12067 ORIGINAL RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court properly grant respondent's motion for summary judgment as to the inverse condemnation cause of action?

II. Did the Trial Court properly grant respondent's motion for summary judgment as to the negligence cause of action?

III. Did the Trial Court properly grant respondent's motion for summary judgment as to the trespass cause of action?

IV. Did the Trial Court properly grant respondent's motion for summary judgment as to Hawkins' cause of action based upon S.C. Code Ann. § 5-31-450?

V. Did the Trial Court properly grant respondent's motion for summary judgment as to Hawkins' conversion cause of action?

VI. Did the release signed by Hawkins in 1994 bar any claims relating to the design, installation and maintenance of the stormwater drainage system in the Laurel Creek basin?

STATEMENT OF THE CASE

Appellants, Louie D. Hawkins, Servicemaster of Greenville, LLC and Dixie P. Hawkins (all of whom are hereinafter collectively referred to as "Hawkins"), initiated this action by filing a summons and complaint on July 23, 1999. Hawkins' complaint alleged causes of action for trespass, nuisance, negligence, inverse condemnation, violation of South Carolina Code Annotated Section 5-31-450, and conversion against the Respondent, City of Greenville (hereinafter "the City"). On September 21, 1999, the City filed an answer, in which it denied any liability and asserted a number of affirmative defenses.

On February 12, 2002, the City filed a motion for summary judgment. By order dated March 21, 2002, the Circuit Court granted summary judgment in the City's favor as to the nuisance claim. Subsequently, by order dated May 2, 2002, the Circuit Court granted the City's motion for summary judgment as to all remaining causes of action. Judgment was entered in the City's favor on May 3, 2002. Hawkins then timely served notice of appeal on May 28, 2002.

STATEMENT OF FACTS

Hawkins bought an existing business known as Servicemaster of Greenville in the late 1960s, and around 1980 moved the business to 1 Byrdland Drive (the property and the business will hereinafter be collectively referred to as "Servicemaster"). (R. p. 228, line 12-p. 230, line 1). Servicemaster is located in a low-lying area just west of Haywood Road at the bottom of a large stormwater basin and is bordered on the east by a stream known as Laurel Creek. The stormwater basin which includes Servicemaster encompasses a 3.24 square mile area on the City's highly developed Eastside, which includes many large commercial developments on Byrdland Drive, as well as Haywood, Airport, and Woods

Lake Roads, and extends to the north across interstate highway I-385. This area is susceptible to natural flooding based on the topography of the area, since all stormwater from this basin naturally runs downhill and eventually drains into Laurel Creek. (R. p. 89, lines 3-10). Laurel Creek was in existence at the time Hawkins located Servicemaster at 1 Byrdland Drive, and its course has not been altered. (R. p. 235, lines 8-25). Servicemaster is not within a floodplain as established by the Federal Emergency Management Agency ("FEMA"). (R. p. 89, lines 122-21). The City does not own any portion of Laurel Creek or any land near Servicemaster. Since Hawkins began operating the business at 1 Byrdland Drive in 1980, there has been a substantial amount of commercial development in the area surrounding Servicemaster. Following the construction of Haywood Road in 1975 by the South Carolina Department of Transportation, Haywood Mall was developed, and the Haywood Road area boomed.

In accordance with the City's Stormwater Management Ordinance, Chapter 34, when property in the City is developed, the owner or developer is required to submit storm drainage calculations to show that the proposed drainage system for the development is adequately designed to handle stormwater runoff as required by the City's ordinances. (R. pp. 397, 400-401, p. 136, lines 17-23). If the owner/developer's proposal for the drainage system satisfies the City's design criteria for developing that particular parcel of land, then the City must approve the design. (R. pp. 411-412, p. 137, lines 3-7). In approving such applications, the City expressly disclaims liability for stormwater discharge from these parcels onto adjacent property. (R. p. 405, p. 137, lines 11-14). The City is unable to lawfully deny permits for development of property which meets the criteria established by its ordinances. (R. p. 411-412, p. 137, lines 17-19).

The drainage system for the Haywood Road/Laurel Creek drainage basin in the immediate area surrounding Servicemaster consists of two 96-inch pipes and an elliptical 11'5" x 7'3" arched pipe ("arched pipe"). One 96-inch pipe was installed in Laurel Creek in 1987 or 1988 by private developers who owned a parcel of land across Laurel Creek from Servicemaster at the corner of Haywood and Airport Roads. (R. p. 333, lines 3-19, p. 383). The owners of this property were permitted by the City to install the pipe for stormwater management purposes in preparation for developing this tract. (R. p. 334, line 16-p. 335, line 6, p. 384). Ultimately, a retail business named Tracks was located on this site in 1989 or 1990. (R. p. 356, line 3-p. 357, line 21, pp. 385-388, p. 389). (Hereinafter this parcel will be referred to as "Tracks"). This 96-inch pipe runs parallel to Byrdland Drive and Haywood Road, between Tracks and Servicemaster.

On July 30, 1991, Servicemaster suffered damage when mud, water and debris flooded into the building following a rainstorm. (R. p. 226, lines 17-20). As a result, in 1992, Hawkins brought suit against the City and several other defendants in the Greenville County Court of Common Pleas, claiming that their actions caused the flooding. The amended complaint filed by Hawkins in 1992 specifically alleges that the City was negligent (a) "in failing to design a reasonably adequate surface water drainage system," (b) "in failing to maintain a reasonably adequate surface water drainage system" and (c) "in failing to properly supervise the surface water drainage system to ensure adequate flow of water during periods of inclement weather." (R. p. 32).

In July, 1993, while this lawsuit was pending, the City replaced a double box culvert, located in Laurel Creek under the Byrdland Drive and Airport Road intersection downstream from Servicemaster, with the larger arched pipe. The double box culvert was

gathering debris, and thus, its capacity was being restricted. The arched pipe increased the drainage capacity of this section of the City's stormwater drainage system. (R. p. 138, lines 2-10). The arched pipe installed in July of 1993 is the only improvement to the stormwater system performed by the City in this area since Servicemaster located there in 1980. (R. p. 336, line 25-p. 337, line 12; p. 377, lines 7-23). By installing the arched pipe, the City did not alter the flow of Laurel Creek, nor did it direct water onto Servicemaster. Furthermore, the City has not taken any other action to increase or redirect the amount of stormwater runoff onto Servicemaster. (R. p. 138, line 19-p. 67, line 2). After Laurel Creek passes through the arched pipe to the other side of Airport Road, the creek turns approximately 90 degrees to the left, perpendicular to Haywood Road, and flows through another 96-inch pipe beneath Haywood Road. (R. p. 377, lines 1-6).

