IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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

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

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

v.

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

Of whom
City of North Charleston ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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September 16, 2016

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2016.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY HOLDING THAT THE CITY'S CONSTRUCTION OF GRADED STREETS CAUSING STORM WATER TO COLLECT IN FRONT OF TIPPERARY'S STORE, IN AND OF ITSELF, WAS AN "AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACT" REQUIRED TO SUPPORT AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY?

II. DID THE COURT OF APPEALS ERR BY HOLDING THAT MERELY CONSTRUCTING GRADED STREETS, IN AND OF ITSELF, SATISFIES THE FIRST ELEMENT OF AN INVERSE CONDEMNATION ACTION AGAINST A GOVERNMENTAL ENTITY WHERE NO ALLEGATIONS ALLEGE THAT THE CITY "COLLECTED, CHANNELED, OR THRUST WATER IN A MANNER DIFFERENT FROM THE NATURAL FLOW?"

III. DID THE COURT OF APPEALS ERR BY IGNORING ITS OWN PRECEDENT SET FORTH IN HAWKINS AND GRAHAM AND MISAPPLYING THE SUPREME COURT'S PRECEDENT FOR AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY?

IV. DOES PUBLIC POLICY FAVOR THE CITY?

STATEMENT OF THE CASE

This case arises from various flooding events in North Charleston over the course of years from 2003-2009 which resulted in damages to the La-Z-Boy Furniture Gallery operated by Appellant Tipperary Sales (hereinafter "Tipperary") at Northwoods Point Shopping Center. Tipperary originally filed a Complaint on April 20, 2010, seeking compensation under theories of negligence/gross negligence, inverse condemnation, and trespass from various governmental entities – South Carolina Department of

Transportation, South Carolina Department of Health and Environmental Control, City of North Charleston, and Charleston Water System.[1] After various proceedings, the case was restored to the docket and this case is currently before the Court on an amended complaint filed October 24, 2012. [APP pp. 35-75] Tipperary alleged causes of action for negligence/gross negligence and inverse condemnation against all four governmental entities and Defendants, and a cause of action for trespass against SCDOT, the City of North Charleston,[2] and the Charleston Water System.

Each of the governmental entities timely answered the amended complaint: SCDOT filed an answer on December 10, 2012 [APP pp. 103-114] SCDHEC filed an answer on November 2, 2012 [APP pp. 76-84]; City of North Charleston filed an answer on December 27, 2012 [APP pp. 115-131]; and Charleston Water System filed an answer on November 13, 2012 [APP pp. 85-102]. Over the course of the next year, Tipperary conducted minimal discovery. By the end of 2013, the governmental entities each filed dispositive motions: the City of North Charleston filed a Rule 12(c) motion to dismiss on November 21, 2013 [APP pp. 132-156]; SCDOT filed a motion for summary judgment on November 21, 2013 [APP pp. 157-160]; SCDHEC filed a motion for summary judgment on November 25, 2013 [APP pp. 161-165]; and Charleston Water System filed a Rule 12(c) motion to dismiss, or, in the alternative, for summary judgment on

[1] Tipperary also sought compensation from Associated Developers, Inc., and Parkhill, LLC; however, those claims are not the subject of this appeal.

[2] Tipperary also alleged a cause of action against the City of North Charleston for violation of S.C. Code Ann. §5-31-450 which was dismissed by the lower court Order; however, Tipperary did not appeal such dismissal, and, therefore, such dismissal is the "law of the case." Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed. See Greenville County v. Kenwood Enters, Inc., 353 S.C. 157, 577 S.E.2d 428 (2003); Douglass v. Boyce, 344 S.C. 5, 542 S.E.2d (2001); Town of Mt. Pleasant v. Jones, 355 S.C. 295, 516 S.E.2d 468 (Ct. App. 1999) (holding unappealed ruling becomes law of case, and appellate court must assume ruling was correct; National Grange Mut. Ins. Co. v. Firemen's Ins. Co., 310 S.C. 116, 425 S.E. 2d 754 (Ct. App. 1992); see also ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (emphasizing that unappealed rulings become law of case and should not be reconsidered by this Court).

