THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal From York County
Court of Common Pleas
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-00146
Appellate Case No. 2015-000079

Nadine Brantley, Appellant,

v.

The City of Rock Hill, a body politic and subdivision of the State of South Carolina, and Wherry Construction Co., Inc., Defendants,

Of Which The City of Rock Hill, a body politic and subdivision of the State of South Carolina is the Respondent.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Nadine Brantley ("Plaintiff") filed this civil action on January 12, 2012. In the Complaint, Plaintiff set forth three causes of action against the City of Rock Hill ("City"): (1) inverse condemnation (Complaint, R. pp. 13-14, ¶¶ 8-19), (2) gross negligence (Complaint, R. pp. 14-17, ¶¶ 20-39), and (3) nuisance (Complaint, R. pp. 17-18, ¶¶ 40-51.) In the Complaint, Plaintiff also asserted a cause of action for defective construction exclusively against defendant Wherry Construction Co., Inc. ("Wherry"). The City filed a Answer in accordance with Rule 12, SCRCP, asserting a qualified denial and affirmative defenses. Wherry did not file an answer or make an appearance in the action.

Upon completion of discovery, the City filed a Motion for Summary Judgment on March 31, 2014. On April 9, 2014, Plaintiff served a Cross Motion for Summary Judgment.

On August 11, 2014, the Honorable S. Jackson Kimball held a hearing on the cross motions. On September 2, 2014, the

lower court entered an Order for Summary Judgment ("Order") dismissing all three claims against the City.

On September 17, 2014, Plaintiff filed a Motion to Reconsider, Alter or Amend Judgment ("Motion to Reconsider") pursuant to Rule 59(e) with respect to the dismissal of Plaintiff's claims for inverse condemnation and gross negligence against the City. A hearing was held on Plaintiff's Motion to Reconsider on October 16, 2014. On December 18, 2014, the Honorable S. Jackson Kimball entered an order denying Plaintiff's Motion to Reconsider.

Plaintiff served a Notice of Appeal on January 12, 2015. Cam Halford, counsel for Plaintiff, served a Petition to be Relieved as Counsel on January 28, 2015. By Order filed by this Court on March 9, 2015, Cam Halford was relieved as counsel and Plaintiff proceeded *pro se*.

Plaintiff served an Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on May 11, 2015. By letters dated May 21, 2015, the Court notified Plaintiff that Appellant's Brief and Designation failed to comply with the requirements of Rules 208(b)(1) and Rule 209, SCACR. On June 1, 2015, Appellant served a revised Initial Brief and revised Designation of Matter to be Included in the Record on Appeal (collectively, "Appellant's Brief").

STATEMENT OF FACTS

Plaintiff is the owner of the property located at 1020 Willowbrook Avenue in Rock Hill, South Carolina ("Property"). (Order, R. p. 2; Complaint, R. p. 12, ¶ 1.) Spencer Park is a public park owned by the City and is situated upstream from the Property. Willowbrook Avenue is a street owned by the South Carolina Department of Transportation ("SCDOT") and is situated immediately downstream from the Property. (Wright Dep. Exhibit A, R. pp. 250-51; Order, R. p. 2.)

A stream flows through a well-defined channel with banks in a fixed course that crosses Spencer Park and the Property (the "Watercourse"). The Watercourse then travels through a culvert located underneath Willowbrook Avenue (the "Culvert") and naturally discharges downstream into Manchester Creek. (Order, R. p. 2; Bagley Aff., R. p. 241, ¶ 4.) The stream is a natural watercourse. (Bagley Aff., R. p. 241, ¶ 4; Wright Dep., R. p. 220, lines 18-21.)

The Culvert which tunnels the Watercourse under Willowbrook Avenue immediately downstream from the Property is owned and maintained by the SCDOT. (Order, R. p. 4; Bagley Aff., R. p. 242, ¶ 9; Brantley Dep., R. p. 180, lines 22-24, R. p. 181, line 22 - p. 182, line 7, Appendix p. 7, line 9 - p. 8, line 9, Appendix p. 9, lines 11-14; Wright Dep., R. p. 198, line 18 - p. 200, line 17; Barfield Dep., R. p. 235, line

24 - p. 236, line 9.) In weather events with extraordinary amounts of rain, the culvert under Willowbrook is unable to handle the quantity of water flowing in the Watercourse and water is impounded resulting in flooding of the Property. (Order, R. p. 3; Wright Dep. R. p. 196, lines 10-22, R. p. 198, lines 7-17.)