In 1994, upon advice from his attorney, Hawkins agreed to a compromise settlement with the City which resolved the lawsuit over the 1991 flood. (R. p. 970, line 17-p. 275, line 3). In exchange for a "full, complete and final release of all damages arising out of the design, construction, maintenance, and operation of the water drainage system on or adjacent to Byrland [sic] Drive," the City paid Hawkins Four Thousand and No/100ths ($4,000.00) Dollars. (R. p. 272, line 8-p. 273, line 14, p. 321). This release was executed by Hawkins on March 28, 1994, almost a year after the arched pipe was installed to increase the capacity of the stormwater system. The release provides, in pertinent part:

> ...[Servicemaster] does hereby release, relieve and forever acquit the City of Greenville, South Carolina, a municipal corporation, their agents, employees, officers, successors and assigns from any and 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 and it is the intention in executing this Release to forever discharge the City of Greenville from any and all claims, demands, actions or causes of action which may exist, known or unknown, of any and all

> damages, past, present and future, in any way connected with or arising out of the aforesaid damages. . . .
>
> It is acknowledged and understood that this is a full, complete and final release of all damages arising out of the design, construction, maintenance, and operation of the water drainage system on or adjacent to Bryland [sic] Drive, that no future or further payments will be paid as a result thereof and that the persons and corporations in whose favor this Release runs are herewith fully finally and forever discharged from any and [sic] all liability with respect to the aforementioned property.

In early July, 1997, the City performed maintenance in Laurel Creek across from Servicemaster, when the banks of the creek were supported with riprap to stem erosion which had been occurring. The record contains photographs taken on July 2, 1997 before the riprap was installed, apparently during the progress of this maintenance work. The riprap was in place by the time of the storm on July 24, 1997, which is the subject of this litigation.

On July 24, 1997, a record rainfall occurred in the City. Official rainfall records from the National Climatic Data Center in Asheville show that 2.51 inches of rain fell in Greenville in one hour on that day (R. p. 140, lines 14-18). The Greenville News reported that 2.4 inches of rain fell in one hour at the downtown airport, which is located on an elevated plain west of Servicemaster. (R. pp. 315-316). Due to the large amount of rain which fell in a short period of time on July 24, 1997, the stormwater overwhelmed the drainage pipe under Haywood Road, backed up into Laurel Creek, and spilled over the banks of Laurel Creek onto Byrdland Drive and other roads in the area. (R. p. 139, line 21-p. 140, line 1). Servicemaster was one of several businesses in the Haywood Road area which flooded as a result of the large amount of rain from this storm. (R. p. 42, lines 4-15, pp. 315-316).

The City completed a study of the Haywood Road/Laurel Creek stormwater basin in July, 2001. One of the recommendations resulting from this study was to increase the capacity of the system. The report suggested upgrading and replacing the pipes beneath several roadways in the area with larger pipes, and also suggested adding another eight-foot pipe to the existing eight-foot pipe under Haywood Road, which would essentially double the drainage capacity of the system under Haywood Road and enable it to handle larger storms. (R. p. 98, line 9-p. 99, line 21). City Council has agreed to fund this project, although it will require cooperation from the State of South Carolina and Greenville County, since the stormwater drainage system in this area is comprised of interconnected systems owned by the State, City, County and private entities. Construction is projected to begin in 2003 with an estimated completion date of 2004. However, even after this system is upgraded, it is still possible that extraordinary rainfalls may occur which exceed the capacity of the system. (R. p. 151, lines 7-14).

ARGUMENT

Hawkins contends genuine issues of material fact exist which preclude the granting of summary judgment as to his causes of action for inverse condemnation, negligence, trespass, violation of South Carolina Code §5-31-450, and conversion.[1] However, Hawkins failed to adduce evidence to support the material elements of any of these causes of action. Based upon the absence of evidence to support Hawkins' claims and the undisputed facts of

[1] Hawkins' statement of issues and arguments on appeal do not contest the Circuit Court's order granting summary judgment to the City with respect to the cause of action for nuisance. Accordingly, this issue is abandoned and the Circuit Court's ruling on this issue must be affirmed. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Fields v. Melrose Limited Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); Peoples Federal Sav. And Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 302 S.C. 223, 229, 394 S.E.2d 849, 852 (Ct. App. 1990) (failure to set forth an exception as a question involved and to argue the exception constitutes abandonment of the exception).

this case, the Circuit Court properly granted summary judgment as to all of these causes of action.

Summary judgment is appropriate and must be granted "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. . . ." McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) "The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Furthermore, "[w]ith respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing the trial court there is an absence of evidence to support the nonmoving party's case." McNair, 330 S.C. at 341, 499 S.E.2d at 493.

I. The trial court properly granted Respondent's motion for summary *judgment as to the inverse condemnation cause of action.*

Inverse condemnation has been defined as an "action against a governmental agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed." Black's Law Dictionary 740 (5th ed. 1979). South Carolina law has long recognized the right of a landowner to bring an action for inverse condemnation. However, this right has been limited to the following circumstances: (1) when government activity, such as construction, causes damage to neighboring property; see, e.g., South Carolina State Highway Dept. v. Moody, 267 S.C. 130, 226 S.E.2d 423 (1976); or (2) when a regulatory program has diminished property value. See, e.g., Moore v. Sumter County Council, 300 S.C. 271, 387 S.E.2d 455 (S.C. 1990). In either case, the elements of inverse condemnation are the same: 1) an affirmative, positive, aggressive act on the part of the governmental agency 2) which results in a taking 3) for public use 4) with

some degree of permanence. Gray v. South Carolina Dept. of Hwys., 311 S.C. 144, 427 S.E.2d 899 (Ct.App.1992).

