

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

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SEP 22 2016

S.C. SUPREME COURT

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 **vs.** Petitioner.

**APPENDIX
VOLUME II**

M. Dawes Cooke, Jr., Esq.
Phillip S. Ferderigos, Esq.
Barnwell Whaley
Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700
*Counsel for Petitioner
City of North Charleston*

Michael S. Seekings, Esq.
Yancey A. McLeod, III, Esq.
Leath, Bouch & Seekings
P.O. Box 59
Charleston, SC 29402
(843) 937-8811
Counsel for Respondent

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

Deborah H. Sheffield, Esq.
Law Office of Deborah Harrison
Sheffield, P.A.
117 Brook Valley Rd.
Columbia, SC 29223
(803) 419-7837

*Counsel for Defendant
Charleston Water System*

Roy P. Maybank, Esq.
Amanda Maybank, Esq.
Maybank Law Firm, LLC
P.O. Box 12579
Charleston, SC 29422
(843) 766-8101
*Counsel for Defendant
SC Department of
Transportation*

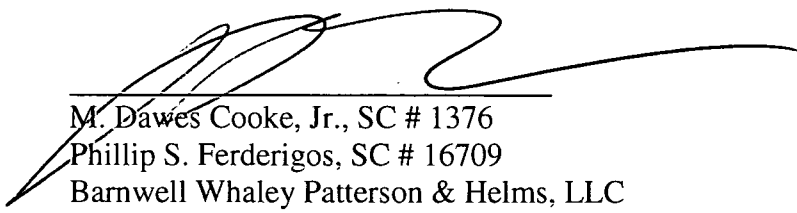
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M. Dawes Cooke, Jr., SC # 1376
Phillip S. Ferderigos, SC # 16709
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700
Counsel for Petitioner
City of North Charleston

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ORIGINAL

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In the Court of Appeals

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SC Court of Appeals

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

v.

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

of which South Carolina Department of Transportation, South Carolina Department of Health
and Environmental Control, City of North Charleston, and Charleston Water System are

.....
Respondents.

FINAL BRIEF
OF APPELLANT

LEATH BOUCH & SEEKINGS, LLP

Michael S. Seekings
Yancey A. McLeod III
92 Broad Street
Post Office Box 59 (29402)
Charleston, S.C. 29401
(843) 937-8811

Attorneys for Appellant

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Statement of Issues

- I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL.
- II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF TRANSPORTATION.
- III. WHETHER THE TRIAL COURT ERRED IN GRANTING CHARLESTON WATER SYSTEM'S MOTION TO DISMISS
- IV. WHETHER THE TRIAL COURT ERRED IN GRANTING THE CITY OF NORTH CHARLESTON'S MOTION TO DISMISS

Statement of the Case

This case arises from the recurring flooding at the Northwoods Pointe Shopping Center in North Charleston, South Carolina (hereinafter "Northwoods"). After the Appellant Tipperary Sales d/b/a La-Z-Boy Furniture Gallery's (hereinafter "Appellant") store was flooded again in October of 2008, it brought the instant action against the South Carolina Department of Health and Environmental Control ("SCDHEC"), The South Carolina Department of Transportation ("SCDOT"), Charleston Water System ("CWS") and the City of North Charleston ("North Charleston"), alleging causes of action for Negligence, Gross Negligence, Trespass and Inverse Condemnation.¹ As to the City of North Charleston, Appellant further alleged the City was in violation of S.C. Code Ann. § 5-31-450 for failing to provide adequate storm water drainage in the Northwood's area watershed.

¹ The Appellant also brought causes of action against Associated Developers, Inc. and Parkhill, LLC. These entities are not parties to the instant appeal.

SCDHEC and SCDOT moved for summary judgment pursuant to *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (2004) and the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to-200 (2005) (Tort Claims Act). Similarly, CWS and North Charleston filed motions to dismiss pursuant to the *Hawkins* decision and the Tort Claims Act.

The hearing on the various motions was held on January 7, 2014. Pursuant to orders filed February 18, 2014, the trial court granted Summary Judgment to DHEC and DOT, and granted CWS and North Charleston's motions to dismiss. On March 17, 2014, Appellant filed the Notice of Appeal and now appeals the trial court's February 18, 2014 orders.

Facts

Taken in the light most favorable to Appellant, the facts alleged are as follows. The Appellant has a leasehold interest in its store facilities at Northwoods Pointe Shopping Center in the City of North Charleston, South Carolina. (R. 38; 359) Appellant has leased the space since 2000. (Id.) Appellant up-fitted the space for its business purposes and installed fixtures and various interior upgrades at its own expense. (Id.) Unbeknownst to Appellant, the Northwoods Mall area was and had always been prone to flooding. (Id.)

Appellant would soon learn the extent of the problem. Immediately upstream from the Appellant's store, storm water is channeled through a box culvert beneath the Highway 52 Connector. (R. 38-46) The box culvert was installed by SCDOT. (R. 39) The box culvert is not sufficiently sized to handle upstream storm water runoff. (Id.) Immediately downstream from the box culvert are twin 84" pipes, which are the intake

point for the drainage system that runs below and through Northwoods Mall parking lot. (Id.) 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. (Id.) The twin 84" pipes have *never* been adequate for managing storm water runoff since they were installed by DOT. (Id.) CWS owns and controls the open ditch running through the lower part of the Northwoods Mall parking lot. (Id.) The drainage basin then flows down an open ditch or streambed, which is owned and controlled by CWS, to its outflow terminus at the Goose Creek Reservoir, also owned, controlled, managed, and operated by the CWS. (Id.)

The outflow point at the Reservoir is actually at a higher elevation than the intake point for the entire drainage system at SCDOT's twin 84" pipes. (Id.) As a result, the entire drainage system remains approximately one-half full even during dry conditions, and is in reality a branch extension of the Reservoir itself. (R. 39-40) This lack of appropriate slope dramatically reduces the volume of water that can be carried by the entire drainage system, such that its capacity is substantially less than was intended. (R. 40)

In addition to the drainage from upstream of the Highway 52 Connector, storm water also flows down the roadbed of Northwoods Boulevard from Ashley Phosphate Road. (Id.) This storm water from the watershed also flows to the intake of the drainage system at the twin 84" pipes. (Id.) During a rain event, the storm water runoff flows down from the upstream Subdivisions and other points to the rear of the La-Z-Boy store. (Id.) In addition, storm water runs from the Ashley Phosphate Road system down Northwoods Boulevard to the front of the La-Z-Boy store. (Id.) 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. (Id.) Rather than being channeled down the watershed, the storm water runoff backs up at the constriction point at the opening of SCDOT's twin 84" pipes. (Id.) As Appellant soon would find out, not only had the above described conditions caused periodic flooding for nearly three decades, the Respondents were all aware of these significant issues the entire time. (R. 38-46)

As early as 1979, E.M. Seabrook, Jr., Inc. was commissioned to perform an extensive study of the flooding issues at the Northwoods Mall. As is reflected in the 1980 E.M. Seabrook Jr., Inc. ("Seabrook Study"), the Northwoods Mall parking lot has had a long history of flooding. (R. 38) The Seabrook Study noted that the flooding issues were discussed with SCDOT and North Charleston. (Id.) The Seabrook Study 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. (Id.) Ultimately, 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. (R. 38-39) To date, no actions have been taken to correct the flooding issues. (R. 38-46) The Seabrook report specifically states that North Charleston and SCDOT were involved in discussions concerning the report and flooding issue at the Northwoods Mall at the time. (R. 40)

Affirmative Acts Exacerbate Flooding

In September 2002, SCDOT began construction to improve the interchange at I-26, Ashley Phosphate Road, and the Highway 52 Connector in North Charleston. (R, 41) On or about March 20, 2003, while construction was ongoing, there was a heavy rainfall that resulted in considerable flooding downstream from the interchange improvements with maximum effect at the Appellant's store. (Id.)

Various merchants in the Northwoods Mall and Northwoods Pointe Shopping Center, including Appellant, notified SCDOT, North Charleston and CWS and complained about the extensive flooding and of its concern over future flooding, insisting that the government agencies immediately investigate the cause of the flooding and take steps to remedy the problems causing the flooding that imperiled the livelihoods of the businesses affected by the torrent. (R. 41-42)

In response to its demand for investigation into the cause of the flooding, Appellant was informed that the extensive roadwork in the area coupled with heavy rainfall were the contributing factors in the flooding that damaged the La-Z-Boy store and inventory. (R. 42) The only roadwork that could have exacerbated and increased the flooding was the I-26/Ashley Phosphate/Highway 52 Connector improvements being built by SCDOT. (Id.)

SCDOT contended that the floodwaters traversed the parking lot and collected in a retention pond at the rear of the store after which it passed into SCDOT's drainage pipes, which SCDOT believed were adequate and operating properly. In reality, the upstream watershed also extended uphill from SCDOT's expanded Highway 52

Connector through the upstream Subdivision and other upstream commercial developments, all of which drained directly to SCDOT's inadequate 84" pipes. (Id.)

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. (Id.) SCDOT to date has refused to make requisite improvements to the choke point in the drainage system at the mouth of the 84" pipes. (Id.)

After the March 20, 2003 flood, Appellants contacted SCDOT's resident engineers on the I-26/Ashley Phosphate Road/Highway 52 Connector project, Davis & Floyd and Earth Tech, to notify them of the flooding problem and demanded that Davis & Floyd take such steps as were necessary to remedy the problem. (R. 43) 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. (Id.) 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. (Id.) Earth Tech notified SCDOT that "the double pipe system under the [North woods] Mall parking lot is not adequately sized to handle the flows that the upstream box culvert [under the Highway 52 Connector] can handle." (Id.) Earth Tech determined that when the 84" pipes' capacity was exceeded, the water level seeks the low point- adjacent to the back of Appellant's store. (Id.) In July 2005, another flood event occurred. At the time, SCDOT was still constructing the improvements to the interchange and to the Highway 52 Connector at the time. (R. 43-44)

Back in 2001, Centex Homes began development of 36.2 acres of land immediately upstream from the Northwoods Mall that became known as Phases 3, 4, and 5 of Parkhill Place subdivision. In 2003, Centex added 21 additional acres of improved property and an additional 151 residential lots. Parkhill Place Subdivision is just upstream from the choke point at SCDOT's 84" pipes and Appellant's store. (R. 44) In 2004 Associated Developers, and Parkhill began developing the last phase of Parkhill Subdivision, known as Phase 6. (Id.) North Charleston and SCDHEC are and were the permitting agencies whose permits were necessary for the development of Parkhill Place Phases 3, 4, 5, and 6 (hereinafter "the Subdivision"), without which the Subdivision's construction could not have taken place. (R. 44-45)

SCDHEC issued permits for the construction and development immediately upstream in the watershed that ended at the constriction point at SCDOT's inadequate 84" pipes, numerous times between 2000, when La-Z-Boy first took up occupancy of its leasehold in the store, and 2009. (R. 38-46) SCDHEC did no investigation into the adverse impact each of these developments would have on the existing flooding problems downstream. (Id.; R. 168-182).