The record is devoid of any facts to support or suggest that the City owns or has assumed control over the Watercourse on the Property. (Bagley Aff., R. p. 241, ¶ 5.) The Watercourse on the Property has not been dedicated to or accepted by the City. (Bagley Aff., R. p. 241, ¶ 11; Brantley Dep., R. p. 190, lines 5-10.) The City has not been granted fee simple title or a right-of-way to the Watercourse located on the Property. (Bagley Aff., R. p. 242, ¶ 12; Bagley Dep., Appendix p. 1, line 9 - p. 2, line 7.)

Moreover, the record does not contain any facts to show that the City has altered the Watercourse or that the City has altered the volume or velocity of water flowing through the Watercourse. (Wright Dep., R. p. 204, line 20 - p. 205, line 8, R. p. 209, lines 15-23; Bagley Aff., R. p. 242, ¶ 6.)

On May 11, 1999, the City issued a residential building permit to Lawrence Wherry, a licensed homebuilder. (Wright Dep., Exhibit A, R. p. 247.) Wherry completed construction of the existing residence on the Property in 2001. (Order, R. p.

3; Wright Dep., Exhibit A, R. p. 247.) The record evidences flood events in 2001, 2003 and 2007. (Wright Dep., Exhibit A, R. pp. 247-48.) Plaintiff acquired the Property through a foreclosure sale in July 2010. (Order, R. p. 2; Brantley Dep., R. p. 171, line 18 - p. 176, line 22.)

According to Plaintiff, the Property flooded on or about August 13, 2011. (Brantley Dep., Appendix p. 11, line 11 - p. 12, line 7.) Plaintiff was not present at the Property during the alleged flood and did not witness the event. (Brantley Dep., R. p. 189, lines 21-23.)

In the lawsuit, Plaintiff designated two expert witnesses: Robert G. Barfield ("Barfield"), a consulting architect, and Ronald E. Wright ("Wright"), a consulting engineer. (Plaintiff's Supp. Responses to Int., R. p. 48.) The scope of Barfield's opinion testimony was limited to issues relating to the construction permit issued to Wherry Construction. (Barfield Dep., R. p. 231, lines 7-18, R. p. 238, lines 14-18.) The scope of Wright's opinion testimony was limited to waterflow, the inadequacy of the Culvert in tunneling the Watercourse under Willowbrook Avenue, and the permit issued to and construction performed by Wherry Construction. (Wright Dep., R. p. 218, line 8 - p. 219, line 10.)

Plaintiff's experts testified that they did not perform any hydrology study, analyze volume or velocity of water flow, or otherwise analyze the hydrological factors relating to the Watercourse or the alleged flood. (Wright Dep., R. p. 199, lines 18-23, R. p. 211, lines 14-23; Barfield Dep., R. p. 229, lines 12-16.) The record is lacking evidence that the City has performed any work upstream of Spencer Park to increase either the volume or rate of flow of storm water discharged into the Watercourse through Spencer Park. (Order, R. p. 3; Bagley Aff., R. p. 242, ¶¶ 6-7.) The record is lacking of any evidence that the City has performed any work within Spencer Park to increase either the volume or rate of flow of storm water discharged into Watercourse. (Order, R. p. 3; Bagley Aff., R. p. 242, ¶¶ 6-7.) Plaintiff's expert testified that the presence of Spencer Park upstream from the Property likely reduces the velocity of water traveling downstream towards the Property. (Wright Dep., R. p. 203, line 5 - p. 204, line 19.)

ARGUMENT

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO ALL CAUSES OF ACTION BY PLAINTIFF AGAINST THE CITY

A. Standard of Review

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976). "An

appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP: summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct.App.1998); see Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "'In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court.'" Wells, 331 S.C. at 301, 501 S.E.2d at 749 (quoting 5 Am.Jur.2d *Appellate Review* § 700 (1995)).