In this case, Hawkins failed to establish the elements of an inverse condemnation cause of action because Hawkins did not demonstrate that an affirmative, positive, and aggressive act by the City caused the flooding of Servicemaster. In order to maintain an inverse condemnation cause of action, Hawkins must do more than show a failure by the City to act. See Brown v. School District, 251 S.C. 220, 161 S.E.2d 815 (1968). Hawkins contends the City can be liable on account of the following: (1) improperly allowing development of the Tracks parcel, which resulted in raising the elevation of that parcel and the piping of Laurel Creek with an undersized 96-inch pipe; (2) generally allowing commercial development of the area without insuring that a sufficient stormwater drainage system was installed; (3) assuming the maintenance of the 96-inch pipe installed by the developers of the Tracks parcel and not replacing the pipe despite the fact that it was undersized; (4) replacing the double box culvert with the arched pipe beneath Airport and Haywood Roads, thereby further restricting the drainage capacity of Laurel Creek; and (5) installing riprap and/or dumping fill dirt into Laurel Creek, which decreased its drainage capacity. Hawkins contends these "acts" constitute affirmative, positive and aggressive acts on the part of the City which could support a claim for inverse condemnation. However, most of these "acts" are in fact allegations of a failure by the City to act, and cannot form the basis for an inverse condemnation claim. The only affirmative acts alleged on the part of the City do not support Hawkin's inverse condemnation claim. The replacement of the double box culvert with the arched pipe *increased* the drainage capacity of the system. And, as the Circuit Court correctly decided, there is no evidence that the riprap installed by the

City decreased the drainage capacity of Laurel Creek or caused any increased flooding of Servicemaster.

In this case, the City has not affirmatively acted to cause the flooding of Servicemaster, and there is no evidence that the City has engaged in the types of affirmative municipal actions which established the basis of liability for inverse condemnation in Newsome v. Town of Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct.App.1989) and Berry's On Main, Inc. v. City Of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981). In Newsome, the plaintiff brought an inverse condemnation suit against the town of Surfside Beach alleging that the fact the town had raised the level of a street by 17 inches and reconstructed a sand dune at the end of that street was an affirmative act supporting his inverse condemnation claim. The plaintiff introduced expert testimony which revealed that these alterations suddenly made his property the low point of the area and the sand dune at the end of the street acted as a dam, forcing water to pond on the plaintiff's property. In Berry's On Main, Inc., as part of a downtown development project, the City of Columbia removed the sidewalks adjoining Berry's and excavated two trenches to the basement for the purpose of installing and relocating water meters and pipes. Heavy rain and storm water flooded the excavations and entered Berry's basement, causing permanent damage. The court found that the City's act of removing public sidewalks was an affirmative, positive, aggressive act sufficient to support an inverse condemnation claim.

Contrary to the facts in Newsome and Berry's on Main, Inc., in this case there is no evidence the City has done any affirmative, positive, aggressive act which caused the flooding of Servicemaster. It is undisputed that the replacement of the double box culvert with the arched pipe actually increased the drainage capacity of Laurel Creek. (R. p. 336,

line 25-p. 337, line 12, p. 370, line 22-p. 371, line 13, p. 150, lines 2-7). With respect to the placement of riprap in the creek in July, 1997, as the Circuit Court correctly held, Hawkins failed to establish that this caused an increase in the amount of stormwater overtopping the banks of Laurel Creek during heavy storms. Julie Arrowood, engineer for the City, stated in her deposition that the riprap was used to protect a neighboring roadway from further erosion. She further noted that the riprap would not have diverted the flow of Laurel Creek. (R. p. 53, line 22-p. 126, line 2). Arrowood could not form a definite conclusion as to the consequences of the addition of riprap to the area surrounding Laurel Creek.

> But I don't know what the crews did. If the crews went out there – okay, here's a bank and they placed, you know, two feet of riprap within the channel, yes, you are going to decrease it [creek flow/drainage]. But if the crew – here's the bank. If they went out there, took some dirt out from behind it and then placed it about the same areas as the existing bank was, even though it was eroding, then they didn't increase the capacity. *I can't say whether they increased it, decreased it, or whatever they did.*

(R. p. 154, line 23-p. 155, line 7). (emphasis added). Appellants failed to present any evidence, by expert testimony or otherwise, that established that the addition of riprap negatively impacted the drainage capabilities of Laurel Creek. Their expert, T.A. Sherard, offered no opinion regarding the effect of the addition of this riprap on the extent of flood damage sustained by Servicemaster. As the Circuit Court correctly decided, since Hawkins failed to present any evidence to create a genuine issue of material fact as to this issue, the City is entitled to summary judgment on the inverse condemnation cause of action.

II. The trial court properly granted Respondent's motion for summary judgment as to the negligence cause of action.

Hawkins contends a genuine issue of material fact exists with regard to whether the City was negligent in the design and maintenance of the stormwater drainage system

surrounding Servicemaster. However, as the following discussion will illustrate, under the undisputed facts of this case, Hawkins has not presented evidence that the City breached a duty of care owed to Hawkins or that any such breach proximately caused the flooding Servicemaster experienced on July 24, 1997. Furthermore, the City is entitled to sovereign immunity based upon the South Carolina Tort Claims Act, and can have no liability to Hawkins in this case even if the elements of a negligence cause of action have been established.

A. To the extent Hawkins' negligence claim is based upon a statute, under the Public Duty Rule the City does not owe Hawkins a duty.

In order to prevail in an action founded in negligence, a plaintiff must establish three essential elements: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by negligent act or omission; and (3) damage proximately caused by breach of that duty. Newton v. South Carolina Public Railways Commission, 312 S.C. 107, 439 S.E.2d 285 (Ct.App.1994). Generally, there is no common law duty to act. An affirmative legal duty, however, may be created by statute, contract, status, property interest, or some other special circumstance. Wyatt v. Fowler, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997). The court must determine, as a matter of law, whether the law recognizes a particular duty. Steinke v. South Carolina Department of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); see also, Rogers v. Atlantic Coastline Railroad, 222 S.C. 66, 71 S.E.2d 585 (1952) (whether defendant is under legal duty to plaintiff is question of law for court). If there is no duty, then the defendant in a negligence action is entitled to judgment in its favor as a matter of law. Steinke, supra.