In October 2008, a heavy rain event took and inundated the entire area, including Appellant's store and the Northwoods Pointe Shopping Center. (R. 46) The La-Z-Boy store was flooded to a depth of several feet; its inventory ruined just as the Christmas shopping season was beginning; the store fixtures and displays were destroyed; and, the store was forced to close for a significant period to effect repairs and to develop a plan to attempt to prevent additional flooding. (Id.)

Argument

I. SUMMARY JUDGMENT IN FAVOR OF SCDHEC WAS IMPROPER WHEN ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND THE ISSUANCE OF NUMEROUS PERMITS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001).

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. *See also Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

A. Negligence/Gross Negligence²

The trial court granted summary judgment in favor of SCDHEC, finding the *Hawkins* decision and the Tort Claims Act prevented recovery as a matter of law. This ruling was in error. The *Hawkins* decision is distinguishable and SCDHEC's conduct in issuing permits for development in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct.

To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. *Hinds v. Elms*, 358 S.C. 581, 585, 595 S.E.2d 855, 857 (Ct. App. 2004). "The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are 'liable for their torts in the same manner and to the same extent as a private individual under like circumstances,' subject to certain limitations and exemptions provided in the Act." *Hawkins*, 358 S.C. at 292, 594 S.E.2d at 563; S.C. CODE ANN. § 15-78-40 (2005). "The governmental entity is not liable for a loss resulting from . . . (12) 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*." S.C. CODE ANN. § 15-78-60 (12) (2005) (emphasis added).

² The causes of action against the various government entities are essentially the same but are analyzed in different sections herein. Appellant will therefore attempt to not unnecessarily duplicate citations to authorities and the elements of each cause of action in every section.

In *Hawkins*, Plaintiff brought a claim against the City of Greenville for simple negligent design and maintenance of its drainage system. *Id.* at 288. Here, unlike *Hawkins*, the Appellant alleges SCDHEC was grossly negligent, which triggers certain sections of the Tort Claims Act not applicable in *Hawkins*. See S.C. CODE ANN. § 15-78-60 (12) (providing exception to government immunity for the issuance of permits or similar authority where exercised in a grossly negligent manner).

"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." *Clyburn v. Sumter County Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "It is the failure to exercise even the slightest care." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 294-95, 628 S.E.2d 496, 504-05 (Ct. App. 2006). "Gross negligence ... means the absence of care that is necessary under the circumstances." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887; *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct.App.2004). In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S. Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

Here, there exists ample evidence for a jury to find that SCDHEC was grossly negligent in issuance of these permits. The overwhelming evidence is that the flooding problems in the Northwoods Mall area have been ongoing for over three decades. In spite of the serious flooding concerns, SCDHEC permitted numerous developments, intentionally ignoring the historical and ongoing flooding concerns. The trial court found

there was no evidence that SCDHEC issued the various permits in a grossly negligent manner. A review of the record evidence indicates otherwise. Summary judgment was improper. *See Proctor*, 368 S.C. at 312, 628 S.E.2d at 514 ("Therefore, because Proctor proceeded under a theory of gross negligence as provided in section 15-78-60(12), the other subsections of that statute do not provide immunity from DHEC's acts of gross negligence.").

B. Inverse Condemnation

The trial court likewise erred in granting summary judgment to SCDHEC on Appellant's Inverse Condemnation claim. An action for inverse condemnation is appropriate where the government takes private property for public use. *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 38, 530 S.E.2d 369, 373 (2000). While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. *Hawkins*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001).

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." *Marietta*

Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002).

Relying on *Hawkins*, the trial court found Appellant had not established any affirmative, positive, aggressive act on the part of SCDHEC. The court's reliance on *Hawkins* was misplaced. Here, the issuance and approval of the development permits constitute affirmative, positive, aggressive acts sufficient to constitute an inverse condemnation claim. The Appellant is not merely alleging SCDHEC failed to act. On the contrary, Appellants' allegations allege that SCDHEC's issuance of each of the permits constituted "an affirmative and aggressive by DHEC." (R. 49) Summary judgment was inappropriate.

II. SUMMARY JUDGMENT IN FAVOR OF SCDOT WAS IMPROPER WHERE ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND THE ROAD CONSTRUCTION AND IMPROVEMENTS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *Catawba Indian Tribe*, 372 S.C. at 524, 642 S.E.2d at 753. Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe ex rel. Doe*, 345 S.C. at 321-22, 548 S.E.2d at 857 (2001).

A. Negligence/Gross Negligence

Initially, it is important to note the trial court analyzed Appellant's negligence/gross negligence claims against SCDOT under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an affirmative, positive, and aggressive act." This finding is contrary to South Carolina law. Negligence does not require an affirmative act; the trial court's analysis is fatally flawed.³

Moreover, any reliance the trial court made on the *Hawkins* decision as to Appellants negligence claims against SCDOT was improper. SCDOT's conduct under the circumstances of this case is entirely inapposite of the municipality defendant in *Hawkins*. Unlike *Hawkins*, SCDOT's here clearly constitutes gross negligence. Indeed, the municipality in *Hawkins* attempted to remedy the problem once it knew it existed. See *Hawkins*, 358 S.C. at 286, 594 at 560. Here, SCDOT has been on notice for three decades that these flooding problems existed. Not only has it done absolutely nothing to correct the problem it created, it has in fact made the problem worse. Much worse. What SCDOT has done – and indeed failed to do – in the present case is outrageously negligent. A close reading of *Hawkins*' reasoning makes clear this instant case is distinguishable.

Noting that no South Carolina cases had addressed the issue, The *Hawkins* court relied on a Texas Supreme Court opinion, stating, "the Supreme Court of Texas has held 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

³ The trial court mistakenly believed the *Hawkins* decision held the Tort Claims Act required an affirmative, positive, aggressive act." It did not. As to the negligence holding, the *Hawkins* court relied solely on certain exemptions found in the Tort Claims Act. There is no requirement under any negligence theory of an affirmative act.

which a government entity is not liable." *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex.1997)). Thus, in *Hawkins*, the court found a "comparable degree of discretion" and found the municipality was not liable to property owner. *Id.* A finding that SCDOT's conduct in the instant case was quasi-judicial and discretionary is absurd. The exemptions in the Tort Claims Act relied on by the trial court do not apply.

SCDOT installed and constructed the twin 84" pipes. It has known for three decades they were installed negligently, and has done nothing. In fact, the Texas *City of Tyler* opinion – relied on by *Hawkins* – actually found the municipality could be held liable for constructing and maintaining the storm sewer because those are "proprietary" functions. *See City of Tyler*, 962 S.W.2d at 501 (1997) ("The City could be liable for the negligent performance of these acts if they proximately caused Likes's damages."). The trial court erred in its analysis and reliance on *Hawkins*. Under the facts of this case, summary judgment was inappropriate.

B. Inverse Condemnation

Similarly, the trial court erred in granting SCDOT summary judgment on its inverse condemnation claim. Once again, the trial court misconstrued and improperly relied on the *Hawkins* decision in its analysis. Specifically, the trial court found that Appellants had failed to allege any "affirmative, positive, aggressive act" on the part of SCDOT. A plain reading of the Amended Complaint clearly indicates otherwise. Specifically, Appellants allege that SCDOT "caused the twin 84" pipes to be installed." (R. 47) Further, Appellants allege "SCDOT improvement project added considerably to

the impermeable material." (*Id.*) To suggest these allegations do not constitute affirmative, positive, aggressive acts is absurd. Of course they do.

As SCDOT is well aware, it and its predecessor have always been subject to inverse condemnation liability for the flooding individuals' properties. *See, e.g., Cutchin v. S. Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990) (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property).

The facts of the *Cutchin* case are almost identical to the present. In *Cutchin*, SCDOT's predecessor, the South Carolina Department of Highways and Public Transportation, constructed a cement culvert under a highway in 1954. *Cutchin*, 301 S.C. at 36-37, 389 S.E.2d at 647 (1990). During the 1970s, the Cutchins' yard flooded on several occasions. *Id.* In 1984, floodwaters again rose onto the property, causing extensive damage. *Id.* After finding the suit timely filed and the injury abatable, the *Cutchin* court upheld the jury award of \$70,000.00. Here, the Appellant alleges affirmative, positive, and aggressive acts similar to those found in *Cutchin*. The trial court misapplied the *Hawkins* decision to the instant case. In *Hawkins*, the court found the municipality's placement of additional pipes and rocks (an attempt to alleviate the flooding) actually helped the problem. Thus, in *Hawkins*, the affirmative, positive, aggressive act did not cause the injury. The facts of this case are the exact opposite. *See also Newsome v. Town of Surfside Beach*, 300 S.C. 14, 17, 386 S.E.2d 274, 276 (Ct. App. 1989) (affirming jury award and finding affirmative act in inverse condemnation case against town for flood damage he sustained during heavy rain following reconstruction of

adjoining street.) Here, SCDOT's affirmative acts directly caused the Appellant's property to be taken. Summary Judgment was inappropriate.

A. Trespass

The trial court, relying on *Hawkins*, found Appellant trespass claim failed to set forth facts to constitute a claim for relief against SCDOT. The trial court failed to consider the allegations against SCDOT. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion.'" *Hawkins*, 358 S.C at 297. Here, the Amended Complaint alleges sufficient affirmative and intentional acts on behalf of SCDOT to constitute an action for trespass.

First, the Amended Complaint alleges that SCDOT has been aware of the flooding problems for three decades. (R. 38). Second, the Amended Complaint alleges that SCDOT, in spite of its knowledge of the existing flooding issues, proceeded with a road project knowing that doing so would result in the exacerbation of the flooding. This conduct was intentional. This conduct was affirmative. The Amended Complaint alleges facts sufficient to constitute a cause of action for trespass, and the trial court erred in granting summary judgment to SCDOT. Whether SCDOT's actions did constitute a trespass must be decided by the jury.