B. Summary Judgment was proper with respect to Nuisance Cause of Action

The lower court's dismissal of Plaintiff's nuisance claim was proper on two independent grounds. First, the nuisance claim against the City is barred by the South Carolina Tort Claims Act ("SCTCA") which provides that "a governmental entity is not liable for a loss resulting from . . . a nuisance." S.C. Code Ann. § 15-78-60(7). Plaintiff has offered no legal precedent to circumvent the express provisions contained in the SCTCA.

Even if one ignored the express preclusion by the SCTCA, the record in this matter lacks any evidence of actions by the

City to interfere with Plaintiff's use and enjoyment of the Property. "A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." O'Cain v. O'Cain, 322 S.C. 551, 562, 473 S.E.2d 460, 466 (Ct. App. 1996).

In this case Plaintiff has not specified any acts or uses which could be characterized as unreasonable, unwarrantable or unlawful. The City owns a public park over which a natural stream flows downhill in the normal course. Upon review of the record, the lower court properly concluded that the record lacks any evidence that City has taken any action to alter, increase or direct the natural flow within the Watercourse. Likewise, the record is void of any evidence that the City's park has been used in any manner which interferes with Plaintiff's use and enjoyment of her Property. Accordingly, this Court should affirm the lower court's order for summary judgment as to the nuisance cause of action.

C. Summary Judgment was proper with respect to Inverse Condemnation Cause of Action

The lower court held that the record contains no facts that can be construed as an affirmative, positive, aggressive act by the City to support a claim of inverse condemnation. (Order, R. p. 4.) The lower court was correct and summary judgment was proper on this claim.

"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." Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient." Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct. App. 2004).

The holding of Hawkins is controlling in this case. (Order, R. p. 4.) In Hawkins, a landowner was suing the City of Greenville for damages arising from stormwater flooding. The record in Hawkins contained evidence that private developers installed pipes in a creek to expand the creek's ability to handle runoff; that the City of Greenville subsequently installed an additional pipe to increase the creek's stormwater capacity; and that the City of Greenville installed riprap along the banks of the creek. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. Following these improvements, a rainstorm caused the creek to overflow and flood the plaintiff's property. The plaintiff alleged that the City of

Greenville's actions were a cause of the flood and asserted claims against the city for inverse condemnation, negligence, trespass and nuisance, among others. This Court found that the City of Greenville's actions did not rise to "affirmative" and "positive" acts required for inverse condemnation.

Like Hawkins, the record in this case contains no facts that can be construed as an affirmative, positive, aggressive act by the City. In this case, the record reveals that the City has not materially altered or exercised even a minimum amount of control over the Watercourse above, within or below the Property.

Upstream from the Property, the record indicates that the City has not altered the Watercourse or altered the volume or velocity of water flowing through the Watercourse; the City has not diverted surface waters towards the Property; and the City has not artificially collected surface waters and cast them in concentrated form onto the Property. (Wright Dep., R. p. 204, line 20 - p. 205, line 8.) These facts are not in dispute. Neither of Plaintiff's experts was able to testify as to any action by the City which has directed water toward the Property or increased the rate of flow of water to the Property. According to one of Plaintiff's experts, it is more likely that Spencer Park reduces the volume or velocity of

water flowing through the Watercourse. (Wright Dep., R. p. 204, lines 2-19.)

Within the Property, the record contains no evidence that the natural Watercourse located thereon has been dedicated to the City, was accepted by the City or has been designed, constructed, or in any manner altered by the City.

