012.

Q. And how did that come about?

A. An email was forwarded to me.

(R. p. 193, line 23 – p. 194, line 2).

Q. Was it at that point that you were put on notice that there may have been a problem with the County's . . . handling of these financial guarantees?

A. Yes.

Q. In March of 2012?

A. Yes.

(R. p. 194, line 22 – p. 195, line 2). *See* (R. p. 330)(email).

Viewing the evidence in the light most favorable to the Appellant, Mr. Repko's testimony establishes the date Appellant discovered "the loss." The County's claim that Mr. Repko "knew of his loss no later than November 3, 2008" is meritless. (Initial Brief of Respondent at 31). The only question is whether, viewing the evidence in the light most favorable to the Appellant, the loss "should" have been discovered more than two years from the April 20, 2012 filing date. The "discovery date" is determined as when "the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Hackworth v. Greenville County*, 371 S.C. 99, 103, 637 S.E.2d 320 (Ct. App. 2006) (quoting *Young v. S.C. Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

Ignoring that the evidence and inferences must be viewed in the light most favorable to the Appellant, the County again insists that the date is "no later than November 3, 2008" because he knew the developer was in bankruptcy, knew the infrastructure had not been installed, and believed that his property had no value because

of the absence of infrastructure. (Initial Brief of Respondent at 31). This argument is absolutely meritless because the foregoing facts do not even remotely permit an inference that the County lost the financial guarantee and no longer had the ability to complete the infrastructure by itself. As Appellant testified, nothing in the letter he received about the bankruptcy filing put him on notice that the County was drawing down the letters of credit. (R. p. 222, lines 2-4).

Further, the County ignores that, after the developer stopped working on the project, a new owner took over the project. The new owner hired its own contractor and requested the County release funds for payment to the contractor after work was completed. (R. p. 64, lines 14-20). The County released funds “quite a few times and maybe for a year after that.” (R. p. 64, line 23 – p. 65, line 1). The County determined the new owner of Harmony was not trustworthy and stopped releasing funds. (R. p. 65, lines 3-11). The new developer walked off the job. (R. p. 74, lines 16-22). The record does not provide full details of precisely when the second developer walked off the job, or when, if ever, Appellant discovered that the second developer also stopped working. But, once again, the scant evidence in the record provides no inference that a reasonable person would have known of the County’s mishandling of the financial guarantee based on the second developer’s withdrawal from the project.

The County’s argument that the bankruptcy of the first developer placed Appellant on constructive knowledge of the mishandling of the financial guarantee also ignores the effect of the automatic stay of the Bankruptcy Code. When a debtor files for bankruptcy, the filing operates as an automatic stay against, *inter alia*, “any act to obtain possession of property of the estate or of property from the estate or to exercise control

over property of the estate.” 15 U.S.C. § 362(c). The County has presented no evidence or argument that the financial guarantee was *not* part of the developer’s bankruptcy estate, or that the County obtained relief from the stay that enabled it to exercise control over the financial guarantee. As a result, a person of common knowledge and experience would not conclude from the mere bankruptcy filing and absence of infrastructure that the County had lost the financial guarantee; rather, such person would conclude that the funds were frozen by the bankruptcy and that the County could not access the funds until the bankruptcy concluded, or the County obtained relief from the stay. Nevertheless, as the Circuit Court recognized, this is a question of fact for the jury to determine in any event. Only when the evidence yields only one inference is a directed verdict in favor of the moving party proper. *See The Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125 (Ct. App. 2006). The trial court must deny the motion when either the evidence yields more than one inference, or the inferences are in doubt. *See Law v. S.C. Dep’t of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006). Accordingly, the Circuit Court’s judgment on the statute of limitations should not be affirmed as an additional sustaining ground in light of the evidence yielding more than one inference.

CONCLUSION

For the reasons stated, the Appellant renews his request that the judgment granting a directed verdict for Georgetown County, the judgment denying the Appellant’s Motion to Recuse, and the judgment denying the Motion for Reconsideration and for New Trial, should be reversed. This case should be remanded for trial.

(Signature Page Follows)

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August 26, 2014
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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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the **Final Reply Brief of Appellant** complies with the provisions of Rule 211(b), SCACR, and with the April 15, 2014, Supreme Court Order regarding personal identifying information and other sensitive information.



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