December 6, 2013[APP pp. 166-170]. The motions came for hearing before The Honorable R. Markley Dennis on January 7, 2014. [APP pp. 281-309].

The Trial Court granted summary judgment to SCDOT and SCDHEC, and dismissed the claims against the City of North Charleston and Charleston Water System.[3] Separate orders were filed as to each Defendant. Relevant for this current Petition, as to the City of North Charleston, the Trial Court held that Tipperary's inverse condemnation claim against the City failed because Tipperary did not allege any affirmative, positive, aggressive act by the City. Tipperary served and filed a Notice of Appeal to the Court of Appeals on March 17, 2014. [APP pp. 419-453]. Tipperary served and filed an Amended Notice of Appeal on April 2, 2014. [APP p. 454].

Tipperary appealed the Trial Court's Order as to all Respondents and, after briefing and oral arguments, the Court of Appeals issued its unpublished decision Opinion No. 2116-UP-351 on June 30, 2016. In its unpublished Opinion, the Court of Appeals upheld the Trial Court's dismissal of all claims against the City of North Charleston, with the exception of Tipperary's inverse condemnation claim, which it reversed and remanded to the lower court. Respondents timely filed petitions for rehearing, which the Court of Appeals denied on August 18, 2016. The City of North Charleston hereby files its timely Petition for Writ of Certiorari as to the Court of Appeals' reversal of the Tipperary's inverse condemnation claim dismissal only.

[3] The Trial Court also dismissed all claims related to any flood events prior to April 8, 2008 based on the two-year statute of limitations, S.C. Code Ann. §15-78-110. Tipperary has not appealed from such ruling, and, therefore, such ruling is the "law of the case."

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CITY'S CONSTRUCTION OF GRADED STREETS CAUSING STORM WATER TO COLLECT IN FRONT OF TIPPERARY'S STORE, IN AND OF ITSELF, WAS AN "AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACT" REQUIRED TO SUPPORT AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY.

This Petition concerns the very limited issue of what constitutes an "affirmative, positive, aggressive act" to establish an inverse condemnation cause of action against a governmental entity in South Carolina. Respectfully, the Court of Appeals erred by finding that allegations alleging "the City constructed nearby streets in such a manner that storm water was directed toward its store," in and of itself, amounts to an "affirmative, positive and aggressive act" of a governmental entity (i.e., the first element of an inverse condemnation claim). As set forth in common law, South Carolina law requires, and has always required, a governmental entity "to collect, channel and thrust water in a manner different from the natural flow" in order to set forth facts alleging the first element of an inverse condemnation cause of action. In other words, municipal authorities which pave and grade streets are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner; however, municipal authorities are not permitted to concentrate, gather such water into artificial drains or channels, and throw it on the land of an individual owner in such a manner and volume that is different than the natural flow of surface water. As such, the mere constructing of streets in a manner that storm water was directed towards a store, in and of itself, does not satisfy the requirement of establishing an inverse condemnation cause of action against a governmental entity.[4]

[4] This is especially the case in this present matter where Tipperary alleges the causes of the flooding are (1) the alleged inadequacy of a "choke point" created by inadequate 84" SCDOT drainage pipes, (2) the

In relevant parts, Tipperary's Amended Complaint allegations set forth:

9. Unbeknownst to La-Z-Boy, the Northwoods Mall area was prone to flooding. As is reflected in a 1980 E.M. Seabrook, Jr., Inc. (hereinafter "Seabrook") study, the Northwoods Mall parking lot has had a long history of flooding. The Seabrook study noted that the flooding issues were discussed with SCDOT and with North Charleston. Seabrook also determined that flooding would take place upstream of the Highway 52 Connector in any 50-year storm due to the sizing of the pipes under the highways and downstream to two 84" pipes laying beneath the Northwoods Mall parking lot, which were and are grossly undersized and form a constriction point and obstruction to storm water drainage for the entire watershed. As such, as early as 1980, SCDOT and North Charleston knew that the facilities were inadequate to handle any heavy rainfall event.