Immediately below the Property, the record amply demonstrates that the Culvert under Willowbrook Avenue is the responsibility of the South Carolina Department of Transportation. (Order, R. p. 4; Bagley Aff., R. p. 242, ¶ 9; Brantley Dep., R. p. 180, lines 22-24, R. p. 181, line 22 - p. 182, line 7, Appendix p. 7, line 9 - p. 8, line 9, Appendix p. 9, lines 11-14; Wright Dep., R. p. 198, line 18 - p. 200, line 17; Barfield Dep., R. p. 235, line 24 - p. 236, line 9.) Plaintiff's expert testified that the flooding of the residence on the Property was caused by the Culvert. (Wright Dep. R. p. 196, lines 10-22, R. p. 198, lines 7-17.) The City does not own or exercise control over the Culvert; the City was not involved in the design or construction of the Culvert; and the City has not made any improvements or modifications to the Culvert.

Therefore, Plaintiff has failed to produce any facts to show that the City committed "affirmative" and "positive" acts as to the Property to sustain a claim for inverse

condemnation. Accordingly, this Court should affirm the lower court's Order as to Plaintiff's claim for inverse condemnation.

D. Summary judgment was proper with respect to Gross Negligence Claim

The lower correctly ruled that Plaintiff has failed to establish a claim against the City for gross negligence. (Order, R. pp. 5-6.) "Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "When the evidence supports but one reasonable inference . . . the question [of gross negligence] becomes a matter of law for the court." Id. at 53, 451 S.E.2d at 887-88 (1994).

Plaintiff's gross negligence claim is based on two factual frameworks. (Order, R. p. 4.) First, she argues that the City was grossly negligent in the issuance of the construction permit and certificate of occupancy for the house. Second, she argues that the City was grossly negligent in failing to prevent the house from flooding once the house was constructed. Both contentions fail as a matter of law.

1. Building and Permitting Claims

The lower court correctly ruled that Plaintiff's claim for gross negligence in issuing the construction permit or the certificate of occupancy fails as a matter of law. First, Plaintiff's negligent permitting claim is barred by the two year statute of limitations under the South Carolina Tort Claims Act ("SCTCA"). S.C. Code Ann. § 15-78-110.[1] Because all material facts and characteristics were known or readily knowable upon completion of the residence, the limitations period expired during 2003.

Even assuming that the limitations period did not commence running under the discovery rule[2] until a flood event put an owner on inquiry notice, these claims are still barred by the expiration of the statute of limitations. According to Plaintiff, the Property flooded in 2001, 2003 and 2007 and claims were filed with the City. Therefore, the two year

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[1] The lower court did not rule on the City's statute of limitations defense. However, the bar of the applicable statute of limitations provides an additional sustaining ground for upholding summary judgment in favor of the City on this claim. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220, SCACR. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

[2] Pursuant to the discovery rule "[t]he statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).

statute of limitations period expired well before the filing of this action.

Second, Plaintiff's claim for gross negligence fails under the SCTCA and common law for lack of duty. "The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the [South Carolina Tort Claims] Act." Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004). "The determination of the existence of a duty is solely the responsibility of the court. Whether the law recognizes a particular duty is an issue of law to be decided by the Court. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003).

Under established law, the City does not have a duty to a property owner for the issuance of a building permit to a homebuilder. Summers v. Harrison Const., 298 S.C. 451, 456, 381 S.E.2d 493, 496 (Ct. App. 1989). In Summers, a homeowner sued the Lexington County Department of Planning and Development ("Department") claiming that the Department was grossly negligent in issuing a construction permit to an unlicensed builder. Summers, 298 S.C. at 455, 381 S.E.2d at 496. The Court of Appeals held that the Department owed no

duty to the plaintiffs and therefore was not liable in negligence. Id.

In this case, the lower court properly ruled that there is neither a common law duty nor a statutory duty owed by the City to Plaintiff. (Order, R. p. 6.) The City issued a building permit to Lawrence Wherry, a duly licensed homebuilder. The City did not construct the house on the Property. Contrary to established South Carolina law, Plaintiff seeks to hold the City liable as the insurer of any defects in construction. See Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 77, 439 S.E.2d 266, 268 (1993) (citing Summers for the proposition that "the duty to issue a building permit to only qualified applicants does not impose upon public officials the responsibility to guard against poor performance in construction").