III. THE TRIAL COURT ERRED IN GRANTING THE CITY OF NORTH CHARLESTON'S MOTION TO DISMISS WHEN ITS CONDUCT ROSE TO THE LEVEL OF GROSS NEGLIGENCE AND PERMITTING NUMEROUS DEVELOPMENTS CONSTITUTED AFFIRMATIVE, POSITIVE AND AGGRESSIVE ACTS.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *Catawba Indian Tribe v. State*, 372 S.C. at 524, 642 S.E.2d at 753. A judgment on the pleadings is a drastic remedy. *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). When considering such motion for a judgment on the pleadings under Rule 12(c), SCRCP, "the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000); *Russell*, 305 S.C. 86, 406 S.E.2d 338. On review of the motion, the court may not consider matters outside the pleadings. *Firemen's Ins. Co. v. Cincinnati Ins. Co.*, 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). "A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." *Falk*, 341 S.C. 281, 286, 533 S.E.2d 350, 353. "[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Id.*

In reviewing a 12(b)(6) motion, the question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the alleged facts and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of

the case, then dismissal under Rule 12(b)(6) is improper. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

A. Negligence/Gross Negligence

Once again, it is important to note the trial court analyzed Appellant's negligence/gross negligence claims against North Charleston under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an affirmative, positive, and aggressive act." This finding is contrary to South Carolina law. Negligence does not require an affirmative act; the trial court's analysis is fatally flawed.

Nevertheless, the trial court granted summary judgment in favor of North Charleston, finding the *Hawkins* decision and the Tort Claims Act prevented recovery as a matter of law. This ruling was in error. The *Hawkins* decision is distinguishable and North Charleston's conduct in issuing permits and approving these developments in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct.

"The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are 'liable for their torts in the same manner and to the same extent as a private individual under like circumstances,' subject to certain limitations and exemptions provided in the Act." *Hawkins*, 358 S.C. at 292, 594 S.E.2d at 563; S.C. CODE ANN. § 15-78-40 (2005). "The governmental entity is not liable for a loss resulting from . . . (12) 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.*" S.C. Code Ann. § 15-78-60 (12) (2005) (emphasis added).

In *Hawkins*, Plaintiff brought a claim against the City of Greenville for simple negligent design and maintenance of its drainage system. *Id.* at 288. Here, unlike *Hawkins*, the Appellant alleges North Charleston was grossly negligent, which triggers certain sections of the Tort Claims Act not applicable in *Hawkins*. See S.C. CODE ANN. § 15-78-60 (12) (providing exception to government immunity for the issuance of permits or similar authority where exercised in a grossly negligent manner).

"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." *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. "It is the failure to exercise even the slightest care." *Proctor*, 368 S.C. at 294-95, 628 S.E.2d at 504-05. "Gross negligence ... means the absence of care that is necessary under the circumstances." *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277 (2000).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887; *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct. App. 2004). "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Faile*, 350 S.C. at 332, 566 S.E.2d at 545.

Here, there exists ample evidence for a jury to find that North Charleston was grossly negligent in issuance of these permits. The overwhelming evidence is that the flooding problems in the Northwoods Mall area have been ongoing for over three decades. Indeed, North Charleston was well aware of these issues in the 1970s. In spite

of the serious flooding concerns, North Charleston permitted numerous developments, intentionally ignoring the historical and ongoing flooding concerns. Because Appellants clearly alleged a cause of action for gross negligence, and there is clearly evidence of gross negligent conduct, summary judgment in favor of North Charleston was improper. *See Proctor*, 368 S.C. at 312, 628 S.E.2d at 514 ("Therefore, because Proctor proceeded under a theory of gross negligence as provided in section 15-78-60 (12), the other subsections of that statute do not provide immunity from DHEC's acts of gross negligence.").

B. Inverse Condemnation

Similarly, the trial court erred in granting North Charleston's Motion to Dismiss on Appellant's inverse condemnation claim. Once again, the trial court misconstrued and improperly relied on the *Hawkins* decision in its analysis. Specifically, the trial court found that Appellants had failed to allege any "affirmative, positive, aggressive act" on the part of North Charleston. A plain reading of the Amended Complaint, however, clearly indicates otherwise. Specifically, Appellants allege that North Charleston "Constructed or participated in the construction of the streets and roads surrounding Northwoods Mall and North Pointe Shopping Center, including Northwoods Boulevard, extending from Ashley Phosphate Road to the Mall Shopping parking lots." Further, Appellants allege its loss of property was "made worse by North Charleston's affirmative act of constructing, maintaining and operating streets and thoroughfares . . ." (See R. 51). To suggest these allegations do not constitute affirmative, positive, aggressive acts is contrary to law.

Government entities have always been subject to inverse condemnation proceedings when their construction projects lead to adverse effects on bystanders' land.

See *Cutchin*, 301 S.C. at 38-39, 389 S.E.2d at 648 (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property); *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 17, 386 S.E.2d 274, 276 (Ct. App. 1989) (affirming jury award and finding affirmative act in inverse condemnation case against town for flood damage he sustained during heavy rain following reconstruction of adjoining street.) *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (finding city's removal of a public sidewalk and support in the course of an urban redevelopment project constituted the affirmative, positive, aggressive act required for unconstitutional taking).

In *Berry's On Main, Inc.*, 277 S.C. 14, 281 S.E.2d 796, (1981), the court found that the municipalities removal of a side walk constituted an affirmative, positive, aggressive act. In doing so, the court noted that it had previously found that damage caused by a municipality's widening of a street constituted an affirmative, positive, and aggressive act. See *Kline v. City of Columbia*, 249 S.C. 532, 539, 155 S.E.2d 597, 600 (1967). Likewise, the act of building roads and thoroughfares that cause significant damages (including flooding) has always been found to give rise to an inverse condemnation claim. As the *Kline* court stated:

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.

249 S.C. at 536, 155 S.E.2d 597. (citing *Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931)). The allegations in the Amended

Complaint contain allegations of sufficient affirmative, positive, and aggressive acts to state an cause of action against North Charleston. The trial court erred in applying the *Hawkins* decision. Dismissing Appellant's cause of action for inverse condemnation on the pleadings was improper.

C. Trespass

The trial court, relying on *Hawkins*, found Appellant's trespass claim failed to set forth facts to constitute a claim for relief against North Charleston. The trial court failed to consider the allegations against North Charleston in the Amended Complaint. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion.'" *Hawkins*, 358 S.C at 297. Here, the Amended Complaint alleges sufficient affirmative and intentional acts on behalf of North Charleston to constitute an action for trespass. First, the Amended Complaint alleges that North Charleston has been aware of the flooding problems for three decades. Second, the Amended Complaint alleges that North Charleston (in spite of its knowledge of the existing flooding issues) proceeded with road projects knowing that doing so would result in exacerbating and further contributing to the area's flooding. This conduct was intentional. This conduct was affirmative. The Amended Complaint alleges facts sufficient to constitute a cause of action for trespass, and the trial court erred in granting summary judgment to North Charleston. Whether North Charleston's actions did constitute a trespass must be decided by the jury.

IV. THE TRIAL COURT ERRED IN GRANTING CWS' MOTION TO DISMISS WHEN CWS OWNS AND CONTROLS BOTH THE GOOSE CREEK RESERVOIR AND THE DRAINAGE SYSTEM AT THE NORTHWOODS MALL.

Standard of Review

This court reviews questions of law de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 4; *Catawba Indian Tribe*, 372 S.C. at 524, 642 S.E.2d at 753. A judgment on the pleadings is a drastic remedy. *Russell*, 305 S.C. 86, 406 S.E.2d 338 (1991). When considering such motion for a judgment on the pleadings under Rule 12(c), SCRCp, "the court must regard all properly pleaded factual allegations as admitted." *Falk*, 341 S.C. at 286, 533 S.E.2d at 353 (Ct. App. 2000); *Russell*, 305 S.C. 86, 406 S.E.2d 338. On review of the motion, the court may not consider matters outside the pleadings. *Firemen's Ins. Co.*, 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). "A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." *Falk*, 341 S.C. 281, 286, 533 S.E.2d 350, 353. "[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Id.*

In reviewing a 12(b)(6) motion, the question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192. If the alleged facts and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then dismissal under Rule 12(b)(6) is improper. *Stiles*, 318 S.C. at 300, 457 S.E.2d at 603.

A. Negligence/Gross Negligence

First, the trial court analyzed Appellant's negligence/gross negligence claims against CWS under the wrong test. Specifically, the trial court improperly found that a claim for negligence/gross negligence required an "affirmative, positive, aggressive act." This finding is contrary to South Carolina law. A cause of action for negligence does not require an affirmative act; the trial court's analysis is fatally flawed.

Moreover, the trial court found that S.C. Code Ann. § 5-31-250 presented additional statutory basis for dismissal. Specifically, the trial court found that because CWS is a statutorily created Commission of Public Works, it did have control of any design, construction or maintenance of any drainage system. The trial court erred in so holding. A plain reading of the statute indicates CWS does have the authority to control and manage the Goose Creek Reservoir. Specifically, CWS has the authority to "purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them." S.C. Code Ann. § 5-31-250 (emphasis added).

The Amended Complaint alleges CWS owns and operates the Goose Creek Reservoir. (R. 37) The Amended Complaint alleges CWS owns the portion of the drainage system below the 84" pipes in the SCDOT right of way. (R. 56) The Amended Complaint alleges this portion of the drainage system "remains half filled at all times because the level of the Goose Creek Reservoir is generally higher than the level of the drainage system." (R. 22) This section of the drainage system – owned by CWS – is a mere extension of the Goose Creek Reservoir. The trial court erred in finding S.C. Code Ann. § 5-31-250 constitutes an additional basis for dismissal.

As to the trial court's reliance on *Hawkins* as to the negligence/gross negligence causes of action, this too, was misplaced. First, the defendant in *Hawkins* was a municipality. Here, CWS owns, operates, and controls the Goose Creek Reservoir. As such – as alleged in Amended Complaint – CWS has a duty to control the water level so as not to flood any upstream (and downstream) bystanders' property. These are the allegations in the Amended Complaint. *Hawkins* is simply not applicable. The facts and circumstances here are very different. CWS owns and controls the water level. CWS has failed to show how any exception found in S.C. Code Ann. § 16-78-60 apply to its gross negligent conduct in failing to control the water level of a major water body. The trial court's dismissal of Appellant's negligence/gross negligence claims was improper.