10. The Seabrook study also revealed that more than 1,900 acres drained to the twin 84" pipes running beneath the Northwoods Mall parking lot - 900 acres more than any previous drainage calculation had projected. The Seabrook study put SCDOT and North Charleston on notice that the twin 84" pipes were even more of a choke point for the storm water drainage system than previously believed. Still, SCDOT did nothing, and, upon information and belief, made it clear to Seabrook that it intended to do nothing.

THE DRAINAGE BASIN NEAR AND AROUND THE LA-Z-BOY STORE

11. Immediately downstream from Parkhill Place subdivision, storm water is channeled through a box culvert beneath the Highway 52 Connector. The box culvert was installed by SCDOT. Upon information and belief, the box culvert is not sufficiently sized to handle upstream storm water runoff.

12. Just downstream from the box culvert are the twin 84" pipes, which are the intake point for the drainage system that runs below and through Northwoods Mall parking lot. SCDOT installed, owns, and maintains, the twin 84" pipes that are intended to carry storm water beneath the Northwoods Mall parking lot until they empty into an open ditch. The twin 84" pipes have *never* been adequate for managing storm water runoff since they were installed by SCDOT.

16. Though SCDOT has repeatedly been warned of the inadequacy of its 84" pipes, and the attendant risks of severe flooding, SCDOT has refused to correct their inadequate facilities. In fact the twin 84" pipes act as a dam, preventing the flow of storm water to the Goose Creek Reservoir.

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alleged construction of a highway by SCDOT, and (3) the alleged high reservoir waters of the Goose Creek Reservoir controlled by CWS.

18. When there is a heavy rainfall, the storm water runoff flows down from the Parkhill Place subdivision and points upstream to the rear of the La-Z-Boy store as well as from Ashley Phosphate road down Northwoods Boulevard to the front of the La-Z-Boy store. The entire flow of storm water, both from the front and rear of the building, is intended to enter SCDOT's 84" pipes and to flow down the CWS-owned watershed to the Goose Creek Reservoir. **The La-Z-Boy store is situated at the low point of the entire watershed**. As Defendant Earth Tech reported to SCDOT and to Davis & Floyd, **the La-Z-Boy store is the lowest point in the area around the mall and shopping center, and the store will tend to flood before any other surrounding stores or the mall itself**.

19. **Instead of being channeled down the drainage watershed, the storm water runoff backs up at the constriction point at the opening of SCDOT's twin 84" pipes**.

20. Further, because of the incorrect design, construction and maintenance of the CWS drainage system, which is either flat or has negative drainage between the Northwoods Mall/Northwoods Pointe Shopping Center and the Goose Creek Reservoir, the entire drainage system is inadequate to the task of moving water away from the La-Z-Boy store and to the Reservoir.

IMPROVEMENT OF THE ASHLEY PHOSPHATE ROAD/HIGHWAY 52 CONNECTOR/I-26 INTERCHANGE

21. In September, 2002, SCDOT began construction to improve the interchange at I-26, Ashley Phosphate road, and the Highway 52 Connector in North Charleston.

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

28. Additionally, all runoff from the added impervious acreage of the expanded highway and interchange likewise flowed to the twin 84" pipes located in SCDOT's right-of-way and within SCDOT's exclusive control.

29. SCDOT had long known that the 84" pipes were inadequate to the task of carrying away even a modest amount of storm water, yet SCDOT refused to make requisite improvements to the choke point in the drainage system at the mouth of the 84" pipes.

32. Davis & Floyd commissioned Earth Tech n/k/a AECOM, SCDOT's design engineers for the improvement project, to study the impact of the interchange improvements on downstream storm water management. Earth Tech concluded that the Highway 52 Connector improvements would add 13.7 acres of impermeable material directly adjacent to the

choke point in SCDOT's right-of-way at the inadequate twin 84" pipes. In fact, Earth Tech notified SCDOT that "the double pipe system under the [Northwoods] Mall parking lot is not adequately sized to handle the flows that the upstream box culvert [under Highway 52 Connector] can handle." Earth Tech determined that when the 84" pipes' capacity was exceeded, the water level seeks the low point - adjacent to the back of the La-Z-Boy store.