Separately and independently, the lower court also ruled that Plaintiff's claim for gross negligence as to permitting fails due to the lack of supporting facts in the record. Plaintiff argues that the City was grossly negligent because it failed to obtain from Wherry certain engineering approval prior to issuing a permit to Wherry Construction. However, the lower court properly rejected this bald assertion not only on legal grounds (lack of duty) but also because Plaintiff failed to adduce facts in the record to support the underlying

premise. The only facts in the record confirm that the City did receive such engineering approval. (Bagley Dep., Appendix p. 3, line 18 - p. 6, line 5.)[3] The lower court was correct in ruling that the City was under no duty to Plaintiff to obtain a written engineering report and, even if there were any such requirement, the mere absence of a written report over a decade later is insufficient to establish a reasonable inference of gross negligence. (Order, R. p. 5.)

2. Failure to Prevent Flooding

The lower court properly ruled that Plaintiff's claim for gross negligence in failing to prevent flooding of the Property fails as a matter of law. (Order, R. pp. 6-7.) In her claim that the City's refusal and failure to prevent flooding is actionable gross negligence, Plaintiff's theory of liability is seemingly premised on the inaccurate belief "that all the water that falls onto the ground in Rock Hill belongs to the City." (Brantley Dep., R. p. 186, lines 3-16.) Plaintiff's misplaced theory is shared by both of her designated experts in this case. (Wright Dep, Appendix p. 13, lines 4-18; Barfield Dep., R. p. 233, line 25 - p. 234, line 7.) This theory fails as a matter of law for at least three reasons.

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[3] Bagley was testifying as the designated representative of the City of Rock Hill under Rule 30(b)(6), SCRCP.

First, it is undisputed that this case involves claims of flooding from a natural watercourse.[4] "An upstream owner has a right and expectation that water will flow unobstructed . . . ." Johnson v. Williams, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961); see Dize Awning & Tent Co. v. City of Winston-Salem, 29 N.C. App. 297, 302, 224 S.E.2d 257, 260 (1976)(holding that "surface waters may be drained into a natural drainway without liability to lower property owners for damage caused to lands along the lower drainway as a result of increased flow of a natural stream."). Although the case law actually allows an upstream owner to reasonably increase the rate of flow in a watercourse, the record in this case establishes that the City has not materially altered the Watercourse and has not increased the volume or velocity that naturally drains into the Watercourse. The City is not strictly liable to Plaintiff for waters flowing through a natural watercourse as a matter of law.

Second, the City has no duty under South Carolina law to protect all property, or in this case, the subject Property, from flooding. The record has no evidence that the flooding at issue is the result of any action by the City. The City

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[4] "To constitute a water course, there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and it naturally discharges itself into some other stream or body of water." Johnson v. Williams, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961).

has not altered the Watercourse or the flow of water upstream from the Property. The City does not own and has not assumed control over the Watercourse on the Property. Finally, the City has no control over the infrastructure located immediately downstream from the Property as Willowbrook Avenue and the drainage infrastructure associated with Willowbrook Avenue is owned and maintained by the SCDOT. In short, the record is void of evidence upon which to find the existence of a duty owed by the City to prevent flooding at the Property.

Third, Plaintiff's claim for gross negligence is barred pursuant to the SCTCA. This Court recently held that municipal stormwater activities are excepted from the general waiver of immunity provided under the SCTCA. Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004). The Court articulated the applicable exceptions that "bear directly upon the alleged acts and failures to act by the City with respect to the municipal drainage system." Id. The Court provided that:

> Specifically, under section 15-78-60, the City is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction ; (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; (3) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; (4) 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; or (5) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety. S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13).

Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004). The Court further stated that "municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for which a government entity is not liable." Hawkins v. City of Greenville, 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004). There is nothing in the record to support any contention that the City owns or controls the Watercourse on the Property or the Culvert.

CONCLUSION

For the reasons stated above, the Order should be affirmed and this appeal dismissed with prejudice.

Respectfully submitted,

By: 

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
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Of which the City of Rock Hill is . . . . . Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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Date: April 8, 2016

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PROOF OF SERVICE

I certify that the foregoing Final Brief of Respondent has been served by depositing a copy thereof in the United States Mail, postage prepaid, on April 8, 2016, addressed to:

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Date: April 8, 2016

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