B. Inverse Condemnation

The trial court found Appellant had not alleged any affirmative, positive, and aggressive act on the part of CWS. Based on this alone, the court granted CWS' Motion to Dismiss. However, a plain reading of the Amended Complaint clearly shows that Appellant has indeed alleged affirmative acts on behalf of CWS. Specifically, the Amended Complaint alleges "CWS' operation and maintenance of the Goose Creek Reservoir and its maintaining the level of the Reservoir above the level of the drainage watershed outflow resulted in the following flood events . . ." (R. 52) The Amended Complaint continues, "As a direct and proximate result of CWS' affirmative and aggressive act of refusing to lower the water level of Goose Creek Reservoir to prevent upstream flooding, [Appellant] has repeatedly been deprived of it's the use of its property and business." (Id.)

These allegations are sufficient to plead a cause of action for inverse condemnation against CWS. See, e.g., *Cutchin v. S. Carolina Dep't of Highways & Pub.*

Transp., 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990) (affirming an inverse condemnation jury award against the South Carolina Department of Highways & Public Transportation after its improperly constructed culvert flooded plaintiff's property). In any event, Appellant had not even had the opportunity to depose CWS or otherwise complete discovery in the matter. The trial court's dismissal of Appellant's Inverse Condemnation claim was improper.

C. Trespass

The trial court dismissed Appellant's trespass claim against CWS, finding no allegation of intentional conduct. Appellant's Amended Complaint, however, sufficiently pleads affirmative and intentional act on the part of CWS. "For a trespass action to lie, 'the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion.'" *Hawkins*, 358 S.C. at 297. The evidence and allegations establish that the flooding had been a serious problem for over three decades. The evidence and allegations establish that CWS is in control of the Goose Creek Reservoir. The intentional mishandling of the Goose Creek Reservoir water level therefore constitutes – or at the very least alleges – an affirmative and intentional act that resulted in harm to Appellant's property. The Amended Complaint alleges CWS "intentionally and knowingly directed storm water runoff to [Appellant's] premises." The trial court erred in dismissing the trespass claim against CWS.

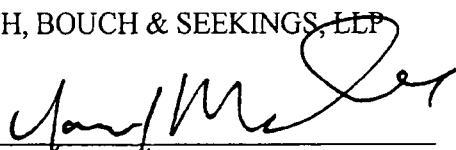
Conclusion

Based on the foregoing, this court should reverse the trial court's orders granting summary judgment and dismissing its claims against the various government entities. The *Hawkins* decision does not control. Unlike *Hawkins*, The Appellant has pleaded

gross negligence. Unlike *Hawkins*, the Appellant has pleaded affirmative, positive, aggressive acts. The Appellants therefore prays this court reverses the orders of the trial court.

Respectfully submitted,

LEATH, BOUCH & SEEKINGS, LLP

By: 

Michael S. Seekings, Esq.

Yancey A. McLeod III, Esq. ✓

92 Broad Street

P. O. Box 59

Charleston, SC 29402

(843) 937-8811

Attorneys for the Appellant

Charleston, South Carolina

OCT 28, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2014-000582

RECEIVED

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SC Court of Appeals

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

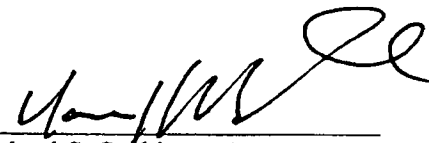
v.

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

Of which South Carolina Department of Transportation, South Carolina Department of Health
and Environmental Control, City of North Charleston, and Charleston Water System
are Respondents.

Certificate of Compliance

I, Yancey A. McLeod III, do hereby certify that the enclosed Appellants' Final Brief in
the above referenced case is in compliance with Rule 211(b), SCACR.



Michael S. Seekings, Esq.
Yancey A. McLeod III, Esq.
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Attorneys for Appellants

October 29, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

R. Markley Dennis, Jr., Circuit Court Judge

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Environmental Control, City of North Charleston, Charleston Water System, and Associated
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Of which South Carolina Department of Transportation, South Carolina Department of Health
and Environmental Control, City of North Charleston, and Charleston Water System
are Respondents.

PROOF OF SERVICE

I, Yancey A. McLeod III, do hereby certify that on October 29, 2015, I served opposing
counsel with a copy of Appellants' Final Brief via United States Mail, postage pre-paid,
addressed as follows:

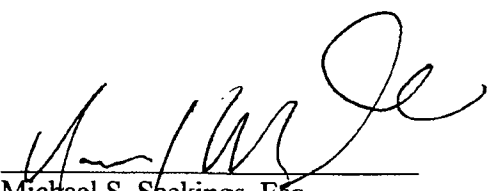
Andrew S. Halio, Esq.
Halio & Halio
P.O. Box 747
Charleston, SC 29402
*Attorneys for Respondent SC
Department of Health and
Environmental Control*

Roy P. Maybank, Esq.
Amanda Maybank, Esq.
Maybank Law Firm, LLC
P.O. Box 12579
Charleston, SC 29422
*Attorneys for Respondent
SC Department of
Transportation*

M. Dawes Cooke, Jr., Esq.
Phillip S. Ferderigos, Esq.
Barnwell Whaley Patterson &
Helms, LLC
P.O. Drawer H
Charleston, SC 29402
*Attorneys for Respondent City
of North Charleston*

G. Wade Cooper, Esq.
Buyck, Sanders &
Simmons, LLC
P.O. Box 2424
Mt. Pleasant, SC 29465

Deborah H. Sheffield, Esq.
117 Brook Valley Rd.
Columbia, SC 29223
***Attorneys for Respondent
Charleston Water System***



Michael S. Seekings, Esq.
Yancey A. McLeod III, Esq.
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Attorneys for Appellants

October 29, 2015

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

R. Markley Dennis, Jr., Circuit Court Judge

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

RECEIVED

OCT 30 2015

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Appellant,

v.

South Carolina Department of Transportation; South Carolina Department
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Charleston Water System; Associated Developers, Inc., Parkhill, LLC,

Defendants,

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

Respondents.

FINAL BRIEF OF RESPONDENTS

Andrew S. Halio, SC Bar #2459
Halio & Halio
13 North Adgers Wharf
Charleston, South Carolina 29401
(843) 577-5200
Attorney for South Carolina Department of
Health and Environmental Control

M. Dawes Cooke, Jr., SC Bar # 1376
Phillip S. Federigos, SC Bar # 16709
Barnwell Whaley Patterson & Helms, LLC
PO Drawer H
Charleston, South Carolina 29402
(843) 577-7700
Attorneys for City of North Charleston

Roy P. Maybank, SC Bar #69643
Amanda Maybank, SC Bar #69825
Maybank Law Firm, LLC
PO Box 12579
Charleston, South Carolina 29407
(843) 408-4272
Attorneys for South Carolina
Department of Transportation

G. Wade Cooper, SC Bar # 69692
Buyck, Sanders & Simmons, LLC
PO Box 2424
Mt. Pleasant, South Carolina 29465
(843) 377-1400
Deborah Harrison Sheffield, SC Bar # 2757
Law of Office of Deborah Harrison Sheffield, PA
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837
Attorneys for Charleston Water System

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
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FINAL BRIEF OF RESPONDENTS

**Andrew S. Halio, SC Bar #2459
Halio & Halio
13 North Adgers Wharf
Charleston, South Carolina 29401
(843) 577-5200
Attorney for South Carolina Department of
Health and Environmental Control**

**M. Dawes Cooke, Jr., SC Bar # 1376
Phillip S. Ferderigos, SC Bar # 16709
Barnwell Whaley Patterson & Helms, LLC
PO Drawer H
Charleston, South Carolina 29402
(843) 577-7700
Attorneys for City of North Charleston**

**Roy P. Maybank, SC Bar #69643
Amanda Maybank, SC Bar #69825
Maybank Law Firm, LLC
PO Box 12579
Charleston, South Carolina 29407
(843) 408-4272
Attorneys for South Carolina
Department of Transportation**

**G. Wade Cooper, SC Bar # 69692
Buyck, Sanders & Simmons, LLC
PO Box 2424
Mt. Pleasant, South Carolina 29465
(843) 377-1400
Deborah Harrison Sheffield, SC Bar # 2757
Law of Office of Deborah Harrison Sheffield, PA
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837
Attorneys for Charleston Water System**

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STATEMENT OF ISSUES ON APPEAL

Respondents would respectfully restate the issues on appeal as¹:

I. WHETHER THE TRIAL COURT ERRED IN GRANTING CHARLESTON WATER SYSTEM'S MOTION TO DISMISS?

- A. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the Charleston Water System is immune from liability for negligence claims arising out of the design and maintenance of the drainage system under the provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?
- B. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the Charleston Water System does not have any control over the City's drainage system and has no duty to lower the level of the Reservoir for flood control during heavy rains?
- C. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by Charleston Water System?
- D. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

II. WHETHER THE TRIAL COURT ERRED IN GRANTING THE CITY OF NORTH CHARLESTON'S MOTION TO DISMISS?

- A. Did the Trial Court properly dismiss the claims for negligence/gross negligence because the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?
- B. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the City?

¹ Rule 208(b)(1)(B), SCACR; Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court.").

- C. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

III. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL?

- A. Did the Trial Court properly grant judgment on the claims for negligence/gross negligence because the SCDHEC is immune from liability for negligence claims arising out of the drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?
- B. Did the Trial Court properly dismiss the claims for negligence/gross negligence because SCDHEC is immune from liability for negligence claims arising out of its issuance of development permits under provisions of S.C. Code § 15-78-60(12)?
- C. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the SCDHEC?

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF TRANSPORTATION?

- A. Did the Trial Court properly grant judgment on the claims for negligence/gross negligence because the SCDOT is immune from liability for negligence claims arising out of design, construction, and maintenance decisions related to a drainage system under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60, and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)?
- B. Did the Trial Court properly dismiss the claim for inverse condemnation because the Plaintiff does not allege any affirmative, positive, aggressive act by the SCDOT?
- C. Did the Trial Court properly dismiss the claim for trespass because the Plaintiff does not allege any affirmative, intentional action of invasion onto the Plaintiff's property?

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 at Northwoods Pointe 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.² 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. [ROA 32; Amd. Complaint.] Tipperary alleges causes of action for negligence/gross negligence and inverse condemnation against all four Respondents, and a cause of action for trespass against SCDOT, the City of North Charleston³, and the Charleston Water System.

