IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-06922
Appellate Tracking No. 2014-000582

Opinion No. 2016-UP-351, filed June 30, 2016

Tipperary Sales d/b/a La-Z-Boy Furniture Gallery, Appellant,

v.

South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; Charleston Water System; Associated Developers, Inc., Parkhill, LLC, Defendants,

Of Which South Carolina Department of Transportation; South Carolina Department of Health and Environmental Control; City of North Charleston; and Charleston Water System are the Respondents.

Petition for Rehearing on behalf of Respondents South Carolina Department of Transportation, City of North Charleston, and Charleston Water System

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In this action, the Appellant Tipperary Sales asserted multiple causes of action against the Respondents governmental agencies for damages arising from various flooding events in North Charleston which resulted in damages to the La-Z-Boy Furniture Gallery operated by Appellant Tipperary Sales at Northwoods Pointe Shopping Center. Tipperary alleges causes of action for negligence/gross negligence and inverse condemnation, and trespass against SCDOT, the City of North Charleston, and the

Charleston Water System.[1] The Trial Court granted summary judgment to SCDOT, and dismissed the claims against the City of North Charleston and Charleston Water System.[2] As to each Defendant, the Trial Court held that the Governmental Entities are immune from liability for any negligence claims arising out of any design, construction, and maintenance decisions related to a drainage system because such decisions are quasi-judicial, relying on the immunity provisions of the South Carolina Tort Claims Act, S.C. Code. Ann. §15-78-60, and the Court of Appeals' decision in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The Trial Court further held that the inverse condemnation claims fail because Tipperary did not allege any affirmative, positive, aggressive act, and similarly, the trespass claims fail because Tipperary did not allege any affirmative, intentional action of invasion onto Tipperary's property. The negligence claims against Charleston Water System were dismissed on the additional ground that it is a statutorily-created Public Works entity under S.C. Code Ann. §§ 5-31-210 et seq., and, as such, it does not have any control of any design, construction, or maintenance of any drainage system in the City of North Charleston.

This Court has affirmed the dismissal of the negligence and trespass claims against the City of North Charleston and SCDOT, but reversed and remanded the claims for inverse condemnation. As to the Charleston Water System, the Court has affirmed

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[1] Tipperary also alleged causes of action for negligence/gross negligence and inverse condemnation against SCDHEC. This Court has affirmed the Trial Court's order granting summary judgment to SCDHEC. Accordingly, SCDHEC does not seek rehearing.

[2] The Trial Court dismissed all claims related to any flood events prior to April 8, 2008, based on the two-year statute of limitations, S.C. Code Ann. §15-78-110. Tipperary has not appealed from this ruling.

the dismissal of the inverse condemnation claim, but reversed and remanded the claims in negligence and trespass. These Respondents seek a rehearing on the ground that the Court has misapprehended and/or overlooked points of fact and law as set forth below.

Negligence Cause of Action against Charleston Water System

The Court holds that the dismissal of the negligence claim against Charleston Water System is premature because:

> Tipperary's specifications of negligence against CWS, however, concern CWS's alleged failure to lower the water level of the reservoir to prevent upstream flooding during heavy rainfalls despite its ability to do so. In our view, the alleged acts or omissions on CWS's part are more appropriately classified as operational concerns rather than failures in design, construction, or maintenance. In our view, the alleged acts or omissions on CWS's part are more appropriately classified as operational concerns rather than failures in design, construction, or maintenance. Therefore, we question whether they involve "legislative, judicial, or quasi-judicial action or inaction."
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> Unlike Hawkins, which involved the grant of summary judgment, Tipperary's claim against CWS was dismissed on the pleadings, and CWS did not present evidence to the circuit court that it used discretion in its decisions regarding the water level of the reservoir or exercised at least slight care. See Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992) ("[M]ere room for discretion on the part of the governmental entity was not sufficient to invoke the discretionary immunity provision. Proof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice is necessary." (Emphasis added)).

The Charleston Water System respectfully seeks rehearing because the Court has misapprehended and overlooked certain points of fact and law as set forth below.

