12067 ORIGINAL REPLY BRIEF

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Joseph J. Watson, Circuit Court Judge

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Case No. 01-CP-23-2459R

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Louie D. Hawkins, individually and d/b/a Servicemaster of Greenville, Servicemaster of Greenville, LLC, and Dixie P. Hawkins ..... Appellants,

v.

City of Greenville ..... Respondent.

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# FINAL REPLY BRIEF OF APPELLANTS

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Robert C. Childs, III, # 1218
Laura W. H. Teer, #16698
MITCHELL, BOUTON, YOKEL & CHILDS
23 Mills Avenue
P.O. Box 10285, F.S.
Greenville, SC 20603
(864) 232-9330/(864) 240-2058 Facsimile

ATTORNEYS FOR THE APPELLANTS

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## STATEMENT OF THE CASE

This action was commenced by a Complaint filed July 23, 1999, alleging trespass, nuisance, negligence, inverse condemnation conversion, and violation of SC Code Ann 5-31-450. The City responded with an Answer dated September 21, 1999. The City filed a Motion for Summary Judgment dated February 12, 2002, which was heard April 24, 2002 before the Honorable Joseph J. Watson. Summary Judgment was granted in favor of the City by Order filed May 3, 2002. Notice of Appeal was filed May 28, 2002.

## STATEMENT OF FACTS

In 1989, the City requested a 25-foot easement from Tracks that was developed at the corner of Byrdland and Airport for maintenance purposes. Appellants' property was flooded in July of 1991, placing the City on notice of a problem with the drainage pipe and its lack of capacity. In 1993, the City installed an arch culvert across the road from Appellants' property. This culvert had a greater capacity than a 96-inch pipe. City additionally granted a business permit to Rooms to Go to develop across the street from Appellants' property, thereby changing

the topography of the area.

In July of 1997, the City spent approximately 100 hours of labor placing riprap on the bank of the creek across from Appellants' property. July 24, 1997, Appellants' property was flooded a second time.

## ARGUMENTS

### I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGEMENT AS TO INVERSE CONDEMNATION.

Respondent argues Appellants have not demonstrated an affirmative, positive and aggressive act by the City. It further argues that at most the allegations are of a failure by the City to act, and cannot form the basis for an inverse condemnation claim. "Under South Carolina law, an affirmative, positive, and aggressive act by a[n agency] must be an act, intentional or not, that overtly affects another's beneficial use and enjoyment of his land." White v. County of Newberry, 985 F.2d 168 (4th Cir. 1993). The evidence presented in this case, however, demonstrates an issue of material fact as to whether the actions taken by the City caused or contributed to the flooding of Servicemaster.

The City undertook an affirmative act in assuming the maintenance of the drainage system. (Deposition of Julie Arrowood, R. 112, l. 2-10) Additionally, the City installed an elliptical arch pipe that joined the 96-inch storm drain. Respondent claims that the replacement of the double box culvert with the arched pipe increased the drainage capacity of the system. There is no evidence to support the assertion that the City's actions actually increased drainage capacity. Respondent also says there is no evidence that the rip-rap installed by the City decreased the drainage capacity of Laurel Creek or caused any increased flooding of Servicemaster. The City has acknowledged, however, that deposits were made into the creek that may have lessened the capacity of the creek.

(Arrowood Dep., R. 127, l. 2-9)

Q. Does not that show some deposits into the creek that have either altered or diverted the flow?

A. It appears that there has been some fill put into the creek itself.

Q. What does that result in in respect to a creek if you deposit fill along its banks.

A. The capacity of that certain channel section, it would be less.

(Deposition of Julie Arrowood, R. 127, l. 2-9) Arrowood also admitted that the placement of rip-rap along the banks of Laurel Creek may have decreased the drainage capacity, once again creating an issue of fact. (Deposition of Arrowood, R. 154, l. 23 – p. 156, l. 7)

The testimony of Andrew Sherard indicates, at the very least, an issue of material fact regarding the adequacy of the arched pipe installed by the City. Sherard stated that it appears the City replaced the twin box culvert beneath Airport Road with an arched culvert and that culvert ties into the 96-inch piping system that goes under Haywood Road and on downstream and also connects to the 96-inch pipe that comes across the Track's property. (Deposition of Andrew Sherard, R. 377, l. 1-6) It is true that Sherard was not clear on the exact size of the pipes that were already in place under Woodruff Road. However, he was able to testify that the 96-inch pipe running along Byrdland Road is not sufficient, in his expert opinion an engineer, to handle the flow of Laurel Creek. (Deposition of Sherard, R. 363, l. 16-22) Sherard additionally testified that the drainage system should be designed to accommodate a 25-year storm, rather than a 10-year storm. (Deposition of Sherard, R. 344, l. 11 – p. 345, l. 4) The system that was maintained by the City and altered by the City, does not accommodate a 25-year storm. In fact, the crossing at Haywood Road is unable to handle even a 10-year storm event. (Deposition of Arrowood, R. 124, l. 17-22)

An issue of material fact has been presented regarding whether the elliptical pipe installed

by the City caused or contributed to the flooding of Servicemaster. The City installed this pipe and overtook the maintenance of the drainage system as a whole. The City had data regarding the drainage system and is responsible for determining the effect that the new pipe would have on the drainage basin as a whole. Therefore, this Court should find that the Trial Court erred in granting summary judgment as to the issue of inverse condemnation.