33. SCDOT ignored all warnings from merchants, their own engineers, and others affected by the flooding - the inadequacy of the twin 84" pipes lying within SCDOT's right-of-way.

54.SCDOT caused the twin 84" pipes to be installed in its right of way adjacent to the current Northwoods Mall site. The 84" pipes were inadequate when installed and constitute a choke point for drainage of storm water flowing down to the watershed from upstream of the Northwoods Mall / Northwoods Pointe Shopping Center Site.

55. In 2002, SCDOT commenced work on the Ashley Phosphate/I-26/Highway 52 Connector interchange and the expansion and improvement of the Highway 52 Connector.

56. SCDOT's improvement project added considerably to the impermeable material immediately upstream from its inadequate 84" pipes. Virtually all water from the roadway will flow directly to the choke point at SCDOT's drainage pipes.

58. By reason of SCDOT's installation of inadequate and insufficient drainage and its addition of more than 13 acres of impermeable material immediately adjacent to and upstream from the La-Z-Boy store, La-Z-Boy has been deprived of its property and the value of its property has been greatly diminished.

FOR A THIRD CAUSE OF ACTION
(Inverse Condemnation)
[City of North Charleston]

72. North Charleston constructed or participated in the construction of the streets and roads surrounding Northwoods Mall and Northwoods Pointe Shopping Center, including Northwoods Boulevard, extending from Ashley Phosphate road to the Mall and Shopping Center parking lots, and Northwoods Boulevard.

73. Northwoods Boulevard and the parking lots of Northwoods Mall are graded and improved as streets or thoroughfare suitable for public travel, and North Charleston has caused them to become the permanent and established grade. **That grade results in storm water flowing and collecting directly to the front and rear of the La-Z-Boy store**.

> 74. La-Z-Boy was deprived of the use of its property and store numerous times because of the following flooding and near flood events, the effects of which were magnified and made worse by North Charleston's affirmative act of constructing, maintaining, and operating streets and thoroughfares graded such that storm water flowed and collected directly in the front and rear of the La-Z-Boy store. ...

Importantly, however, Tipperary's Amended Complaint allegations do not allege that the City collected, channeled or thrust water in a manner different than the natural flow; to the contrary, pursuant to the Amended Complaint paragraphs cited above, Tipperary alleged that its store was the lowest point in the area and situated at the low point of the entire watershed, which water would naturally flow towards.

Based on the above Amended Complaint allegations, the Court of Appeals correctly noted that it has been held that: "It is an actionable injury for one to collect surface water into an artificial channel, and thence cast the same in concentrated form upon adjacent lands." Taylor v. Lexington Water Power Co., 165 S.C. 120, 163 S.E. 137, 142 (1932).[5] However, the Court of Appeals misunderstands and misapplies the complete common law in this area. As reflected in South Carolina case law, the best summation of the common law in this area is set forth in DiBlaisi v. City of Seattle, 969 P.2d 10 (1999), wherein, in relevant portions, the Washington Supreme Court set forth:

> ... [M]unicipalities are not liable for injury to property "occasioned by the original grading of streets" ... [T]he rights and liabilities of a municipality as to surface water are identical to those of private landowners, and that because surface water is a 'common enemy' the municipality may defendant itself against it - even to the consequent injury of others." ...[A] municipality can be liable if "in the course of an authorized construction, it collects surface water by an artificial channel or in large quantities and pours it, in a body, upon the land of a private person, to his injury."... [W]hile municipal authorities may pave and grade streets and are not

[5] In that case, the power company erected a dam across the Saluda River and thereby impounded a large volume of water and then opened the gates during a heavy rainfall which turned the flood waters upon the plaintiff's land.

> *ordinarily* liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made. ... A municipality ordinarily is not liable for consequential damages occurring when it increases the flow of surface water onto an owner's property if the damages arise wholly from changes in the character of the surface produced by the opening of streets, building of houses, and the like, in the ordinary and regular course of the expansion of the municipality. On the other hand, it is liable if, in the course of an authorized construction, it collects surface water by an artificial channel or in large quantities and pours it, in a body, upon the land of a private person to his injury. Under this rule, while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made. ... At the same time, it is the rule that the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not untimely diverted from its natural flow onto the property of another. (Emphasis added).