As the South Carolina Supreme Court recently decided, it is only when the plaintiff relies upon a statute as creating the duty owed by a governmental entity that the public duty

rule comes into play. Arthurs v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001). To the extent the plaintiff relies upon a duty founded on the common law, the public duty rule has no applicability. Here, it is unclear whether Hawkins relies upon a statute as creating the duty owed by the City or whether the claim is based upon the common law. Hawkins has neither alleged nor argued any statutory basis for the negligence cause of action, and has not cited any statute in his brief which arguably gives rise to any duty on the part of the City to protect him from flooding. Thus, no statutory basis for a duty is before the court, and additional statutory bases for a duty cannot be raised for the first time on appeal. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Morris v. Anderson County, 349 S.C. 607, 611, 564 S.E.2d 649, 651 at n.4 (2002).

Nevertheless, to the extent Hawkins bases the negligence cause of action on a statute, the public duty rule is applicable, and the City owes no duty of care to Hawkins or any other individual members of the general public. As the court stated in Arthurs, supra:

> The "public duty" rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public.

551 S.E.2d at 582. Recently, in Morris v. Anderson County, 349 S.C. 607, 564 S.E.2d 649 (2002), the Supreme Court clarified that where an action is based upon an applicable statute and the plaintiff claims a special duty is created by that statute so as to take the case out of the public duty rule, the plaintiff must establish the existence of an identifiable class of persons the statute intends to protect which can be determined prior to the incident in question. Where there is no way to identify, in advance of the incident in question, a specific class of individuals protected by a

statute, but rather the statutory duty is owed to the public as a whole, the public duty rule bars an individual from maintaining a negligence action against the governmental entity involved. 349 S.C. at 612, 564 S.E.2d at 652.

Generally, governmental entities owe a duty to the public at large and not to any individual. Id. The public duty rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public." Summers v. Harrison Construction Co., 298 S.C. 451, 455, 381 S.E.2d 493, 496 (Ct.App.1989). The public duty rule was originally adopted by the South Carolina Supreme Court in Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940):

> The law necessarily grants a certain discretion to its officers in handling the public business. In one instance, it may be wise for a public officer to pursue one course, in another instance, another course. Those charged with protecting the public interest should view that interest as supreme, should consider what is best for the public, and should be free at all times to prosecute the course that appears to be in the public interest . . . . It is well settled that an individual has no right of action against a public officer for breach of a duty owing to the public only, even though such individual be specially injured thereby. Where a duty is owing to the public only, an officer is not liable to an individual who may have been incidentally injured by his failure to perform it.

10 S.E.2d at 632. Thus, the public duty rule insulates governmental entities from liability for negligent performance of their official duties by negating the existence of a duty toward the plaintiff. Arthurs, supra. See also Tanner v. Florence County Treasurer, et al., 336 S.C. 552, 521 S.E.2d 153 (1999); Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 403 S.E.2d 615 (1991). Since this rule is grounded in duty, rather than immunity, it has not been affected by the enactment of the South Carolina Tort Claims Act ("Act"), and it

remains the law of South Carolina. Arthurs, supra. Thus, even if a duty exists which is breached by a governmental entity, "the governmental entity may not be liable because of immunities reinstituted by the Tort Claims Act. Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue." Id.

In discussing the public duty rule in Tanner v. Florence County Treasurer, supra, the court noted that its decisions have generally found no special duty was owed in the cases which have come before it:

> In general, we have been reluctant to find special duties statutorily imposed. *See, e.g., Brady Dev. Co. v. Town of Hilton Head Island,* 312 S.C. 73, 439 S.E.2d 266, 268 (1993) (holding that the town's Development Standards Ordinance was intended to protect the public from over-development, not to protect homeowners from deprivation of water and other services); *Bellamy v. Brown,* 305 S.C. 291, 408 S.E.2d 219, 220-21 (1991) (holding that statutorily prescribed exceptions to the disclosure requirements of the state's Freedom of Information Act did not establish a duty to maintain confidentiality); *see also Summers v. Harrison Constr.,* 98 S.C. 451, 381 S.E.2d 493 (Ct.App.1989) (holding that a state statute requiring officers who issue building permits to secure evidence that the builders and renovators of residences are licensed did not create a special, actionable duty to protect homeowners); *Jensen v. South Carolina Dep't of Soc. Services*, 297 S.C. 323, 377 S.E.2d 102, 105-07 (Ct. App.1988) (holding that the state's Child Protection Act, reporting, and investigation responsibilities, did impose on local officials to whom instances of alleged child abuse had been reported a special duty to investigate and intervene, but did not impose on the state officials a special duty to protect particular children); *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916-17 (Ct. App.1988) (holding that a state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates did not create a special duty to protect particular members of the public against crimes committed by released prisoners).

336 S.C. at 158, 521 S.E.2d at 562. Other than the Jensen, Tanner and Steinke cases, the Supreme Court has never recognized a special duty owing to an individual as a result of negligence in the performance of public duties. These three decisions all involved exceptional circumstances where the government was dealing directly with a specific individual or had been charged by a special statute with inspecting the safety of the amusement ride which caused the injuries at issue.

In Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998), the Court of Appeals held that the public duty rule barred a tort action brought by homeowners against the City after fire destroyed their home. In rejecting the homeowners' argument that the City owed them a special duty separate from that owed to the public generally to maintain and inspect fire hydrants and to provide fire protection, the Court of Appeals held:

> Other than mentioning the existence of certain DHEC regulations, appellants have failed to point to any statute that creates a special duty on behalf of any public officer of the City of Lynchburg. See Atkins v. Varn, 312 S.C. 188, 193, 439 S.E.2d 822, 825 (1993) (where there is a duty to the general public only, an officer is not liable to an individual who is incidentally injured by the officer's failure to perform that duty). The DHEC regulations pertaining to municipal water systems or more particularly, fire hydrants, do not create a special duty reaching beyond the public at large. There is no identification of a particular class of potential victims and there is no particular harm identified in its terms. Accordingly, the trial court did not err in this regard.