Each of the Governmental Entities timely answered the amended complaint: SCDOT filed an answer on December 10, 2012 [ROA 100]; SCDHEC filed an answer on November 2, 2012 [ROA 73]; City of North Charleston filed an answer on December 27, 2012 [ROA 112]; and Charleston Water System filed an answer on November 13, 2012 [ROA 82]. Over the course of the next year, Tipperary took only one deposition – the deposition of a SCDHEC employee, Mr. Richard Geer. [ROA 168; Geer Deposition; see

² Tipperary also seeks compensation from Associated Developers, Inc., and Parkhill, LLC; however, those claims are not the subject on this appeal.

³ Tipperary also alleged at cause of action against the City of North Charleston for violation of S.C. Code Ann. §5-31-450; however, it has not pursued that claim on appeal.

Hearing Tr. 15:6-7.] 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 [ROA 129]; SCDOT filed a motion for summary judgment on November 21, 2013 [ROA 154]; SCDHEC filed a motion for summary judgment on November 25, 2013 [ROA 158]; and Charleston Water System filed a Rule 12(c) motion to dismiss, or, in the alternative, for summary judgment on December 6, 2013 [ROA 163]. The motions came for hearing before the Honorable R. Markley Dennis on January 7, 2014.⁴ [ROA 278; Transcript.]

The Trial Court granted summary judgment to SCDOT and SCDHEC, and dismissed the claims against the City of North Charleston and Charleston Water System.⁵ Separate orders were filed as to each Defendant; however, the Court's holdings rely on common legal foundations and reasoning. [ROA 1, 9, 14, 24; Orders filed February 18, 2014.] As to each Defendant, the Trial Court held that the Governmental Entities are immune from liability for any negligence claims arising out of any design, construction, and maintenance decisions related to a drainage system because such decisions are quasi-

⁴ At the hearing, Tipperary acknowledged that the Court could rely on matters outside of the record in ruling on Charleston Water System's motion in the alternative. [ROA 279; Tr. 2:21-25.] In its Brief, the Appellant Tipperary claims that it has not had the opportunity to depose anyone from CWS, [Appellant's Brief, p. 26]; however, this case had been pending for three years at the time the Court heard the motions, and, further, Tipperary did not ask for additional time to conduct further discovery at the hearing or submit any affidavit under Rule 56(f), SCRCP. See Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 480, 465 S.E.2d 765, 772 (Ct. App. 1995) (party made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery).

⁵ The Trial Court dismissed all claims related to any flood events prior to April 8, 2008, based on the two-year statute of limitations, S.C. Code Ann. §15-78-110. Tipperary has not appealed from this ruling.

judicial, relying on the immunity provisions of the South Carolina Tort Claims Act, S.C. Code. Ann. §15-78-60, and the Court of Appeals' decision in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The Trial Court further held that the inverse condemnation claims fail because Tipperary did not allege any affirmative, positive, aggressive act, and similarly, the trespass claims fail because Tipperary did not allege any affirmative, intentional action of invasion onto Tipperary's property. The negligence claims against Charleston Water System were dismissed on the additional ground that it is a statutorily-created Public Works entity under S.C. Code Ann. §§ 5-31-210 et seq., and, as such, it does not have any control of any design, construction, or maintenance of any drainage system in the City of North Charleston. The negligence claims against SCDHEC were dismissed on an additional ground that it is immune from liability for negligence claims arising out of its issuance of development permits under provisions of S.C. Code § 15-78-60(12).

Tipperary served and filed a Notice of Appeal on March 17, 2014. [ROA 416.]

Tipperary served and filed an Amended Notice of Appeal on April 2, 2014. [ROA 451.]

STATEMENT OF THE FACTS⁶

Overview of the Periodic Flooding at Northwoods Pointe Shopping Center

As alleged by Tipperary, there has been a problem for more than 30 years with flooding in the Northwoods Mall area in the City of North Charleston, including the

⁶ Tipperary's Amended Complaint makes many factual assertions and legal conclusions to which these Respondents do not concede. However, for the purposes of this Brief, Tipperary's factual assertions are treated as true as required by the applicable motion to dismiss standard. The fact that these Respondents reference or incorporate certain of Tipperary's factual assertions into this appellate brief does not represent a waiver by these Respondents to later challenge any of those factual assertions if necessary.

Northwoods Pointe Shopping Center where Tipperary operates a La-Z-Boy store in a leased space. Notwithstanding the alleged existence of this generally, well-known flooding problem, Tipperary alleges that it did not have any knowledge of any prior flooding events when it leased the space in 2000 and undertook improvements and upgrades. The La-Z-Boy store is the lowest point in the area and tends to flood first.

Over the course of years, the La-Z-Boy store has been flooded on a number of occasions as a result of which Tipperary suffered damages. The amended complaint alleges damages from specific flooding events ranging from March 20, 2003, to December 18-19, 2009. As a result of Tipperary's decision not to appeal the Trial Court's ruling on the statute of limitations issue, the only events at issue are: July 16, 2008; October 24, 2008; April 2, 2009; July 8, 2009; July 29, 2009; August 26, 2009; October 28, 2009; and December 18-19, 2009.

Tipperary's amended complaint contains extensive allegations as to the purported cause(s) of the recurrent flooding. In a more condensed version, Tipperary alleges that the problem originates from a box culvert and two 84" storm water drainpipes installed by SCDOT near the Northwoods Mall at some point prior to 1980 and that the problem has grown worse over time as the area has been developed and road construction projects have impacted the area. [ROA 39; Amd. Complaint ¶ 11-12.] Of note, while Tipperary broadly contends that the two 84" pipes were never adequate to handle storm water, Tipperary more specifically alleges that an engineering study (the Seabrook Study) performed in 1979, determined that flooding would take place upstream *in a 50-year storm*. [ROA 38-39; Amd. Complaint ¶12, 9.] Tipperary further alleges the engineering report put the SCDOT and the City of North Charleston on notice of the drainage

problem, and that Tipperary itself has been complaining about the drainage and flooding since 2003, but SCDOT and the other agencies have ignored the problem and done absolutely nothing to remedy the drainage problem. [ROA 38-39; Amd. Complaint ¶¶9-10.]

S.C. Department of Transportation

As to SCDOT, Tipperary alleges that the drainage system, as originally installed, was inadequate to provide sufficient drainage, and that SCDOT has not made any effort to improve the “choke point” at the mouth of those 84” drainage pipes⁷:

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. La-Z-Boy has been adversely impacted by continual and repeated flooding....
60. SCDOT has also refused to remedy the drainage in its right of way, resulting in repeated flooding of the La-Z-Boy and deprivation of its use and access to its property. [ROA 47-48.]

Tipperary alleges that SCDOT was negligent/grossly negligent in certain particulars, all of which amount to alleged failure to provide adequate drainage, i.e.:

- a. In ***refusing to ensure adequate and appropriate drainage*** from the Northwoods Mall site, when, as early as the E.M. Seabrook, Inc. drainage study in 1980, SCDOT knew that its twin 84" pipes were woefully inadequate to provide adequate drainage in the area surrounding Northwoods Mall and Northwoods Point Shopping Center.
- b. In ***refusing to take any steps to remedy and correct the inadequate drainage*** from the entire Northwoods area, though on notice of the

⁷ Tipperary alleged that SCDOT road improvements in 2002-03 caused flooding in March 2003 and July 2005, but any damages from those flooding events are barred by the statute of limitations.

existing problem and future exacerbating factors of increased development and the addition of vast areas of impermeable material causing increased water flow to the low points of the watershed- at the front door and rear loading dock of the La-Z-Boy store.

- c. In *failing and refusing to ensure adequate drainage* for implementation of a storm water system in the Northwoods Mall and Northwoods Pointe area after being placed on notice of the necessary remedial action as recently as the 2007 Davis & Floyd Report, which set forth specific measures that could be taken to prevent further flooding.
- d. In designing, constructing and maintaining the Highway 52 Connector improvements *without providing for sufficient drainage* of surface water from the highway, which surface drainage flows directly to the La-Z-Boy store, as is reflected in the Earth Tech study of 2003.
- e. In *refusing to take any substantive steps to mitigate or prevent future flooding* after the October, 2008 flood event.
- f. In *failing to properly supervise the surface water drainage system* in the Northwoods Mall and Northwoods Pointe Shopping Center area, including its twin 84" pipes, to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA 66-67; Amd. Complaint ¶126 (emphasis added).]

S.C. Department of Health and Environmental Control

As to SCDHEC, Tipperary complains that the Department issued permits allowing a Centex Homes residential development in 2001 upstream from the "choke point" without conducting any investigation into the adverse impact such development would have on the flooding problems:

- 66. DHEC's issuance of permits to applicants whose permit applications failed to account for any potential flooding downstream from the respective sites constituted an affirmative and aggressive act by DHEC. [ROA 49.]

Tipperary alleges that SCDHEC was negligent/grossly negligent in failing to ensure adequate drainage and approving drainage plans for construction projects in the area:

- a. In failing and refusing to ensure adequate drainage for implementation of a storm water system in the Northwoods Mall and Northwoods Pointe area after being on notice of severe and repeated flooding.
- b. In negligently reviewing, inspecting, and approving ill-conceived and factually erroneous drainage plans for construction upstream from the designated and well known flood areas in and around Northwoods Mall and Northwoods Pointe Shopping Center.
- c. In failing and refusing to take any substantive steps to mitigate or prevent future flooding after the October, 2008 flood event.
- d. In failing to properly supervise the surface water drainage in the Northwoods Mall and Northwoods Pointe Shopping Center area to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA 65; Amd. Complaint ¶ 122.]

City of North Charleston

As to the City of North Charleston, Tipperary alleges that the City constructed streets and roads in the Mall area and that the grade results in storm water being directed to its store:

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.... [ROA 50-51; Amd. Complaint.]

However, Tipperary has not alleged that the City was negligent in constructing or maintaining the roads; rather, Tipperary alleges that the City of North Charleston was negligent/grossly negligent in failing to provide adequate drainage:

- a. **In failing and refusing to ensure adequate and appropriate drainage from the Northwoods Mall site**, when, as early as the E.M. Seabrook, Inc. drainage study in 1980, North Charleston knew the level of the Northwoods drainage system was below the mean water level of the outflow of the entire drainage system at the Goose Creek Reservoir.
- b. **In failing and refusing to take steps to remedy and correct the inadequate drainage from the entire Northwoods area**, though on notice of the existing problem and future exacerbating factors of increased development and the addition of vast areas of impermeable material causing increased water flow to the low points of the watershed- at the front door and rear loading dock of the La-Z-Boy store.
- c. **In failing and refusing to ensure adequate drainage for implementation of a storm water system** in the Northwoods Mall and Northwoods Pointe area after being placed on notice of the necessary remedial action as recently as the 2007 Davis & Floyd Report, which set forth specific measures that could be taken to prevent further flooding.
- d. **In negligently reviewing, inspecting, and approving ill-conceived and factually erroneous drainage plans for construction upstream** from the designated and well known flood areas in and around Northwoods Mall and Northwoods Pointe Shopping Center to account for increased drainage from Ashley Phosphate Road and the increased commercial development between Ashley Phosphate.
- e. **In failing to provide for sufficient drainage** for surface water from Ashley Phosphate Road and down Northwoods Boulevard, which surface drainage flows directly to the doors of the La-Z-Boy store.
- f. **In failing and refusing to take any substantive steps to mitigate or prevent future flooding** after the October, 2008 flood event.