1. The Court has overlooked or misapprehended that in any negligence action, existence of a duty is a necessary element, and in this case, Tipperary has cited no

authority that would support any conclusion that Charleston Water System had a duty to lower the water level in the Reservoir to prevent the upstream flooding in the Mall area.[3]

Existence of a legal duty is a matter of law, and a mere allegation of a duty is not accepted as true on a Rule 12(c) motion. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct.App.1986) ("The existence and scope of the duty are questions of law."); Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988)[4]("A motion under ... Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law."). "Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. It follows that a person usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act." Rayfield v. S. Carolina Dep't of Corr., 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988).

South Carolina Code includes a "Dams and Reservoirs Safety Act," §§49-11-110 et seq., but it only deals with the safety of the structure of a dam or reservoir and allows SCDHEC to order a drawdown where structure of dam/reservoir is threatened by imminent floods. S.C. Code §49-11-190. The Act does not, however, impose any duty

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[3] The Charleston Water System adamantly denies that the Reservoir is capable of being lowered to manage any upstream drainage issues during impending weather events.

[4] *Overruled on other grounds in* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

on the CWS to open its spillway to release water to avoid upstream flooding during heavy rains.

At common law, "the only obligation imposed upon a dam operator in the operation of his dam is not to worsen conditions ***downstream*** beyond what would have occurred in the absence of the dam. Key Sales Co. v. S. Carolina Elec. & Gas Co., 290 F. Supp. 8, 23 (D.S.C. 1968), *aff'd* 422 F.2d 389 (4th Cir. 1970) (emphasis added).[5] In this case, Tipperary's store is ***upstream***, and paradoxically, any argument that the Water System is obligated to lower the levels of the Reservoir – if it even has that engineering capability -- runs contradictory to the common law duty not to worsen the conditions downstream.

2. The Court misapprehends and misapplies the decision in Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997). The Court cites to Miller with the parenthetical: "recognizing the City of Camden had, pursuant to its contract with a textile company that built a reservoir to aid production at its plant, "complete control of the dam and water level in the event of a weather emergency". First, the claims in Miller arose from the dam breaking; there was no allegation that the City was negligent in failing to lower the level during a weather event. Second, there was no evidence that the City was

[5] Courts in other jurisdictions also have held that the owner of a water supply reservoir has no duty to institute flood control during heavy rains. Shamnoski v. PG Energy, Div. of S. Union Co., 579 Pa. 652, 680, 858 A.2d 589, 606 (2004)("This was not a flood-control dam, but a water supply reservoir and there is no support for an argument that every dam owner has a duty to institute flood control measures in times of heavy precipitation."); Kambish v. Santa Clara Val. Water Conservation Dist. of San Jose, 185 Cal. App. 2d 107, 110, 8 Cal. Rptr. 215, 217 (Ct. App. 1960) ("no duty to improve that situation by using the dam for flood control"); Iodice v. State, 277 A.D. 647, 648-49, 102 N.Y.S.2d 742, 743 (App. Div.) aff'd, 303 N.Y. 740, 103 N.E.2d 348 (1951)(no legal duty imposed upon state as owner of water storage reservoir to operate its dam for flood control purposes).

obligated to control the lake level during weather events; rather, the opinion recited that "the City agreed to maintain the level of the lake at approximate spillway level, absent some repair or weather emergency." Third, the City's duties and obligations were not before the Court; the issues on appeal related to the duty of the Grantor/textile company (Kendall) that built the reservoir and retained rights to draw from it for factory production purposes when it transferred the reservoir to the City of Camden. Fourth, the Court made two holdings: (1) "we conclude Kendall owed no duty of care to respondents based on its contractual right of control"; and (2) "there is a factual issue regarding Kendall's status as a volunteer," and thereby owed a duty of due care under the common law. Nothing in the Miller decision supports the Court's ruling in this case.

3. The Court has misapprehended or overlooked the application of the immunity provisions of §15-78-60(1) for policy level discretionary decisions.

CWS's refusal to open the spillway is a discretionary decision under the quasi-judicial immunity provision of §15-78-60(1), which provides that: "The governmental entity is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction." In line with Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) and City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex.1997), the Texas appellate court held that a county water company's decision whether to open the spillway of a reservoir to manage flood control constituted a discretionary decision for which the water district was immune from liability. Bennett v. Tarrant Cnty. Water Control & Imp. Dist. No. One, 894 S.W.2d 441, 452 (Tex. App. 1995).