## II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO THE ISSUE OF NEGLIGENCE.

### A. Respondent breached a duty owed to Appellants.

The Trial Court erred in granting summary judgement as to the issue of negligence. Respondent first argues that it has not breached any duty that may have been owed to Appellants. Respondent breached the duty of care owed to Appellants under S.C.ode Ann. Sec. 5-31-450, which states:

> Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

Respondents argue that if there is a breach of a statutory duty, it is a public duty only and that Appellants are required to show that they are included within the class of persons intended to be protected by the statute. Section 5-21-450 is designed to protect against the particular harm of

inadequate or improper drainage from public thoroughfares. Appellants are clearly within the class of persons intended to be protected. Respondent was aware of the harm from flooding that could result to the Appellants' property if proper drainage was not installed through Servicemaster's prior lawsuit. The City certainly had the authority to install proper drainage, as demonstrated by its insufficient drainage system installed in 1993. Despite this knowledge, the City allowed the continuing development of surrounding properties including roads, curbing and gutters and building up of surrounding lower elevations. The City additionally, installed inadequate drainage systems in the form of the elliptical arch pipe. Just as in Newsome v. Town of Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989), the City's acts increased Appellants' susceptibility to flooding. The City's negligence in the present case is not based merely on a failure to redesign the existing drainage system. Appellants have presented a genuine issue of material fact that the acts taken by the Respondent actually decreased the drainage capacity of Laurel Creek and increased the likelihood of flooding to Servicemaster.

**B. Genuine issues of material fact exist as to proximate cause.**

Respondent argues that because Servicemaster didn't flood every time it rained, there is no evidence of proximate cause. Respondents overlook the fact that the City's actions don't have to be the sole cause of the injury to the Appellants in order for to be a proximate cause. The drainage system that was maintained by the City and subsequently altered by the City did not meet the City's own standards for floodwater management. (Deposition of Arrowood, R. 124, l. 10-22) This taken along with the evidence indicating that the City's actions actually further decreased the drainage capacity of Laurel Creek and increased the chances of flooding to Servicemaster creates a genuine issue of material fact as to proximate cause. The Court of Appeals found that an issue of material fact existed in Newsome, supra, even though the Plaintiff

in that case experienced heavy rainfall at the time he was injured.

Respondent further argues that Sherard's testimony fails to raise a genuine issue of material fact because it is based on the erroneous assumption that the pipe under Haywood Road was larger than 96-inches and was properly sized for a 25-year storm event. This assumption does not change Sherard's conclusion; however, that the arched culvert is larger than the 8-foot pipe to which it connects, and that the 96-inch aluminum pipe installed on July 27, 1993 was undersized and not sufficient. (Deposition of Sherard, R. 364, l. 3 – p. 365, l. 8)

### C. Respondent is not immune from liability under the South Carolina Tort Claims Act.

Respondent claims it is immune, under the South Carolina Tort Claims Act, for its acts related to the design or maintenance of stormwater drainage systems or the development of commercial property which causes an increase in stormwater runoff. Respondent argues that the design and planning of its culvert system is a quasi-judicial function for which it is not liable. Respondent cites City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997) for this proposition. However, other courts have found liability in cases similar to the present one. See Templeton v. Huss, 57 Ill.2d 134, 311 N.E.2d 141 (1974); Starcevich v. City of Farmington, 110 Ill.App.3d 1074, 443 N.E.2d 737 (3d Dist. 1982). See also Powell v. Village of Mt. Zion, 88 Ill. App. 3d 406, 410 N.E.2d 525 (4th Dist. 1980).

Respondents argue the City could not deny permits for commercial development to applicants who met the necessary criteria. The City continued to make improvements in this area, however, and to install curbing and guttering which would further affect stormwater drainage at Appellants location. There is no evidence that the City made a determination between competing alternatives in the present case. The actions that were undertaken regarding

the drainage situation were taken without any studies as to their effect on the surrounding area. Furthermore, the present case involves not only the development of the surrounding properties which altered the natural flow of surface water but also a failure by Respondent to properly install and maintain its drainage system after knowing of the drainage and water flow problems it had already created with regards to Appellants' property.

Therefore, this Court should find that summary judgment is not appropriate as to the issue of negligence.

## III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO THE ISSUE OF TRESSPASS

Respondent's argument as to trespass is based on its assertion that the City took no affirmative actions. As set forth previously, genuine issues of material fact exist as to the actions taken by the City which decreased the drainage capacity of Laurel Creek and increased the likelihood of flooding to Servicemaster. This is not merely a case of inaction by the City. Therefore, this Court should find that the Trial Court improperly granted summary judgment on the issue of trespass.

## IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO S.C. CODE ANN. 5-31-450

Once again Respondent argues a lack of affirmative action taken by the City. As argued previously, there is an issue of fact as to acts taken by the City that affected the susceptibility of Appellants' property to flooding. This is not simply about the increased problem caused by the development of surrounding commercial property. "The generally accepted doctrine as to casting surface water into a natural stream seems to be that a municipality has the right to do this provided the normal capacity of the stream is not overtaxed." 38 Am. Jur., Municipal Corporations, Section 644, page 351. The City allowed the normal capacity of the stream to

become overtaxed and did not design a sufficient drainage system given the alterations it was allowing to the surrounding property.

The City has admitted that the current drainage system is not adequate. It has also admitted that it undertook maintenance of the pipe and that it made alterations to the drainage system in the installation of the elliptical arch pipe and the depositing of rip-rap on the banks of Laurel Creek. The City argues that it was only able to address drainage problems on a priority basis and as funds allowed and that it has only recently been able to address the drainage basin in question. However, the City admits that it was aware of flooding problems to the Appellants' property and took no action to correct the problem, but rather undertook corrections that may have increased the problem.

There are material issues of fact as to whether the flow of water and debris onto Appellants' property was the result of the city's construction of its drainage facilities. The Court in Hall found that even if Plaintiffs' property was susceptible to flooding in the past, a question of fact for the jury exists as to whether Defendant's acts aggravated the tendency of water and debris to flow onto Plaintiffs' property. The same is true in the present case; therefore, this Court should find that summary judgment is not appropriate.

## V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO CONVERSION.

Respondent argues that an action for conversion is inappropriate in the present case because conversion is not applicable to control over real property. Respondent also argues that there is no evidence that the City took control of any chattel belonging to Appellants. The City's negligence was a proximate cause of the water and debris that entered Appellants' property and destroyed the property, thus altering the condition of the property. Appellants' goods and

personal chattel were altered, included seven automobiles. Because the City caused the alteration of the condition of the Appellants' personal chattel, summary judgment should not be granted as to this issue.

## VI. THE RELEASE EXECUTED MARCH 28, 1994, DOES NOT RELEASE THE CITY FROM THE APPELLANTS' PRESENT CLAIMS

The March 28, 1994 release is specifically for the damages which occurred to the property on or about July 30, 1991 and does not contemplate future damages which occurred to the property on or about July 30, 1991 and does not contemplate future damages from new acts or omissions of the Respondent, but rather precludes future action for damages arising from the July 30, 1991 incident. The release states that it is a release from all liability "arising out of or in any way connected with the water and mud damage to Plaintiff's place of business located at 1 Byrdland Drive which occurred on or about July 30, 1991." The City has taken new actions since the time that the March 28, 1994 settlement was entered into. The City has installed a culvert across from Appellants' property and has continued to allow new construction. The 1994 Release clearly did not include damages incurred as a result of new and separate acts and omission of the City. Therefore, this Court should find that the 1994 Release does not release the City from the claims alleged in the current case.

## CONCLUSION

Based on the foregoing arguments, this Court should find that genuine issues of material fact exist as to all issues. The City undertook to maintain the drainage pipe in question. The City failed to correct the drainage problems that it knew to exist at the time that it began maintaining the pipe. The City committed affirmative, positive, and aggressive acts by allowing the development of the surrounding property and by installing a elliptical arch pipe and placing riprap on the banks of

Laurel Creek with the knowledge that Appellants' property had experienced flooding in the past and these actions could increase the potential for flooding.

The City owed a duty to the Appellants and breached that duty. The City is not immune for these acts under the Tort Claims Act. Genuine issues of material fact also exist as to whether the City's actions constitute inverse condemnation, trespass, and conversion.

The release previously entered into by the Appellants was limited to damages occurring on or about July 30, 1991 and does not apply to the damages incurred in the current case.

Therefore, this Court should reverse the decision of the Trial Court and remand the case for trial.

MITCHELL, BOUTON, YOKEL & CHILDS

Robert C. Childs, III, # 1218
Laura W. H. Teer, #16698
23 Mills Avenue
P.O. Box 10285, F.S.
Greenville, SC 20603
(864) 232-9330/(864) 240-2058 Facsimile

ATTORNEYS FOR THE APPELLANTS

Greenville, SC
Date 2/28/03

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## CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

Robert C. Childs, III, # 1218
Laura W. H. Teer, #16698
Mitchell, Bouton, Yokel & Childs
PO Box 10285, F.S.
Greenville, SC 20603
(864) 232-9330

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Respondent.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the **Final Reply Brief of Appellants** were served upon the following by First Class Mail, postage prepaid, on this 3rd day of March 2003.

W. Howard Boyd, Jr., Esquire
Gibbes, White & Boyd, P.A., P.O. Box 10589, Greenville, SC 29603

***MITCHELL, BOUTON, YOKEL & CHILDS***

Sue Ellen Schulz

Sue Ellen Schulz, Paralegal to
Robert C. Childs, III
Laura W. H. Teer
Attorneys for Appellants
23 Mills Avenue
PO Box 10285
Greenville, SC 29603
(864) 232-9330