- g. **In failing to design and maintain a reasonably' adequate surface water drainage system** in the Northwoods Mall and Northwoods Pointe Shopping Center area and downstream to the discharge of the flood plain at the Goose Creek Reservoir.
- h. **In failing to properly supervise the surface water drainage system** in the Northwoods Mall and Northwoods Pointe Shopping Center area to ensure adequate flow of water through the drainage system to the Goose Creek Reservoir during periods of inclement weather. [ROA 62-63; Amd. Complaint ¶ 118 (emphasis added).]

Charleston Water System

The Charleston Water System owns, operates and manages the Goose Creek Reservoir which is one of the sources of the water it provides to its customers. The Reservoir is downstream from the Mall area. The Charleston Water System also owns and controls a drainage ditch in the area of the Mall that runs into the Reservoir. [ROA 56; Amd. Complaint ¶ 94.]

Tipperary complains that the Charleston Water System failed to provide a drainage system to prevent or mitigate flooding and it should have lowered the level of the Reservoir to prevent the upstream flooding:

- 79. The drainage system running from the Northwoods Mall site to its outflow at the Goose Creek Reservoir is controlled and maintained by the Charleston Water System f/k/a Commissioners of Public Works.
- 80. CWS also controls the level of the Goose Creek Reservoir and, as it is believed to have occurred in December, 2009, can lower the level of the reservoir to that the drainage system and watershed upstream to above Northwoods Mall and Northwoods Pointe Shopping Center will adequately and effectively drain during a torrential downpour:
- 81. Upon information and belief, CWS owns, controls, maintains, and operates the drainage watershed from the Northwoods Mall parking lot to the outflow at Goose Creek Reservoir. CWS's drainage system throughout is either flat or ascending from the Mall parking lot to the reservoir, the result of which is that, because CWS maintains the level of the Reservoir above the level of the drainage basin, the drainage

watershed remains approximately half full and does not properly drain any storm water.

82. CWS' operation and maintenance of the Goose Creek Reservoir and its maintaining the level of the Reservoir above the level of the drainage watershed outflow resulted in the following floods and near flood events, the effects of which could have been nullified or abated had the Reservoir been lowered: ****

83. As a direct and proximate result of CWS' affirmative and aggressive act of constructing, maintaining, and controlling a drainage system that is flat or ascending, rather than descending, La-Z-Boy has repeatedly been deprived of the use of its property and business. [ROA 52-53; Amd. Complaint.]

Tipperary alleges that the Charleston Water System was negligent/grossly negligent in failing to provide a drainage system to prevent flooding and failing lower the level of the Reservoir to prevent flooding:

- a. Failing to design, maintain, and operate the drainage system under its control to prevent or mitigate flooding resulting from even moderate rainfall;
- b. Failing to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding. [ROA 57, 58-59; Amd. Complaint ¶ 98; see also ¶ 101-105.]

ARGUMENT

Standard of Review

On review of a grant of summary judgment, the Appellate Court applies the same standard which governs the trial court, namely, summary judgment is properly granted when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRCP; Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). “In determining whether any

triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Id.*

Similarly, the Appellate Court applies the same standard of review implemented by the trial court on a motion under Rule 12(c), SCRCP. Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006). On a motion for judgment on the pleadings under Rule 12(c), the court must regard all properly pleaded factual allegations as admitted, and the court may not consider matters outside the pleadings. Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000).

In this case, the Trial Court granted summary judgment to SCDHEC and SCDOT and dismissed the claims against the City of North Charleston and Charleston Water System. However, the appellate review is substantially the same because the Plaintiff did not submit any evidentiary materials and the Trial Court relied almost exclusively on the allegations of the Amended Complaint.

The S.C. Tort Claims Act- Generally

As succinctly stated in Hawkins v. City of Greenville, *supra*, the Tort Claims Act governs all tort claims against governmental entities. It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann § 15-78-20(b). However, while the Tort Claims Act makes governmental entities liable for their torts, a plaintiff must present evidence of the governmental entity’s duty to act in order to recover under the Act, and any potential liability is subject to certain limitations and exemptions as provided in the Act. S.C. Code Ann. §15-78-40.

Section 15-78-60 sets out forty “exceptions” to this waiver of sovereign immunity which significantly limit the tort liability of government entities, and those limitations

and exemptions must be liberally construed in favor of limiting liability of the State. S.C. Code Ann § 15-78-20(f). Potentially applicable sections of § 15-78-60 as referenced in the Trial Court's orders, include:

The governmental entity 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) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
- (4) 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;
- (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
- ...
- (7) a nuisance;
- ...
- (9) entry upon any property where the entry is expressly or impliedly authorized by law;
- ...
- (12) 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;
- (13) 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;

...

(20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons.

As the Trial Court noted, the application of the Tort Claims Act to allegations arising out of design and/or maintenance of a governmental agency's drainage system has been addressed by the Court of Appeals in Hawkins v. City of Greenville, in which the Court held that the city was entitled to summary judgment on claims of negligence, inverse condemnation and trespass brought by a business property owner alleging that the city's improper and negligent design and maintenance of its drainage system caused his business to flood.

Tipperary argues that Hawkins is distinguishable on the facts, procedural posture and pleadings, and specifically contends that: (1) Greenville had attempted to remedy the flooding problems; (2) Tipperary has pleaded gross negligence; and (3) Tipperary alleges affirmative acts of building and approving roads and issuance of permits. As a general proposition, it is rare that any two cases are identical on every point of fact, but, as to the law, Hawkins is substantially on-point and bars Tipperary's claims as a matter of law. Tipperary's attempt to ignore the key holdings of the Hawkins binding precedent and sound rationale based upon irrelevant facts is unavailing.

As in this case, the plaintiff Hawkins was a business owner who brought an action against the City of Greenville alleging that the City had improperly and negligently designed and maintained its municipal drainage system in the area which caused his business property to flood after a rainstorm. Hawkins alleged the same causes of action

for: inverse condemnation, negligence in the City's design and maintenance of its storm water drainage system, and trespass.⁸ Any other specific factual differences do not weaken the rationale or application of those holdings in this case. The Trial Court's rulings in this case are well-founded on the statutory provisions of the Tort Claims Acts, and the precedent found in the Hawkins opinion and other settled legal propositions as discussed in detail below.⁹

I. *Quasi-judicial Immunity:* The Governmental Entities are immune from claims of negligence/gross negligence arising from the exercise of their quasi-judicial duties related to the design and maintenance of the drainage system under § 15-78-60(1).

Section 15-78-60(1) provides that governmental entities are not liable for a loss resulting from quasi-judicial action or inaction. In Hawkins v. City of Greenville, supra, the Court of Appeals held that the City was immune from any liability for any negligence claims arising out of the design and maintenance of the drainage system because a governmental entity's duties in regards to its drainage system are of a quasi-judicial nature. In reliance on the statutory provisions of §15-78-60(1) and the Hawkins holding, the Trial Court properly granted judgment and/or dismissed all claims against the Respondents related to the design, construction, and maintenance of the drainage system.

In Hawkins, the Court of Appeals relied on and quoted from a Texas appellate decision in City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex.1997), discussing the quasi-judicial nature of a governing authority's actions in adopting public drainage systems:

⁸Hawkins also alleged a violation of S.C. Code § 5-31-450, as did Tipperary.

⁹ The following arguments are organized by the nature of the cause of actions in an effort to provide clarity and avoid repetition. Specific points and arguments as to the Governmental Entities may be discussed therein.

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.

594 S.E.2d at 564. The Court of Appeals found “a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville.”

Id.

In addition to the supporting rationale of the Texas decision, the quasi-judicial immunity ruling is also supported by comparable decisions in other jurisdictions, including an opinion from the U.S. Supreme Court, in Johnston v. D.C., 118 U.S. 19, 20-21 (1886):

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 the 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. (Emphasis added.)

See also J.N. Legacy Grp., Inc. v. City of Dallas, 745 S.E.2d 721, 725 (Ga. App. 2013)(“the duty of a city to maintain its sewerage-drainage system in a good working and sanitary condition is a governmental function,” for which no liability against the municipality exists in an action for negligence’); Coleman v. Portage Cty. Eng’r, 975 N.E.2d 952, 960 (Ohio 2012)(“a claim based on a failure to upgrade [a storm water

drainage system] is a claim based on a failure of design and construction, for which political subdivisions enjoy immunity”); Beck v. City of New York, 199 N.Y.S.2d 584, 591 (Sup. Ct. 1960) aff’d, 229 N.Y.S.2d 736 (1962) (inadequacy of sewer system is a discretionary decision committed in the exercise of a quasi-judicial determination). Ultimately, “a municipality cannot be held liable for its failure to provide a drainage system sufficient to dispose of surface waters flowing as a result of the natural drainage, the grading and paving of streets.” Beck, *id.*

Tipperary argues that the City of Tyler opinion “actually found the municipality could be held liable for constructing and maintaining the storm water system because those are ‘propriety’ functions.” [Appellant’s Brief, p. 14.] However, Tipperary miscomprehends the Texas appellate rulings. First and foremost, the Texas court definitively held that the City’s design and planning of its culvert system were quasi-judicial functions subject to governmental immunity. 962 S.W.2d at 501. To the extent that the court held that the City of Tyler could be liable for the negligent performance in constructing and maintaining the storm system prior to 1970, that holding was based on a distinction between propriety and governmental functions in the context of significant changes in Texas law. Namely, Texas common law classified operation and maintenance of storm sewers as proprietary functions for which a municipality could be sued, and that common law distinction remained in place when Texas enacted a Tort Claims Act in 1970; but, in 1987, the Texas Tort Claims Act was amended to reclassify operation of a storm sewer system from a proprietary function to a governmental function subject to immunity. Thus, the Texas appellate court held that, while the claim for negligent operation of the system was barred under the 1987 amendment, the claim for negligent

construction before 1987 was not subject to dismissal.