In reversing the decision on discretionary immunity, the Court states that Charleston Water System did not present evidence that it used discretion in its decisions,

citing Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992). In so holding, the Court misapprehends the application of quasi-judicial immunity under § 15-78-60(1) in contrast to the discretionary immunity under §15-78-60(5) which provides: "The governmental entity is not liable for a loss resulting from ... (5) 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." It is accurate to state that:

> To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. Furthermore, the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.

Graham v. Town of Latta, S. Carolina, No. 2013-000752, 2016 WL 1239752, at *9 (S.C. Ct. App. Mar. 30, 2016) (citations and quotations omitted). However, that is true only as to discretionary immunity under §15-78-60(5). As the Court explained the differences in Graham,

> In Hawkins, this court held the Tort Claims Act barred plaintiff's claims because the design and maintenance of a municipal stormwater system is a discretionary governmental function requiring a city to exercise measured policy judgments. Id. at 292–94, 594 S.E.2d at 563–64. Accordingly, the City of Greenville was "immune from liability for [the] negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." Id. at 294, 594 S.E.2d at 564.
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> *Hawkins*, however, did not address the questions of whether the municipality actually weighed competing considerations or utilized accepted professional standards in designing and maintaining its stormwater drainage system. Instead, Hawkins focused, in pertinent part, upon the degree of discretion granted to the City to "exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville." ***To the extent measured policy***

> ***judgments are at issue, Hawkins would certainly control.*** The evidence presented at this trial, however, demonstrates this is not the situation in the case at bar. (Emphasis added)

2016 WL 1239752, at *9-10. In this case, the decisions in issue are measured policy judgments immune from tort liability under §15-78-60(1).

4. The Court misapprehended the application of S.C. Code Ann. 5-31-250, because the Charleston Water System cannot be held liable for failure to act beyond its authority. The Trial Court properly dismissed the claims against the Charleston Water System related to the design, construction, and/or maintenance of the drainage system in the Mall area on the additional ground that CWS's authority is limited by § 5-31-250:

> The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

S.C. Code Ann. § 5-31-250. The Charleston Water System is not empowered to operate a stormwater drainage system, and Tipperary's allegation that a drainage basin leading into the Goose Creek Reservoir – below the "choke point" which it alleges is the source of the drainage problems -- is owned by CWS simply does not defeat the immunity under §15-78-60(1), or the scope of authority under §5-31-250.

Trespass Claim Against Charleston Water System

The Court has reversed the dismissal of the trespass claim against Charleston Water System, stating:

> Finally, we hold the circuit court should not have dismissed Tipperary's trespass claim against CWS on the pleadings. As Tipperary pointed out in its brief, it alleged CWS "intentionally and knowingly directed storm

> water runoff to [its] premises."4 Tipperary, therefore, asserted CWS not only knew its actions could lead to storm water runoff flooding Tipperary's store but also actively caused water intrusion to that location despite knowledge that its actions could result in serious flooding. These allegations, if proven, could support a finding that CWS committed a trespass onto Tipperary's property. See Snow, 305 S.C. at 553, 409 S.E.2d at 802 ("To constitute an actionable trespass, . . . there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion."); id. ("Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act.").

The Court has overlooked the factual allegations of the Complaint and misapprehends that the allegations against Charleston Water System do not meet the elements of trespass, namely: "To constitute actionable trespass, ... there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797, 802 (Ct.App.1991).

1. The Court has misapprehended or overlooked the allegations of the complaint. While it is often stated that on a motion to dismiss or a motion for judgment on the pleadings, the well pleaded facts of the complaint are accepted as true, that standard of does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. Carrington v. City of Spartanburg, 283 S.C. 298, 299, 322 S.E.2d 28, 29 (Ct. App. 1984).[6]

In Paragraph 108 contained within its trespass cause of action, Tipperary makes a conclusory allegation that "... CWS separately intentionally and knowingly directed storm water runoff to La-Z-Boy's premises." However, none of the actual factual allegations in the complaint support that conclusion on intent. The Court has overlooked

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[6] *Overruled on other grounds by* McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

that the crux of Tipperary's allegations against CWS are based on the ***downstream*** drainage system, for example:

> 96. The drainage system under CWS' control, was designed, constructed, and has been maintained such that water does not drain from the watershed in and around Northwoods Mall and Northwoods Pointe Shopping Center, but instead remains approximately half filled at all times because the level of the Goose Creek Reservoir is generally higher than the level of the drainage system.
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> 97. Further, upon information and belief, CWS can manipulate the level of the Goose Creek Reservoir to prevent flooding of upstream properties by lowering the level of the Reservoir to allow water collected in the drainage system in and around Northwoods Mall and Northwoods Pointe Shopping Center to drain properly into the Reservoir.
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> 101. Upon information and belief, the level of the Goose Creek Reservoir is under the purview and control of the Charleston Water System and· can be lowered when necessary to abate or prevent flooding upstream from the reservoir.
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> 103. Though CWS had the ability to prevent upstream flooding during heavy rainfalls, it failed or refused to do so resulting in flooding in the Northwoods Mall/Northwoods Pointe Shopping Center area during the ... flood events ....

In addition, Tipperary alleges that its flood damages were caused by the construction, maintenance and operation of the drainage watershed ***downstream*** from the Mall area [¶99], and/or the failure or refusal to manage storm water runoff through its drainage basin terminating at the Reservoir [¶105]. None of the specific factual allegations support any conclusion that Charleston Water System committed an affirmative act that intentionally invaded the Store, and directly caused the flood damages.

2. In reversing the Trial Court and allowed the Plaintiff to pursue its trespass claim against the Charleston Water System, based solely on the conclusory allegations of intent, the Court has also overlooked the fact that Charleston Water System made a motion for

summary judgment and Tipperary never made any attempt to present any evidence to support such an allegations. [7] At the hearing, Tipperary acknowledged that the Court could rely on matters outside of the record in ruling on Charleston Water System's motion in the alternative. [ROA 279:21-25.] In its Brief, the Appellant Tipperary claims that it has not had the opportunity to depose anyone from CWS. [Appellant's Brief, p. 26.] However, this case had been pending for three years at the time the Court heard the motions, and, Plaintiff's Counsel admitted that he had not even deposed anybody yet. [ROA 292:6-8.] Further, Tipperary did not ask for additional time to conduct further discovery at the hearing or submit any affidavit under Rule 56(f), SCRCP. *See* Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 480, 465 S.E.2d 765, 772 (Ct. App. 1995) (party made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery).

3. The Court also has misapprehended or overlooked the core reasoning of two of the opinions upon which it has relied. In Snow v. City of Columbia, 409 S.E.2d at 802, the Court stated that:

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[7] In contrast, the Court affirmed the grant of summary judgment to the SCDOT based on Tipperary's lack of evidence to support its conclusory allegation of gross negligence:

> Although Tipperary argued in its brief that DOT's conduct constituted gross negligence, it supported this position by referencing the allegation in its complaint that although DOT had been on notice about the flooding problems, it had done nothing to correct them and in fact exacerbated them. Tipperary, however, did not direct our attention to any evidence that would support these allegations or its position that DOT was grossly negligent; therefore, we conclude summary judgment to DOT on Tipperary's negligence claim was proper.

> Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land.

There, the Court found that "the immediate cause of the entry on the Snows' land was the discharge of water from the leaking pipe joint. However, the City did not intentionally discharge the water." Id. Here, the Charleston Water System did not intentionally discharge water from the Reservoir onto Tipperary's property; rather, the immediate cause of the entry on to Tipperary's store was the stormwater that flooded from the drainage problem upstream of the Store.

This distinction is also recognized in the Court's decision in Graham v. Town of Latta. In that case, the town sewer system backed up, overflowed, and flooded the plaintiffs' property on a recurrent basis, but the Court held that trespass was not proven, as a matter of law, in the absence of any evidence that the town intentionally released sewage onto their property. Likewise, apart from the conclusory accusation on intent against SCDOT, the City and CWS collectively, there are no allegations that Charleston Water System intentionally released stormwater onto Tipperary's store. In Snow and Graham, the Court focused on whether the event which constituted the entry was voluntary. Snow, 409 S.E.2d at 802; Graham, 2016 WL 1239752, at *15. Here, events of entry were the incidents of overflow of stormwater during certain heavy rains – none of which were voluntary, intentional acts by the Charleston Water System.