Through numerous decisions, our Supreme Court has adopted the common law referenced above. For example, in Taylor v. Lexington Water Power Co., 165 S.C. 120 (S.C. 1932), the Supreme Court found an affirmative, positive, and aggressive act where the authority accumulated water behind an unfinished dam and then released it in large and unusual quantities, altering thereby the flow of the stream "in its natural condition" until there had been a "tremendous and dangerous accumulation of water." In Collins v City of Greenville, 233 S.C. 506 (1958), however, the City's attempt to unclog a sewer line which caused sewage to overflow from plaintiff's commodes damaging plaintiff's property was not an affirmative, positive, aggressive act. In Hoffman v. Greenville County, 242 S.C. 34 (1963), the Court found liability where the county

constructed ditches and drains that "changed the normal course of drainage" and "increased [the] volume of surface water," which caused impounding of water and the casting/dumping of the increased volume of water on an owner's realty. Further, the Court reaffirmed the requirement that the county must collect surface water into an artificial channel and cast the same in concentrated form upon the land. Finally, the Supreme Court held "[t]he burden of proof was upon the respondents to show that the appellant so constructed the ditches and drains in a manner as to cause the impounding of water and the casting of same upon their property...." Id. at 39-40. (Emphasis added).

In Kline v. City of Columbia, 249 S.C. 532 (1967), the Supreme Court held:

> "It has long been recognized in this jurisdiction that the casting of water on adjoining premises by some act of governmental authority in the course of making improvements to a public way constitutes a taking of property in violation ... of the Constitution."

In other words, the City's overt act of rupturing a gas line and causing a gas explosion (and causing a fire) while widening a street was an affirmative, positive, and aggressive act by the City. [6] Finally, in Brown v. School Dist. Of Greenville County, 251 S.C. 220 (S.C. 1968), the Supreme Court found landowners could recover damages from a school district for causing surface waters to be wrongfully concentrated onto their land where the natural flow of rain water was directed in concentrated form into and across the drive and onto the landowners' property with great force and volume.

More recently, in Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14 (S.C. 1981), the Supreme Court found an "affirmative, positive, aggressive" act where the City removed sidewalks, excavated two trenches leading to plaintiff's basement and failed to back fill the trenches, which redirected the waters directly to plaintiff's basement, i.e.,

[6] The Kline Court requires that the "affirmative, positive, and aggressive" act be "in the course of" making the City's improvements.

redirected the surface water in a manner contrary to the natural flow. Moreover, in WRB Ltd. P'ship v. Cty. of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006), the Supreme Court held that the capping of a landfill which prevented the natural underground migration of methane and which caused it to vent laterally onto plaintiff's property constituted an affirmative, positive, aggressive act.

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

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

630 S.E.2d at 481. The distinction, overlooked by the Court of Appeals, is that the flooding events at issue in this case (1) did not occur during any active construction by the City; (2) were not alleged to be a result of public improvement by the City[7]; and (3)

[7] The allegations that DOT constructed a box culvert and drainage pipes at some point prior to 1980 and undertook a construction project in 2002, with knowledge of a history of flooding problems and the possible impact of the new construction on the drainage system, do not amount to the type of affirmative, aggressive, and positive act that will support an inverse condemnation claim against the City.

are not alleged to have been contrary to the "natural flow" of surface waters to the subject property, which is alleged to be at the bottom of a geographic, bowl-like area (i.e., "the low point of the entire watershed"/"lowest point in the area"). Importantly, the City's act of previously constructing graded streets is not alleged to have altered the natural flow of the surface waters. The core allegation of Tipperary's Amended Complaint is that the SCDOT original culvert and pipes were not large enough to handle the storm water, and the SCDOT improvement project increased the runoff that the storm water system could not handle. While it might be that the SCDOT installing the pipes and building roads were positive actions, the allegations do not amount to the type of aggressive, positive, and affirmative acts that impose liability for inverse condemnation by the City.