In contrast to Texas law, prior to the Supreme Court's decision to abolish sovereign immunity in McCall v. Batson,¹⁰ the Court had "consistently refused to recognize a distinction between governmental and proprietary functions of a municipal corporation." Boyce v. Lancaster Cnty. Natural Gas Auth., 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976); *see also* Horton v. United States, 622 F.2d 80, 83 (4th Cir. 1980)("While a majority of states today find waiver of immunity when the sovereign engages in proprietary functions, ... as opposed to purely governmental activities, South Carolina has declined the invitation to adopt this distinction."). Thus, under South Carolina precedent, there is no distinction between proprietary and governmental function to support Tipperary's attempt to avoid the holding of Hawkins.

In South Carolina, the key distinction for immunity purposes has been between discretionary decisions and ministerial actions:

The duties of public officials are in general classified as ministerial and discretionary. They are also referred to as being ministerial and quasi-judicial. The character of an official's public duties is determined by the nature of the act performed. The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Quasi-judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.

Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659, 662 (1973). The Court of Appeals in Hawkins held that the City exercised discretion in making policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville, and the Trial Court properly relied on that holding in finding that the actions of which

¹⁰ 285 S.C. 243, 329 S.E.2d 741 (1985).

Tipperary complains fall in the same category of discretionary, quasi-judicial duties.

Tipperary alleges that there is inadequate drainage because the 84" pipes SCDOT installed and constructed do not provide adequate drainage – that is a design decision within the Department's quasi-judicial duties for which it retains immunity. To the extent that Tipperary also alleges that SCDOT and the other Governmental Entities are responsible for generally failing to provide an adequate drainage system and/or failing to remedy the flooding problems, such decisions are quasi-judicial and protected by the immunity provision of §15-78-60(1). Accordingly, the Trial Court orders dismissing those claims should be affirmed.

As to Charleston Water System, the Trial Court also properly dismissed the claims against the Charleston Water System related to the design, construction, and/or maintenance of the drainage system in the Mall area on the additional ground that CWS's authority is limited by § 5-31-250:

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

S.C. Code Ann. § 5-31-250. Tipperary's allegation that a drainage basin leading into the Goose Creek Reservoir – below the "choke point" -- is owned by CWS simply does not defeat the immunity under §15-78-60(1), or the scope of authority under §5-31-250.

II. *Gross Negligence*: SCDHEC is immune from claims of gross negligence related to the issuance of permits for development and construction in the Mall Area under § 15-78-60(12).

Tipperary claims that the Hawkins opinion does not support the dismissal of the claims against SCDHEC because it has alleged gross negligence in issuing permits for development in the area, relying upon Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006).¹¹ More specifically, Tipperary argues that the conduct of SCDHEC “in issuing permits for development in the face of three decades of catastrophic flooding rises to the level of gross negligent conduct.” [Appellant’s Brief, p. 9.] Neither the opinion in Proctor nor the allegations/evidence support any viable claim for gross negligence by SCDHEC in issuing any development permits.

In Proctor, a tire waste disposal operator asserted a claim against DHEC for gross negligence in failing to restore operator to rebate list after an ALJ had ordered DHEC to do so. The Court discussed various provisions for immunity under separate subsections of § 15-78-60¹² and held that: “When a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions.” Proctor, *id.* at 513; see also Steinke v. S.C. Dep't of Labor, Licensing and Regulation,

¹¹ As to the City of North Charleston, Tipperary’s Complaint allegations do not specifically allege gross negligence related to the issuance of permits for the development and construction in the Mall area against the City. Moreover, any such claim would be barred against the City of North Charleston pursuant to Hawkins decision as well.

¹² §15-78-60(1), (2), (3), (4), (5) and (12).

336 S.C. 373, 397, 520 S.E.2d 142, 154 (1999) (“the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception.”).

Discussing the licensing and permitting immunity provision of §15-78-60(12) as applicable in Proctor, the Court recited, “[g]ross 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.” Proctor, *id.* (citation omitted). In upholding the trial court’s decision to submit the question to a jury, the Court noted the evidence that DHEC violated its own policy in refusing to perform an inspection for over four years despite the plaintiff’s request for one: “There is sufficient evidence to support the jury’s finding of intentional, conscious failure by DHEC to do that which it ought to have done.” *Id.*

Here, the Trial Court held that Tipperary “was unable to provide any evidence that the [DHEC] permits at issue were issued in a grossly negligent manner.” [ROA 12; DHEC Order p. 4.] Tipperary maintains that “there is ample evidence for a jury to find that SCDHEC was grossly negligent in issuance of these permits. The overwhelming evidence is that the flooding problems in the Northwoods Mall area have been ongoing for over three decades. In spite of the serious flooding concerns, SCDHEC permitted numerous developments, intentionally ignoring the historical and ongoing flooding concerns.” [Appellant’s Brief, p. 10.]

SCDHEC maintains that Hawkins resolves all of the claims against DHEC, including the gross negligence claim, and that §15-78-60(12) provided an additional ground for the Trial Court to grant the motion for summary judgment. On the matter of

subsection 60(12), however, the only evidence – beyond the pleadings – sustains the grant of summary judgment to DHEC because unlike Proctor, there is no evidence that DHEC violated any policy or regulation in issuing the permits.

The only deposition that Tipperary has taken¹³ is Richard Geer, the DHEC engineer associate with the division that issues storm water permits for development and redevelopment in the Coastal Counties area. As Mr. Geer explained, storm water permit applications were submitted under the regulations with the required plans and calculations which included a drainage analysis from a consulting engineer hired by the developer. See SC Reg. §§72-300-316 – Standards for Stormwater Management and Sediment Reduction. [ROA 171; Geer Dep. 14:10-15:9.] “[W]e review applications, issue the permit, do compliance inspections during construction and make sure it’s built according to what we approved. As long as that’s done, it’s done.” [ROA 171; Geer Dep. 29:6-9.] Under the regulations, DHEC relies upon the developer’s engineer’s report regarding the storm water impact. See SC Reg. § 72-305(H). [ROA 172,174-75; Geer Dep. 17:8-13, 28-29.] DHEC does not approve or choose the engineer for a particular project. [ROA 175; Geer Dep. 30:24 – 31:1.] “[W]e rely on them [state registered professionals] and their preparations and that professional registration and goes with that.” [ROA 175; Geer Dep. 30:10-16.]

The 1998 application for Phase 1 of the Parkhill Place development did not contain a question about whether there were any flooding concerns in the general area; however, by the time the 2000 application was submitted for Phase 2A & 2B, a question

¹³ This is the only deposition that Tipperary has taken during the course of the litigation. See ROA 292; Hearing Tr. 15.

had been added: “14. Are there any existing flooding problems in the surrounding areas?” [ROA 173, 174, 241; Geer Dep. 24, 27; ex. 4.] The developer’s engineer had answered “no” to the question on the 2000 application, as well as the 2001 application for Phases 3, 4, & 5 and the 2004 application for Phase 6. [ROA 243, 246; Geer Dep. Ex. 5 & 7.]¹⁴ Tipperary inquired as to whether DHEC had some responsibility to follow-up on the answers given by the engineer once it became aware that there was in fact flooding. However, the only evidence is that DHEC has no responsibility or duty in that regard. [ROA 177; Geer Dep. 39-40.] Accordingly, the Trial Court properly granted judgment and dismissed the claims against SCDHEC under §15-78-60(12).

III. *Gross Negligence: The claims of gross negligence against Charleston Water System failing to lower the water level in the Reservoir during the periods of heavy rainfall fail as a matter of law.*

In addition to complaining that Charleston Water System was responsible for the flooding of the La-Z-Boy store because of the slope of the drainage basin that leads into the Reservoir, Tipperary alleges that CWS was grossly negligent in “failing to institute protocols and procedures by which the level of the Goose Creek Reservoir would be lowered in the event of significant rainfall resulting in potential for flooding.” [ROA 57; Amd. Complaint ¶ 98.] From one perspective, any decision as to water levels is discretionary and protected by the immunity provisions of §15-78-60(1), and, in addition, the allegation fails to state a claim for gross negligence, as a matter of law, because the alleged failure to act is not cognizable in the absence of a duty.

¹⁴ Tipperary also questioned the DHEC employee about a 2003 application for a school and a 2001 application for some townhomes both of which also contained the answer “no” to question 14 about flooding. [ROA 177, 178, 248, 250; Geer Dep. 38-39, 41, Ex. 8, 9.]

Tipperary alleges that CWS had a duty to lower the water level in the Reservoir to prevent the upstream flooding in the Mall area, but it cites no authority for its assertion. Existence of a legal duty is a matter of law, and a mere allegation of a duty is not accepted as true on a Rule 12(c) motion. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct.App.1986) (“The existence and scope of the duty are questions of law.”); Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988)¹⁵(“A motion under ... Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.”).

“Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. It follows that a person usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act.” Rayfield v. S. Carolina Dep't of Corr., 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). South Carolina Code includes a “Dams and Reservoirs Safety Act,” §§49-11-110 et seq., but it only deals with the safety of the structure of a dam or reservoir and allows SCDHEC to order a drawdown where structure of dam/reservoir is threatened by imminent floods. S.C. Code §49-11-190. The Act does not, however, impose any duty on the CWS to open its spillway to release water to avoid upstream flooding during heavy rains.

¹⁵ *Overruled on other grounds in* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

At common law, “the only obligation imposed upon a dam operator in the operation of his dam is not to worsen conditions downstream beyond what would have occurred in the absence of the dam. Key Sales Co. v. S. Carolina Elec. & Gas Co., 290 F. Supp. 8, 23 (D.S.C. 1968), *aff’d* 422 F.2d 389 (4th Cir. 1970). Courts in other jurisdictions also have held that the owner of a water supply reservoir has no duty to institute flood control during heavy rains. Shaninoski v. PG Energy, Div. of S. Union Co., 579 Pa. 652, 680, 858 A.2d 589, 606 (2004)(“This was not a flood-control dam, but a water supply reservoir and there is no support for an argument that every dam owner has a duty to institute flood control measures in times of heavy precipitation.”); Kambish v. Santa Clara Val. Water Conservation Dist. of San Jose, 185 Cal. App. 2d 107, 110, 8 Cal. Rptr. 215, 217 (Ct. App. 1960) (“no duty to improve that situation by using the dam for flood control”); Iodice v. State, 277 A.D. 647, 648-49, 102 N.Y.S.2d 742, 743 (App. Div.) *aff’d*, 303 N.Y. 740, 103 N.E.2d 348 (1951)(no legal duty imposed upon state as owner of water storage reservoir to operate its dam for flood control purposes).