It has been held that: "It is an actionable injury for one to collect surface water into an artificial channel, and thence cast the same in concentrated form upon adjacent lands." Taylor v. Lexington Water Power Co., 165 S.C. 120, 163 S.E. 137, 142 (1932). In that case, the power company erected a dam across the Saluda river and thereby

impounded a large volume of water, and then opened the gates during a heavy rainfall turned the flood waters down river and upon the plaintiff's land. Accusations that Charleston Water System contributed to the flooding by refusing or failing to lower the Reservoir levels during the storms or its design/construction/maintenance of the ditches ***downstream*** do not constitute allegations of casting of stormwater that caused direct harm the Store. Ironically, if the Charleston Water System were to release water from the Reservoir during a heavy rainfall and cause harm to property downstream, it might then be subject to claims similar to those asserted against the Lexington Water Power Co.

Inverse Condemnation Claim against SCDOT

> The well-settled law, as recited in Hawkins v. City of Greenville, holds that:
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> > An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. To establish an inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.' ...594 S.E.2d at 562

In affirming the dismissal of the negligence/gross negligence claims, the Court correctly found that Tipperary's complaints are about DOT's ***refusal*** to correct the drainage system that was allegedly improperly designed and installed originally. However, in reversing on the inverse condemnation claim, the Court improperly focused on DOT's original construction and the 2002 project, stating:

> The court, however, appeared to ignore Tipperary's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding Tipperary's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that DOT had installed; (3) in September 2002, DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by DOT's resident engineers indicated the project would add 13.7 acres of impermeable surface adjacent to the choke point in

> DOT's right-of-way, which in turn could result in flooding that would exceed the capacity that the existing drainage system could handle. We hold DOT's alleged conduct could constitute an affirmative, positive, and aggressive act that would support Tipperary's inverse condemnation claim. See WRB Ltd. P'ship v. Cty. of Lexington, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, was "an affirmative, aggressive, positive act"), Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); Kline v. City of Columbia, 249 S.C. 532, 537, 155 S.E.2d 597, 599-600 (1967) (finding that improving and widening a public street is an affirmative, aggressive, and positive act).

The Court has misapprehended or overlooked the allegations of fact and the legal holding in the cited cases.

The allegations that DOT constructed an box culvert and drainage pipes at some point prior to 1980 and undertook a construction project in 2002, with knowledge of a history of flooding problems and the possible impact of the new construction on the drainage system do not amount to the type of affirmative, aggressive, and positive act that will support an inverse condemnation claim. There are no allegations that the construction caused the flooding event; rather, in regards to "IMPROVEMENT OF THE ASHLEY PHOSPHATE ROAD I HIGHWAY 52 CONNECTOR 11-26 INTERCHANGE," Tipperary alleges that SCDOT:

- SCOOT refused to make requisite improvements to the choke point in the drainage system at the mouth of the 84" pipes;
- determined not to correct the cause of the flooding- the inadequacy of the twin 84" .pipes lying within SCDOT's right-of-way; and
- SCDOT did nothing to remedy the inadequate drainage provided by the twin 84"

pipes in its drainage right-of-way.

There allegations are about DOT's refusal to correct the drainage system that was allegedly improperly designed and installed originally and do not support a claim for inverse condemnation.

In WRB Ltd. P'ship v. Cty. of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006), the Court restated well-settled law that to prevail on an inverse condemnation claim, a plaintiff must prove "an affirmative, aggressive, and positive act" by the government entity that caused the alleged damage to the plaintiff's property, citing Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967). The Court further discussed the operative facts that constituted the requisite affirmative actions:

> Each of those cases involved ***affirmative actions as part of public improvements that directly damaged private property***. In *Kline*, the City of Columbia was widening and improving a public street when a gas line was breached causing an explosion and fire on the neighboring property. In *Berry's On Main*, the City of Columbia undertook an urban redevelopment project that involved excavating a public street. The excavations flooded during heavy rain damaging the property owner's store. In both these cases we found an affirmative, aggressive, and positive act by the local government that supported a cause of action for inverse condemnation. (Emphasis added).