331 S.C. at 309, 501 S.E.2d at 753. Thus, Wells establishes affirmatively that DHEC regulations regarding municipal water systems do not create a special duty, and thus, cannot form the basis of a duty in this case. Accordingly, here, as in Wells, Hawkins has failed to plead or prove any statute which creates a special duty on behalf of any public officer or

employee of the City to Hawkins in connection with the operation and maintenance of the stormwater drainage system for the Byrdland Drive area.

B. To the extent Hawkins' negligence cause of action is based on the common law, the City does not owe Hawkins any duty to re-design or upgrade the stormwater drainage system in the Laurel Creek basin, and the City is not liable for permitting commercial development in the area.

As discussed earlier in this brief, there is no basis upon which the City can be held liable for the flooding of Servicemaster as a result of the City's affirmative acts of maintenance in the Laurel Creek basin relating to the replacement of the double box culvert with the arched pipe to increase the stormwater drainage through the creek and installing riprap to stabilize the banks of Laurel Creek. The other allegations of negligence made by Hawkins in this case relate to the allowance of commercial development in the area by the City and the City's failure to redesign the stormwater drainage system to enlarge the capacity of the system. However, to the extent these claims are based on the common law rather than an applicable statute, they fail because the City owes no duty to Hawkins to redesign the stormwater drainage system and there is no evidence in the record to support Hawkins' claims that the City was negligent in allowing commercial development in the area.

Research has revealed no authority, and Hawkins has cited none, which requires a municipality to expend funds to upgrade an existing stormwater management system in the community to increase its drainage capacity. Such decisions involve interrelated questions of public policy and public finance, as to which municipalities must prioritize among many competing public infrastructure improvement needs. Indeed, the City has no duty under the common law to provide stormwater management within the City limits, and certainly has no duty under the common law to provide a stormwater drainage system of adequate capacity.

Furthermore, since the stormwater drainage system in the Laurel Creek basin is an interrelated system involving federal, state, county and municipal components, the City cannot independently undertake to re-design the system. In this case, for example, since the South Carolina Department of Transportation initially installed a 96-inch pipe underneath Haywood Road, which is a state highway, any upgrade of the City's system in Laurel Creek would not have been effective to prevent the overloading of the pipe underneath Haywood Road and the resulting flooding problems in the Laurel Creek basin. (R. p. 338, lines 15-24, p. 377, line 24-p. 378, line 7). Any effective re-design of the stormwater drainage system in the area would have had to have included an increase of the capacity of the pipe underneath Haywood Road. Thus, although it is undisputed that the stormwater drainage system in the Laurel Creek basin is presently undersized, and it is to be redesigned to increase its capacity in the future, the City is not liable to Hawkins or any private individual for failure to re-design the system earlier.

Hawkins' allegation that the City can be held liable in negligence in this case for accepting responsibility for the maintenance of the 96-inch pipe installed by private developers in anticipation of the development of the Tracks site is likewise without merit. Just as the City has no duty to re-design the entire system, research has revealed no authority, nor has Hawkins cited any, requiring the City to replace components in the existing stormwater drainage system to enlarge the capacity of the system. And, as noted above, replacement of the 96-inch pipe in Laurel Creek with a larger pipe would not have prevented the flooding, due to the fact that the pipe underneath Haywood Road is a 96-inch pipe. In fact, the City's enlargement of the capacity of the system by replacing the double box culvert with a larger arched pipe in 1993 did not prevent the flooding of Servicemaster

in 1997. Hawkins' expert conceded that replacement of the 96-inch pipe in Laurel Creek with a larger pipe by itself would not be sufficient to alleviate the flooding problem in this area. (R. p. 338, lines 15-24, p. 377, line 24-p. 378, line 7).

Hawkins also contends the City has somehow negligently allowed commercial development in the Haywood Road area. However, there is a complete failure of proof in regard to this allegation. In order to establish a claim against the City in this regard, Hawkins would be required to present evidence that the City was grossly negligent in connection with the issuance of permits for commercial development in the area. However, Hawkins did not present any evidence concerning any specific permit for development in the area. His expert testified that without an extensive flood study, he would not be able to render any opinions in regard to these issues. (R. p. 327, line 24-p. 328, line 23). Since there is no evidence in the record to support Hawkins' allegation that the City negligently allowed commercial development in the Laurel Creek basin area, the Circuit Court's decision granting summary judgment to the City on Hawkins' negligence claims should be affirmed.

C. There is no evidence that any breach of duty was a proximate cause of Hawkins' damages.

Even assuming the City breached a duty it owed Hawkins, there is no evidence such a breach was the proximate cause of Hawkins' damages. Hawkins claims that the flood damage resulted from the City's negligent failure to upgrade the stormwater drainage system, installing an undersized arched pipe, and placing riprap in Laurel Creek. However, Hawkins' arguments overlook the fact that Servicemaster does not flood every time it rains, but instead, it appears that Servicemaster flooded as a result of an extraordinary rainfall event. Arrowood testified that the National Climatic Data Center in Asheville reported that

2.51 inches of rain fell in Greenville, South Carolina in one hour on July 24, 1997; however, she was unable to state what type of storm event such a rainfall represents. (R. p. 140, line 14-p. 141, line 11). Arrowood did indicate that she would expect Laurel Creek to overflow its banks during an extraordinary event. (R. p. 151, lines 1-6). It appears from the record that the damages sought by Hawkins are the proximate result of one extraordinary rainfall event which caused flooding throughout the City, not just to Servicemaster.

Although research failed to reveal any South Carolina appellate decisions addressing this precise issue, the court in Glisson v. City of Mobile, 505 So.2d 315 (Ala. 1987), faced with similar facts, held that even if a municipality negligently maintains a creek, the municipality is relieved of liability where the damage occurs after an extraordinary rain or flood which would have produced the injury independent of the negligence. Likewise, the only reasonable inference is that any action or inaction by the City had no effect on whether Servicemaster flooded on July 24, 1997, since it is undisputed that Servicemaster does not flood every time it rains and that the rainfall event that day was extraordinary. Rather, the July 24, 1997 rainfall was an extraordinary event constituting an Act of God, for which the City is not liable.