Respectfully, the Court of Appeals misapprehends and misapplies the South Carolina common law, its own Hawkins and Graham decisions, and Supreme Court precedent as to the inverse condemnation cause of action against the City of North Charleston. The Court reversed the trial court's ruling on the inverse condemnation claim against the City of North Charleston based upon the following reasoning:

> 8. We hold, however, the circuit court erred in dismissing Tipperary's inverse condemnation claim against the City. In its complaint, Tipperary alleged the City constructed nearby streets in such a manner that storm water was directed toward its store. Relying on Hawkins v. City of Greenville, the circuit court ruled this alleged conduct amounted only to a failure to act rather than to an affirmative act. Although this court concluded the appellant showed only a mere failure to act, a careful reading of the opinion reveals that this holding was in response to the City's failure to replace the drainage pipes after they were rendered inadequate. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. In the present case, Tipperary alleged the City's construction of nearby streets directly led to the flooding of its store because the City's construction, maintenance, and operation of graded streets and thoroughfares caused storm water to collect directly in front of and behind Tipperary's store. Unlike the situation in Hawkins, then, the City's conduct about which Tipperary complains amounted to an affirmative, positive, and aggressive

act that could support a claim for inverse condemnation. See WLB Ltd. P'ship, 369 S.C. at 33, 630 S.E.2d at 481 (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, met the requirement for "an affirmative, aggressive, positive act"); Cutchin v. S.C. Dep't of Highways & Pub. Transp., 301 S.C. 35, 39, 389 S.E.2d 646, 648 (1990) (affirming a jury award on a claim of inverse condemnation resulting from the construction of an inadequate culvert that caused the plaintiff's property to flood); Berry's On Main, 277 S.C. at 16, 281 S.E.2d at 797 (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); Kline, 249 S.C. at 537, 155 S.E.2d at 599-600 (holding that improving and widening a public street is an affirmative, aggressive, and positive act).

While Tipperary made conclusory allegations that the City constructed graded streets in the Mall area that led to water flowing and collecting to the front and rear of Tipperary's store, the Court of Appeals' reliance on those allegations fails to properly consider Tipperary's specific allegations.

In this regard, the Court of Appeals has misapprehended or overlooked the allegations of the Amended Complaint itself. The Court failed to properly consider Tipperary's specific allegations, most significantly, including Tipperary's emphatic allegations as to the cause of the increased flooding:

16. Though SCDOT has repeatedly been warned of the inadequacy of its 84" pipes, and the attendant risks of severe flooding, SCDOT has refused to correct their inadequate facilities. In fact the twin 84" pipes act as a dam, preventing the flow of storm water to the Goose Creek Reservoir.

18. When there is a heavy rainfall, the storm water runoff flows down from the Parkhill Place subdivision and points upstream to the rear of the La-Z-Boy store as well as from Ashley Phosphate road down Northwoods Boulevard to the front of the La-Z-Boy store. The entire flow of storm water, both from the front and rear of the building, is intended to enter SCDOT's 84" pipes and to flow down the CWS-owned watershed to the Goose Creek Reservoir. **The La-Z-Boy store is situated at the low point of the entire watershed**. As Defendant Earth Tech reported to SCDOT and to Davis & Floyd, **the La-Z-Boy store is the lowest point in the area around the mall and shopping center, and the store**

> **will tend to flood before any other surrounding stores or the mall itself**.
>
> 19. **Instead of being channeled down the drainage watershed, the storm water runoff backs up at the constriction point at the opening of SCDOT's twin 84" pipes**.
>
> 25. ... Upon information and belief, the only roadwork that could have exacerbated and increased the flooding was the Ashley Phosphate/I-26/ Highway 52 Connector improvements being built by SCDOT. (Emphasis added).

Interestingly, similar to Tipperary's allegations, in Gaines v. Pierce County, 834 P.2d 631 (Wash. App. 2003), the Washington Court of Appeals held that (1) because the property lay at the low point of the drainage basin and all surface water in the basin ultimately flowed to it, and (2) the property had a long history of flooding by surface waters, both identical allegations to this present case, the plaintiff failed to assert that the flooding would have occurred "but for" the county's actions; thus, the alleged increased surface water flow from the construction of impervious surfaces, including the widening of a highway, was not compensable, where plaintiffs were not even able to meet the threshold requirement of proving that, "but for" the road construction, their property would not have been damaged.