630 S.E.2d at 481. The distinction, overlooked by this Court, is that the flooding events at issue in this case did even not occur during the active construction; thus, neither the affirmative act of building the culvert and drainage pipes nor the later construction project improvement directly caused the flooding events.[8] The core allegation is that the original culvert and pipes were not large enough to handle the stormwater – a TCA

[8] To the extent that Tipperary alleged flooding during the 2002 project, any claim for that event is barred by the statute of limitations. Amended Complaint ¶23.

protected discretionary decision; the only allegation as to the improvement project is that it increased the runoff that the stormwater system could not handle. While it might be that installing the pipes and building roads were positive actions, the allegations do not amount to the type of aggressive, affirmative acts that impose liability under inverse condemnation because no affirmative acts, as alleged, actually collected the storm water and directed it onto La-Z-Boy store property during the flooding events at issue.

Inverse Condemnation Claim against City of North Charleston

Respectfully, the Court of Appeals misapprehends and misapplies the South Carolina common law, Hawkins and Graham decisions as to the inverse condemnation cause of action against the City of North Charleston. The Court has reversed the ruling on the inverse condemnation claim against the City of North Charleston on reasoning parallel to its ruling on the same claim against the SCDOT:

> 8. We hold, however, the circuit court erred in dismissing Tipperary's inverse condemnation claim against the City. In its complaint, Tipperary alleged the City constructed nearby streets in such a manner that storm water was directed toward its store. Relying on Hawkins v. City of Greenville, the circuit court ruled this alleged conduct amounted only to a failure to act rather than to an affirmative act. Although this court concluded the appellant showed only a mere failure to act, a careful reading of the opinion reveals that this holding was in response to the City's failure to replace the drainage pipes after they were rendered inadequate. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. In the present case, Tipperary alleged the City's construction of nearby streets directly led to the flooding of its store because the City's construction, maintenance, and operation of graded streets and thoroughfares caused storm water to collect directly in front of and behind Tipperary's store. Unlike the situation in Hawkins, then, the City's conduct about which Tipperary complains amounted to an affirmative, positive, and aggressive act that could support a claim for inverse condemnation. See WLB Ltd. P'ship, 369 S.C. at 33, 630 S.E.2d at 481 (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the
> plaintiff's property, met the requirement for "an affirmative, aggressive,

> positive act"); Cutchin v. S.C. Dep't of Highways & Pub. Transp., 301 S.C. 35, 39, 389 S.E.2d 646, 648 (1990) (affirming a jury award on a claim of inverse condemnation resulting from the construction of an inadequate culvert that caused the plaintiff's property to flood); Berry's On Main, 277 S.C. at 16, 281 S.E.2d at 797 (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); Kline, 249 S.C. at 537, 155 S.E.2d at 599-600 (holding that improving and widening a public street is an affirmative, aggressive, and positive act).

While Tipperary made conclusory allegations that the City constructed roads in the Mall area that led to the flooding, the Court's reliance on those allegations fails to properly consider Tipperary's specific allegations.

1. In this regard, the Court has misapprehended or overlooked the allegations of the amended complaint in which Tipperary only alleges that the City is responsible for the stormwater and drainage system. The Court fails to properly consider Tipperary's specific allegations, most significantly, including Tipperary's emphatic allegations as to the cause of the increased flooding:

> 25. ... Upon information and belief, the only roadwork that could have exacerbated and increased the flooding was the Ashley Phosphate I 1-26 I Highway 52 Connector improvements being built by SCDOT.

More, as discussed above, even that if construction project exacerbated or increased flooding after it was complete by adding the stormwater runoff, such act of construction does not amount to an actionable "affirmative acts" because the construction did not actively cause the flooding events at issue.