Arrowood's testimony confirms that the stormwater drainage pipe installed by the SCDOT underneath Haywood Road is a 96-inch corrugated metal pipe, the same size as the 96-inch pipe installed in Laurel Creek by the owners of Tracks. (R. p. 98, line 18-p. 99, line 5). It is undisputed that both of these drainage pipes are undersized and do not now meet the criteria for stormwater drainage at major road crossings, and both are to be enlarged when the re-design of the stormwater drainage in the Laurel Creek basin is completed. Neither Arrowood nor Sherard offered any opinion as to whether, or the

extent to which, the installation of a larger pipe in Laurel Creek would have made any difference in the flooding Hawkins experienced on July 24, 1997. Since the SCDOT installed a 96-inch pipe under Haywood Road, common sense indicates that this would not have made any significant difference in the amount of flooding Hawkins experienced. The burden of proof is upon Hawkins, and Hawkins failed to present any evidence on this issue.

Although Sherard did initially testify that the undersized 96-inch pipe in Laurel Creek may have caused the flooding of Hawkins' property, he based this testimony 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. He testified further that "the size of the pipe under Haywood Road would have an impact on what my opinion may be on that [Laurel Creek] line," (R. p. 335, lines 17-19), and "if the size of the culvert going under Haywood Road appears to be bigger than what the 96-inch pipe is, then that's obviously going to have some limiting effect on the water being able to drain underneath Haywood Road, consequently causing the back-up of that 96-inch pipe." (R. p. 336, lines 2-7). Subsequently, however, Sherard confirmed with reference to the stormwater drainage system map for the Haywood Road/Laurel Creek basin that the pipe under Haywood Road is in fact a 96-inch pipe, contrary to his earlier assumption that the pipe under Haywood Road was much larger than the 96-inch pipe in Laurel Creek. (R. p. 377, lines 1-6). Arrowood confirmed that the pipe under Haywood Road is a 96-inch pipe. (R. p. 98, line 18-p. 99, line 5). Accordingly, Sherard's deposition testimony fails to raise any genuine issue of material fact.

<u>D. The City is immune from liability for the negligence claim under the South Carolina Tort Claims Act.</u>

The trial court's order should also be affirmed because the City is immune from liability to Hawkins based upon the provisions of the South Carolina Tort Claims Act. Thus, even assuming Hawkins has evidence to support the negligence cause of action, several of the limitations on liability set forth in S.C. Code Ann. § 15-78-60 apply in this case to bar Hawkins' negligence claim. Specifically, the City is not liable for a loss resulting from any of the following: (1) legislative, judicial, or quasi-judicial action or inaction, pursuant to § 15-78-60(1); (2) administrative action or inaction of a legislative, judicial or *quasi-judicial nature, pursuant to § 15-78-60(2); (3) adoption, enforcement or compliance* with any law or the failure to adopt or enforce any law, including, but not limited to, any regulation or written policy, pursuant to § 15-78-60(4); (4) 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, pursuant to § 15-78-60(5); (5) 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, pursuant to § 15-78-60(12); (6) regulatory inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection, of any property to determine whether it complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety, pursuant to § 15-78-60(13); or an act or omission of a person other than an employee, pursuant to § 15-78-60(20). Based upon these provisions, there can be no liability on the part of a municipality relating to the design or

maintenance of stormwater drainage systems or the private development of commercial property which causes an increase in stormwater runoff.

Although research revealed no cases in South Carolina applying these provisions of the Act to facts similar to those in this case, the Texas Supreme Court, in a similar case, concluded that municipalities are not liable for the design and planning of their culvert system, or failure to improve it, since these are generally considered quasi-judicial functions for which a governmental entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997). Thus, this function should be considered quasi-judicial pursuant to §15-78-60(1). The court in City of Tyler explained:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

Id. at 501. This is precisely what Hawkins is alleging in this case. Accordingly, as the court in City of Tyler explained, the City should be immune from liability for appellants' claim that the stormwater drainage system in the Byrdland Drive area is inadequate since the design and planning of this system is a quasi-judicial function covered by §15-78-60(1) of the Act.

Hawkins has also alleged that the City "caused" the flooding by allowing private development in the Byrdland Drive area. Issuing permits for private development is an action which lies at the heart of a municipality's protected administrative powers, as set

forth in § 15-78-60(2), its licensing powers described in §15-78-60(12), and its regulatory powers contained in § 15-78-60(13). Additionally, the City must comply with the law, and it cannot deny a permit to an individual or entity whose application meets the necessary criteria. Nor is the City liable for enforcement of stormwater regulations or its failure to do so. S.C. Code Ann. §15-78-60(4). Further, there is no evidence that the City was grossly negligent by failing to exercise slight care in issuing permits for development in the Haywood Road area which would remove the City from the protections of these provisions of the Act. In fact, there is no evidence at all pertaining to whether any of these developments met the Act's requirements or failed to do so. Last, if Hawkins contends that the private development in this area caused the flooding, this allegation is more appropriately directed to the entities which constructed this development and their drainage systems. Accordingly, any flooding which Hawkins claims occurred as a result of the commercial development of the area is an act of a third person for which the City is not liable under § 15-78-60(20).

The Tennessee court of appeals addressed a similar issue in Miller v. City of Brentwood, 548 S.W.2d 878 (Tenn.Ct.App. 1977). There, the court noted:

> The gravamen of this suit is that the City of Brentwood, by granting building permits for construction which reduced the absorption of rainfall into the earth, has authorized and permitted an increase in the 'run-off' of rainfall which overtaxes the drainage ditch thereby causing flooding and damage to plaintiffs' property.

Id. at 879. In reviewing the parties' arguments over the injunctive relief awarded by the trial court, the court of appeals noted that there was no authority holding a "local government liable for failure to assure that a building project would not injure its neighbors before issuing a permit for construction." Id. at 882. To do so, the court held, would make cities

"the liability insurers upon each building constructed by permission of the city." Id. Reversing the injunctive relief awarded against the City of Brentwood which had restrained them from issuing further permits, the court noted, inter alia, that: 1) the right of action, if any, for plaintiff's injuries is directly against those who caused the problem – the owners of property procuring unnatural amounts of water; 2) there is no authority to enjoin the issuance of a permit, otherwise lawful, for the reason that its use might result in private injury; and 3) "there is no authority for compelling a city to construct an artificial drainage sewer; and it would be a radical, dangerous, and undemocratic precedent for the courts to undertake to enter municipal legislation and administration in any such respect." Id. at 883. Similarly, to allow Hawkins' claims in this case would render the City an insurer of damages between private parties and render the above-cited exceptions to the waiver of sovereign immunity provided by the Act meaningless.