Moreover, as discussed above, even if the City's prior road work exacerbated or increased surface waters to the front and rear of Tipperary's store, such acts of construction do not amount to an actionable "affirmative acts" when there is no allegation that the City collected, channeled, and thrusted surface waters upon Tipperary's store contrary to the "natural flow" of surface waters.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT MERELY CONSTRUCTING GRADED STREETS, IN AND OF ITSELF, SATISFIES THE FIRST ELEMENT OF AN INVERSE CONDEMNATION ACTION AGAINST A GOVERNMENTAL ENTITY WHERE NO ALLEGATIONS ALLEGE THAT THE CITY "COLLECTED, CHANNELLED, OR THRUST WATER IN A MANNER DIFFERENT FROM THE NATURAL FLOW."

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

The Court of Appeals misapprehended the reasoning of the various cases upon which it relies. Again, as discussed above, in Berry's On Main, Inc. v. City of Columbia,

supra, the city had excavated two trenches to the basement that impounded water during a heavy rain and cast the water into the store's basement, contrary to the natural flow of surface waters. Respondents would also submit Cutchin v. S. Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 36-37, 389 S.E.2d 646, 647 (1990) is also consistent with the common law, or alternatively, the factual foundation mentioned in Cutchen is too sparse to make a worthwhile comparison to allegations of this case in the face of the Supreme Court's litany of inverse condemnation cases which recognize a claim for inverse condemnation where water is impounded and cast upon the plaintiff's land. In this case, Tipperary's allegations against the City of North Charleston do not amount to impounding surface water and casting it onto Tipperary's property contrary to the "natural flow" of surface waters or a "collecting, channeling, or thrusting" of surface waters in a manner different from the "natural flow." Accordingly, the City requests this Honorable Court grant its Petition to review and reverse the Court of Appeals on this important, albeit limited issue potentially impacting all governmental entities/municipalities which are responsible for the construction, maintenance and operation of roadways in South Carolina.

III. THE COURT OF APPEALS ERRED IN IGNORING ITS OWN PRECEDENT SET FORTH IN HAWKINS AND GRAHAM AND MISAPPLYING THE SUPREME COURT'S PRECEDENT FOR AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST A GOVERNMENTAL ENTITY.

The Court of Appeals' unpublished Opinion is also contrary to the Court of Appeals' own precedent in Hawkins and the more recent Graham (2016) decision which states that governmental municipalities, such as the City, are simply not liable for inverse

condemnation for such flooding-type cases.[8] Setting aside the Court of Appeals' inconsistent holdings concerning the South Carolina Tort Claims Act applicability for such flooding-type cases, which is not relevant to the limited issue set forth in this Petition, the Court of Appeals' Hawkins and Graham decisions both set forth that an inverse condemnation claim was not proper against a governmental entity as no "affirmative, positive and aggressive act" was asserted under those facts of those cases. Although the Court of Appeals attempts to distinguish its own Hawkins decision[9] by asserting that "in the present case, Tipperary alleged the City's construction of nearby streets directly led to the flooding of its store because the City's construction, maintenance, and operation of graded streets and thoroughfares caused storm water to collect directly in front of and behind Tipperary's store," Tipperary's Amended Complaint allegations do not allege that the City's construction, maintenance, and operation of graded streets caused storm water to be collected, channeled and thrusted in a manner different from the natural flow of the land; to the contrary, Tipperary's Amended Complaint alleges that Tipperary's property is located at the bottom of a geographical bowl. See Amended Complaint Par. 18 which alleges:

> "The La-Z-Boy store is situated at the low point of the entire watershed. ... the La-Z-Boy store is the lowest point in the area around the mall and shopping center, and the store will tend to flood before any other surrounding stores or the mall itself."

[8] Hawkins and Graham are themselves inconsistent as to whether or not government municipalities may be liable for such flooding-type cases pursuant to the Tort Claims Act; however, such legal issue is not relevant to this Petition.