2. As discussed above, the Court has also misapprehended or overlooked that the affirmative act requisite for imposing liability in flooding cases such as this is a collecting and casting of surface water. "It is an actionable injury for one to collect surface water

into an artificial channel, and thence cast the same in concentrated form upon adjacent lands." Taylor v. Lexington Water Power Co., supra. If a governmental entity might be liable in inverse condemnation for flooding caused by road construction, there must be a showing of more than the fact that the road is impervious and creates or increased runoff; there must be proof that the city collects, channels and/or thrusts water upon the land of another in a different matter from the natural flow, *See* DiBlasi v. City of Seattle, 136 Wash. 2d 865, 879, 969 P.2d 10, 16 (1998). *Compare* Brown v. Sch. Dist. of Greenville Cnty., 251 S.C. 220, 222, 161 S.E.2d 815, 815 (1968)("natural flow of rain water was directed in concentrated form into and across the drive and onto the landowners' property with great force and volume"); Hoffman v. Greenville Cnty., 242 S.C. 34, 39-40, 129 S.E.2d 757, 760 (1963)(ditches and drains impounded surface water and casting it upon their property); M & M Corp. of S. Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 261, 701 S.E.2d 33, 36 (2010)("deliberately channeled and cast upon Plaintiff's land").

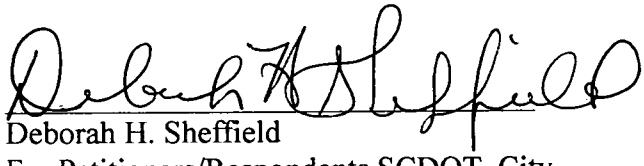
3. The Court misapprehended the reasoning of the various cases upon which it relies. Again, as discussed above, in Berry's On Main, Inc. v. City of Columbia, supra, the city had excavated two trenches to the basement that impounded water during a heavy rain and cast the water into the store's basement. Respondents would also submit that the factual foundation mentioned in the Court's opinion in Cutchin v. S. Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 36-37, 389 S.E.2d 646, 647 (1990) is too sparse to make a worthwhile comparison to allegations of this case in the face of Hawkins and the other inverse condemnation cases which recognize a claim for inverse condemnation where water is impounded and cast upon the plaintiff's land. In this case, Tipperary's

allegations against the City of North Charleston do not amount to impounding surface water and casting it onto Tipperary's property.

CONCLUSION

WHEREFORE, based on the foregoing, the City of North Charleston and the South Carolina Department of Transportation seek rehearing on the Court's decision to reverse the dismissal of the inverse condemnation claims asserting against them, and respectfully request that the Court affirm the Trial Court's ruling based on the grounds stated above and in their Respondents' brief. Likewise, the Charleston Water System seeks rehearing on the Court's decision to reverse the dismissal of the negligence and trespass claims asserted against it, and respectfully request that the Court affirm the Trial Court's ruling based on the grounds stated above and in the Respondents' brief.

Respectfully submitted,



Deborah H. Sheffield
For Petitioners/Respondents SCDOT, City of North Charleston, and Charleston Water System *with Permission*

G. Wade Cooper, SC #69692
Buyck, Sanders & Simmons,LLC
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
(843) 377-1400

Deborah H. Sheffield, SC #2757
117 Brook Valley Rd.
Columbia, SC 29223
(803) 419-7837
Attorneys for Respondent Charleston Water System

Roy P. Maybank, SC # 69643
Amanda Maybank , SC # 69825
Maybank Law Finn, LLC
P.O. Box 12579
Charleston; SC 29422
(843) 408-4272
Attorney for Respondent
SC Department of Transportation

M. Dawes Cooke, Jr., SC # 1376
Phillip S. Ferderigos, SC # 16709
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700
Attorney for Respondent
City of North Charleston

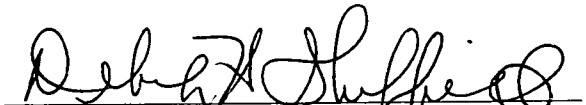
July 15, 2016

CERTIFICATE OF SERVICE

I, Deborah Harrison Sheffield, Counsel for the Respondent Charleston Water System, do hereby certify that on July 15, 2016, I served a copy of the foregoing Petition for Rehearing, on Counsel for Appellant and Respondent SCDHEC, via U.S. Mail, first class, postage prepaid to the following address:

LEATH, BOUCH & SEEKINGS
Michael S. Seekings
Yancey A. McLeod III
P. O. Box 59
Charleston, SC 29402

Andrew S. Halio, Esq.
Halia & Halio
P.O. Box 747
Charleston, SC 29402-0747
Attorney for Respondent
SCDHEC



Deborah Harrison Sheffield, SC Bar # 2757