Additionally, other courts have held that a municipality is not liable for an increased flow of surface water over or onto the land of a property owner where the water's course has not been altered and when the increased flow arises solely from changes in the character of the surface produced by development which occurs in the ordinary and regular course of the expansion of a municipality. See, e.g., Baldwin v. City of Overland Park, 205 Kan. 1, 468 P.2d 168 (Kan. 1970); 57 Am.Jur.2d. Municipal County, School and State Tort Liability § 425. This is distinguished from the situation where a governmental agency actually altered the course of drainage of surface water so as to direct water onto property where it does not naturally flow. Like Hawkins' claim in this case, the theory of liability in Baldwin was based upon increased water problems due to the city's growth and development where the course of the water had not been altered by the city. The Baldwin court held that the solution

to the problem of increased water flow resulting from rapid growth is an economic one and lies in concerted political action, rather than in the courts. 205 Kan. At 7, 468 P.2d at 172. On this basis, the Kansas Supreme Court reversed the lower court's ruling that the flooding at issue constituted a nuisance for which the City of Overland Park was liable. Id. at 173. Likewise, the City should not be liable for flooding due to an increase in the natural flow of surface water due to urban development. Therefore, the trial court's order should be affirmed.

III. The trial court properly granted Respondent's motion for summary judgment as to the trespass cause of action.

To establish a claim for trespass, the act must be affirmative, the invasion of land must be intentional, and the harm caused must be a direct result of that invasion. Mack v. Edens, 320 S.C. 236, 464 S.E.2d 124 (Ct.App.1995). There is no evidence to support Hawkins' trespass cause of action. Appellants allege that the City's actions in allowing and encouraging the further development of the area surrounding their property, including Tracks, and installing a drainage system that substantially affected the susceptibility of Servicemaster to flooding, constituted affirmative acts. As argued in response to Hawkins' cause of action for inverse condemnation, this argument is without merit. The City took no affirmative action which changed the topography or caused the flooding of Servicemaster.

As discussed above, the City's only affirmative acts contributed to an *increase* in the drainage capacity of Laurel Creek. It is undisputed that the City installed a *larger* pipe in 1993 to accommodate greater rainfall amounts and to relieve the restricted capacity of the current system. Thus, any allegation by Hawkins that the City is liable for trespass by installing the arched pipe in 1993 is misplaced. Moreover, there is no evidence of intent on

the part of the City to invade Servicemaster by flooding it, or that Servicemaster sustained damage due to the presence of the larger, arched pipe.

To the extent this claim is based upon allegations that the City failed to act by increasing the capacity of the system further, it is also misplaced. The South Carolina Court of Appeals has held that "[t]respass does not lie for nonfeasance or failure to perform a duty." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct.App.1991). Accordingly, any claim that the City failed to upgrade the present drainage system does not support an action for trespass. For these reasons, the court properly granted summary judgment to the City on the issue of trespass.

IV. The trial court properly granted Respondent's motion for summary judgment as to Hawkins' cause of action based upon S.C. Code. Ann. § 5-31-450.

Hawkins claims entitlement to damages from the City based upon provisions of South Carolina Code Annotated Section 5-31-450. However, as the following discussion will illustrate, this statute is not applicable under the facts of this case.

Section 5-31-450 provides as follows:

> 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.

There is no evidence to support a claim under this statute in this case. Although, under some circumstances, § 5-31-450 may require the City to take measures to prevent stormwater from running onto private property from public streets, the cases which have been decided by the South Carolina Supreme Court have limited the application of this statute. These cases have held that, absent some affirmative act by the municipality which causes stormwater runoff to alter course and enter private property, or increases the amount of stormwater runoff onto the private property, the City has no obligation to take measures to prevent the passage of stormwater over private lands or property. See Brown v. School District of Greenville County, 251 S.C. 220, 161 S.E.2d 815 (1968) (city's construction of a catch basin which mitigated the amount of stormwater runoff flowing onto the plaintiffs' property held insufficient to maintain action under statute against the city, since whatever damages were suffered by the plaintiffs were not caused by any positive action taken by the city); Lail v. South Carolina State Highway Department, 244 S.C. 237, 136 S.E.2d 306 (1964) (held that plaintiff must prove that act of municipality increased flow of water onto plaintiff's land and municipality not liable for inverse condemnation where improvement did not change the capacity of the drainage and the damage was caused by the poor state of repair and maintenance of the ditches in the subdivision and excessive rainfall); Hall v. City of Greenville, 227 S.C. 375, 88 S.E.2d 246 (1955) (statute does not make municipality insurer of private lands and a landowner may only recover for damage caused by municipality's works); Hill v. City of Greenville, 223 S.C. 392, 76 S.E.2d 294 (1953) (failure of municipality to provide drainage system to protect property from run-off which entered property through a ditch that was connected to the street was not actionable under statute); Taleff v. City of Greer,

284 S.C. 510, 327 S.E.2d 363 (Ct.App.1985) (evidence that the City failed to accommodate a plaintiff by remedying a preexisting problem of surface water flowing through a culvert was insufficient to maintain a cause of action against the City under the statute).

In Hall, supra, the South Carolina Supreme Court noted that "the statute does not purport to make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover." 88 S.E.2d at 251. As the court noted in reversing the trial judge's dismissal of the case because there were factual issues for the jury to determine, the issue in that case was whether the flooding of the plaintiffs' property was the result of the City's construction work in the area or whether it was due to the natural topography of the neighborhood in which their houses were located. The decision of the court clarifies that the City could only be liable where surface water overflows from its streets onto private property as a result of the construction of the street or other overt acts of the City which it failed to remedy after receiving notice. The court found there was evidence from which a jury could conclude that when the City installed concrete curbs, gutters, and other improvements in City streets lying uphill from the plaintiff, the City had diverted stormwater into a stream which did not have the capacity to carry it off, causing the stormwater to overflow onto the plaintiffs' property. The City's liability was premised upon its affirmative acts in causing an increase in the flow of surface water and altering the course of that surface water so that it flowed onto the appellant's property.