[9] The Court of Appeals does not address or explain why it believes the Graham allegations did not allege an "affirmative, positive or aggressive" act, but somehow the allegations in the present case did allege such element. Graham involved facts more similar to Kline (where the Supreme Court held such element to be satisfied) than this present matter, but the Court of Appeals' Graham opinion found such allegations did not satisfy the required element.

Further, Tipperary's Complaint alleges that the property is flooded because of the insufficient drainage from pipes which were inadequate and placed by the SCDOT. See Complaint Pars. 9-19.

In Hawkins, Hawkins specifically alleged the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace the inadequate pipes; nevertheless, the Court of Appeals held inverse condemnation failed as a matter of law and that Hawkins failed to allege any affirmative, positive, or aggressive acts by the City. In other words, in Hawkins, the City's actions allowed the alteration of the elevation of the area (i.e., altering the natural flow of waters), but the Court of Appeals held the City took no affirmative, positive or aggressive act satisfying the first element of an inverse condemnation claim.[10] Further, in Graham, the Court of Appeals held that an alleged break/leak in a sewer line by the Town, which spewed sewage underneath plaintiff's home, making it uninhabitable, was not an affirmative, aggressive, and positive act; as such, a proper application of Graham would also require a dismissal in the case at bar. As such, pursuant to a proper application of the Court of Appeals' own Hawkins and Graham decisions, the City is entitled to a dismissal of Tipperary's inverse condemnation as a matter of law.

IV. PUBLIC POLICY FAVORS THE CITY.

Finally, public policy requires that the Court of Appeals' new interpretation of inverse condemnation's first element be rejected. The common law embodies sound public policy which allows an aggrieved party redress in the limited circumstances where

[10] Thus, the Court of Appeals' attempt to distinguish Hawkins from the present case makes little sense where Tipperary fails to even allege any casting of waters different than the natural flow of the surface waters.

a governmental entity alters the natural flow of surface waters which causes damage to the aggrieved party's property. With the Court of Appeals new interpretation, absolutely every single property owner who has property along any paved street or road would be entitled to sue the governmental entity for each and every rain event, exposing governmental entities to limitless liability indefinitely. Such absurd result will transform governmental entities into the insurers of property owners for weather and rain events caused by Mother Nature. By eliminating the requirement that the governmental entity must "catch, collect, and thrust surface waters in a manner different than the natural flow," the Court of Appeals has literally and figuratively opened the flood gates for endless, ongoing, never ending litigation by property owners against governmental entities, especially for property owners who have purchased property in low-lying areas, which would be prone to flooding based on geographical location alone. Further, the sound public policy of the common law is best reflected in Columbia Venture, LLC v. Richland County, 413 S.C. 423 (S.C. 2015), where our Supreme Court cited Sanguinetti v. US, 264 U.S. 146 (1924) which, in evaluating the claim in reference to a particular statute, the United States Supreme Court cited its decision in United States v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230 (1939), as instructive, and held:

> [T]he 1928 Act had not increased the immemorial danger of unpredictable major floods to which [Sponenbarger]'s land had always been subject. Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no [action] of any kind. So to hold would far exceed even the "extremest" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private party owner for flood damages which it in no way caused. (Emphasis added).

Sound public policy, as reflected in the well-developed common law in this area of the law, requires that the Court of Appeals' new interpretation be reversed and that governmental entities, which are the representatives of the citizens of the State of South Carolina, will not be hampered by needless litigation which will serve as a disincentive for governmental entities to improve access and roadways for the traveling public and its citizens. Accordingly, this matter is of grave importance, not only to the present litigants, but to future litigants and the general public as well.

CONCLUSION

For the reasons stated, City of North Charleston respectfully petitions the Court to issue a Writ of Certiorari to the Court of Appeals' unpublished Opinion and request this Court to affirm the circuit court's dismissal of the inverse condemnation claim against the City of North Charleston.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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

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

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

v.

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

Of Whom
City of North Charleston.....Petitioner.

PROOF OF SERVICE

I hereby certify that on the 16th day of September, 2016, I mailed a copy of the foregoing Petition for Writ of Certiorari to counsel of Record, with sufficient postage, correctly addressed as follows:

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