Based upon these decisions of the South Carolina Supreme Court, Section 5-31-450 is not applicable here. The City has taken no affirmative action which has caused the

flooding of Servicemaster. As discussed earlier in this brief, the only affirmative acts of the City with respect to the stormwater drainage system in the vicinity of Servicemaster involved increasing the drainage capacity by the installation of the arched pipe in 1993 and installation of riprap on the banks of Laurel Creek in 1997. These affirmative acts did not redirect surface water onto Servicemaster, and the flooding of Servicemaster occurred due to the extraordinary rainfall which fell during a short period of time on July 24, 1997 and the overwhelming of the capacity of the stormwater drainage system in the area as a result.

V. The trial court properly granted Respondent's motion for summary judgment as to Hawkins' conversion cause of action.

Hawkins alleges a cause of action for conversion, claiming that by flooding Servicemaster, the City wrongfully gained control of Servicemaster, thus preventing Hawkins from conducting business and benefiting from Servicemaster. However, this claim is not appropriate under the facts of this case. Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another. Crane v. Citicorp Nat. Serv., Inc., 313 S.C. 70, 437 S.E.2d 50 (1993). Since an action in conversion does not lie for an exercise of dominion or control over real property, it is not appropriately asserted under the facts of this case. Equitable Trust Co. of Columbia v. Columbia Nat. Bank et al., 145 S.C. 91, 142 S.E. 811 (1928). Further, no conversion can be established as the City never assumed or exercised the right of ownership over Hawkins' property. Alternatively, if Hawkins is attempting to use conversion to recover for damage to chattels or the property used by Servicemaster employees, there is no evidence that the City seized, disposed of, denied use of, or wrongfully took control of any chattel belonging to Hawkins. Accordingly, the trial court's order should be affirmed.

ADDITIONAL SUSTAINING GROUNDS PURSUANT TO SCACR 220(c)

Rule 220(c) of the Appellate Court provides that the appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal. Pursuant to Rule 208(b)(2), the City includes the following additional argument which, although not relied upon by the Circuit Court, is an additional basis upon which this court should affirm the judgment below.

VI. The release signed by Hawkins in 1994 bars any claims relating to the design, installation and maintenance of the stormwater drainage system in the Laurel Creek basin.

After experiencing flood damage in 1991, Hawkins filed a lawsuit against the City and other defendants in 1992 in which he specifically sought damages from the City for the alleged negligent design of the stormwater drainage system in the area and the City's failure to maintain or re-design the stormwater drainage system to prevent flooding of private property such as Servicemaster. In exchange for the payment of damages by the City, Hawkins executed a release which, in addition to providing for a full release of any claims relating to the damage caused by the flooding on July 30, 1991, provided as follows:

> It is acknowledged and understood that this is a full, complete and final release of all damages arising out of the design, construction, maintenance, and operation of the water drainage system on or adjacent to Bryland [sic] Drive, that no future or further payments will be paid as a result thereof and that the persons and corporations in whose favor this release runs are herewith fully, finally and forever discharged from any and all liability with respect to the aforementioned property.

(L. Hawkins Dep. at 63, Ex. 6) *In this lawsuit, Hawkins seeks to raise the same issues and* recover additional damages due to flooding as a result of the alleged failure of the City to properly maintain or install a stormwater drainage system which prevents flooding during times of heavy rainfall. These claims are specifically barred by the express terms of the

release Hawkins signed in 1994. As of March 28, 1994, the date the release was signed by Hawkins, the components of the stormwater drainage system in the Laurel Creek basin were in place, and no changes have been made to the system since that time. The only maintenance work performed by the City in this area since 1994 was the placement of riprap along the banks of Laurel Creek in early July, 1997, shortly before the storm which gave rise to this lawsuit. As is discussed in more detail above, there is no evidence that this maintenance work by the City caused the flooding on July 24, 1997 or increased the amount of stormwater which overflowed the banks of the creek during the storm. In accepting the City's offer of settlement and the consideration paid for the release, Hawkins agreed he would never again sue for damages relating to the design of the stormwater drainage system in the Laurel Creek basin. Accordingly, all of Hawkins' claims relating to the design of the stormwater drainage system are barred by this release.

CONCLUSION

Based upon the foregoing authorities and arguments, the City respectfully submits that the trial court's order granting its motion for summary judgment should be affirmed.

Respectfully submitted,

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March 13, 2003

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Joseph J. Watson,
Circuit Court Judge

Case No. 01-CP-23-2459R

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.

PROOF OF SERVICE

I, Lori A. Rogers, legal secretary to Fred W. Suggs, III, certify that I have served the Respondent, City of Greenville's, Final Brief by depositing three copies in the United States Mail, first class postage prepaid, on March 13, 2003, addressed to counsel for appellants, as follows:

Mr. Robert C. Childs, III
Mitchell, Bouton, Yokel & Childs
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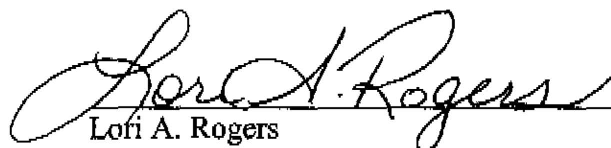

Lori A. Rogers

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

Joseph J. Watson, Jr.
Circuit Court Judge

Case No. 01-CP-23-2459R

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.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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City of Greenville

March 27, 2003

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The Honorable Joseph J. Watson,
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PROOF OF SERVICE

I, Lynette S. Birkner, legal secretary to Fred W. Suggs, III, certify that I have served the Respondent, City of Greenville's, Certificate of Compliance, by depositing three copies in the United States Mail, first class postage prepaid, on March 27, 2003, addressed to counsel for appellants, as follows:

Mr. Robert C. Childs, III
Mitchell, Bouton, Yokel & Childs
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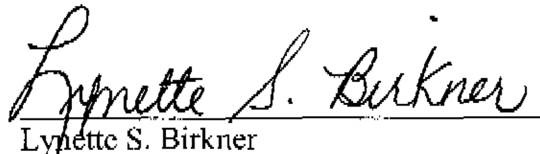
Greenville, SC 29603



Lynette S. Birkner