From an additional perspective, CWS’s refusal to open the spillway is a discretionary decision under the immunity provision of §15-78-60(1). Consistent with the Texas appellate court’s decision in City of Tyler, as cited in Hawkins and discussed above, the Texas appellate court has also held that a county water company’s decision whether to open the spillway of a reservoir to manage flood control constituted a discretionary decision for which the water district was immune from liability. Bennett v. Tarrant Cnty. Water Control & Imp. Dist. No. One, 894 S.W.2d 441, 452 (Tex. App. 1995).

IV. *Inverse Condemnation* – The claims for inverse condemnation fail because Tipperary does not allege any affirmative, positive, aggressive acts by the Governmental Entities.

The well-settled law, as recited in Hawkins, holds that:

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

The Court of Appeals found that Hawkins had failed to allege any affirmative acts by the city and affirmed the summary judgment to the city: "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."¹⁶ Hawkins, 594 S.E.2d at 563. Tipperary does not dispute that the applicable law requires a showing of an affirmative, positive, aggressive act to establish a claim of inverse condemnation. Rather, Tipperary argues that it has alleged the requisite affirmative, positive, aggressive acts by each of the Governmental Entities.

As to the City of North Charleston, Tipperary's inverse condemnation claim fails

¹⁶ Section 5-31-450 provides certain duties and rights upon municipalities that install drainage systems to avoid damage to landowners, however, any such liability is not imposed absent some affirmative act by the municipality which alters the course or increases the amount of storm water runoff onto private property. In Hawkins, the Court found that the claims under this section failed for lack of any offer proof of any affirmative, positive acts on the part of the City that caused the flooding. Here, the Trial Court found that Tipperary's claim against the City of North Charleston under § 5-31-450 fails on three grounds: (1) Tipperary is a tenant, not the landowner; (2) there is no allegation that the landowner made demand as required under the statute; and (3) there is no allegation of any affirmative, positive, aggressive acts. Tipperary did not appeal the Trial Court's dismissal of its §5-31-450 claim against the City of North Charleston; therefore, the issue is not before the Court on appeal.

pursuant to the Hawkins decision. Hawkins had argued that the city was liable for his inverse condemnation claim, contending he was deprived of his full right to his property without just compensation as a result of the city's design and maintenance of the drainage system. In affirming the trial court's summary dismissal of Hawkins' claim, the Court of Appeals held that the City of Greenville's conduct was insufficient to render it liable for inverse condemnation:

In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the Servicemaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts 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 these pipes. 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. See, e.g., *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); *Gray v. South Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency"). 594 S.E.2d at 562-63 (emphasis added).

Similarly, here, Tipperary fails to allege any "affirmative, positive, aggressive" on the part of the City of North Charleston. Complaint Paragraphs 4-52, and 72-74 do not factually allege any "affirmative, positive, aggressive act" on the part of the City. The allegations of the City's mere failure to act are insufficient as a matter of law. Here, the alleged conduct by the City of North Charleston giving rise to Tipperary's inverse condemnation claim is practically the same as the City of Greenville's conduct absolved

by the court in Hawkins. Pursuant to the Hawkins' Court's ruling, the City's action in "allow[ing] the development of neighboring parcels of commercial property" which alleged "add[ed] strain" to the existing upstream watershed, as well as its alleged failure to remedy the drainage defects, do not constitute the type of "affirmative, positive aggressive" act by [a] governmental agency to render it liable for inverse condemnation. At most, the City's actions amount to a "mere failure to act," which Hawkins hold is an insufficient basis to render a municipality liable for inverse condemnation. Id.

As to the Charleston Water System, Tipperary argues that the allegations that CWS maintained the level of the Reservoir and refused to lower the level are sufficient to plead a cause of action for inverse condemnation. However, consistent with the Court of Appeals' holding in Hawkins, the Trial Court properly held a failure to act does not allege or show any requisite "affirmative, positive, aggressive act". *See also Brown v. Sch. Dist. of Greenville Cnty.*, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968)("In such case there would normally have to be some positive, aggressive, overt act on the part of the agency which brings about the taking. In other words, it is difficult, if not impossible, to take anything from someone negatively or by failing to act.")

As to SCDHEC, Tipperary argues, without citation to any authority, that "the issuance and approval of the development permits constitute affirmative, aggressive, positive, and aggressive acts sufficient to constitute an inverse condemnation. [Appellant's Brief, p. 12.] The Trial Court correctly found that "the mere allegation that DHEC issued permits without accounting for potential downstream flooding is insufficient to support a claim for inverse condemnation." [ROA 12; DHEC Order, p. 4.] *See supporting authorities from other jurisdictions: City of Keller v. Wilson*, 168

S.W.3d 802 (Tex. 2005) (allegations that city approval of drainage plans resulted in flooding of private property did not prove inverse condemnation); First Gaston Bank of N. Carolina v. City of Hickory, 203 N.C. App. 195, 202, 691 S.E.2d 715, 721 (2010) (inverse condemnation claim not sustained by allegation that city was reckless in approving development upstream that concentrated unreasonable amounts of storm water resulting in a sinkhole); Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club, 283 Mich. App. 264, 769 N.W.2d 234 (2009) (city's approval of construction plans nor city's failure to construct a drainage system constituted an affirmative act, for purposes of an inverse condemnation claim); State ex rel. City of Blue Springs v. Nixon, 250 S.W.3d 365, 371 (Mo. 2008)(inverse condemnation claim not stated based on mere approval of plat in compliance with city code because there is no liability in absence of an affirmative act). The words of the Missouri Supreme Court are most apt:

While the Stevenses may be correct that “as a matter of good government” cities *should not* approve plats unless developers prevent rainwater from running on other property, they simply fail to cite any authority for finding inverse condemnation occurred where the municipality does approve them. A failure to meet aspirational goals does not result in liability.

State v. Nixon, 250 S.W.3d at 372. The Trial Court correctly held that SCDHEC is not liable for inverse condemnation based on issuance of the development permits.

As to SCDOT, Plaintiff argues that the allegation that DOT originally installed the culvert and the 84” pipes and constructed roads in the area is an allegation of an affirmative, positive and aggressive act. Tipperary similarly argues, as to the City of North Charleston, that allegations the City constructed or participated in road

construction in the Mall area which made the flooding worse constitutes affirmative, positive, aggressive acts to state an claim for inverse condemnation.

At their core, the allegations of injury are based on the *failure* to provide adequate drainage for 50-year rains. As alleged by Tipperary, the cause of the flooding is the inadequacy of the twin 84" pipes and culvert. [ROA 43; Amd. Complaint ¶33.] The allegation is that the storm water flows from the Parkhill development and other areas above the Mall/Shopping area and pools at the lowest point – the location of the La-Z-Boy store because the culvert and pipes are inadequate to carry away all the storm water fast enough during a heavy – “50-year” – storm. [ROA 40; Amd. Complaint ¶18]. There is no allegation that road construction (within the statute of limitation time period) directly caused any flooding; rather, the allegations are that the roads added impervious acreage which increased the runoff and that storm water collects at the La-Z-Boy store because of the grade of roads. [ROA 41, 47, 51; Amd. Complaint ¶20, 58, 74.] While it might be that installing the pipes and building roads are positive actions, the allegations do not amount to the type of aggressive, affirmative acts that impose liability under inverse condemnation because no affirmative acts, as alleged, actually collected the storm water and directed it onto La-Z-Boy store property.

“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) (erection of dam across Saluda river impounded a large volume of water, and opening the gates during a heavy rainfall turned the flood waters down river and upon the plaintiff’s land). To recover, the Plaintiff must plead and prove that the defendant constructed the highway in

such a manner as to cause the impounding of waters and the casting of such upon its property. Lail v. S. Carolina State Highway Dep't, 244 S.C. 237, 246, 136 S.E.2d 306, 311 (1964). If a governmental entity might be liable in inverse condemnation for flooding caused by road construction, there must be a showing of more than the fact that the road is impervious and creates or increased runoff; there must be proof that the city collects, channels and/or thrusts water upon the land of another in a different matter from the natural flow, *See DiBlasi v. City of Seattle*, 136 Wash. 2d 865, 879, 969 P.2d 10, 16 (1998). *Compare Brown v. Sch. Dist. of Greenville Cnty.*, 251 S.C. 220, 222, 161 S.E.2d 815, 815 (1968)(“natural flow of rain water was directed in concentrated form into and across the drive and onto the landowners' property with great force and volume”); Hoffman v. Greenville Cnty., 242 S.C. 34, 39-40, 129 S.E.2d 757, 760 (1963)(ditches and drains impounded surface water and casting it upon their property); M & M Corp. of S. Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 261, 701 S.E.2d 33, 36 (2010)(“deliberately channeled and cast upon Plaintiff's land”).

Tipperary cites to Newsome v. Town of Surfside Beach, 300 S.C. 14, 15, 386 S.E.2d 274, 275 (Ct. App. 1989), as precedent in support of its inverse condemnation claims against the DOT and the City; however, in that case, a dam had been created, and waters from a heavy rain breached the dam and drained onto the plaintiff's property. In Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 15, 281 S.E.2d 796, 797 (1981), the facts as set forth in the Court's opinion show that 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.

Tipperary also cites to Cutchin v. S. Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 36-37, 389 S.E.2d 646, 647 (1990), a case in which the Court upheld a jury verdict in an inverse condemnation action predicated on a culvert that was "improperly constructed." Respondents would submit that the factual foundation as found in the Court's opinion in Cutchin is too sparse to make a worthwhile comparison to allegations of this case in the face of Hawkins and the other inverse condemnation cases discussed above, which recognize a claim for inverse condemnation where water is impounded and cast upon the plaintiff's land.

Similarly, the other pre-Hawkins cases cited by Tipperary do not support a reversal of the Trial Court's decision in this case and are unavailing to support Tipperary's urging that the Court ignore its own precedent in Hawkins. In this case, Tipperary's allegations do not amount to impounding surface water and casting it onto Tipperary's property. Accordingly, the Trial Court properly dismissed the inverse condemnation causes of action.

V. Trespass – The trespass claims fail because Tipperary does not allege any affirmative, intentional action of invasion onto its property.

Tipperary has attempted to assert claims for trespass against SCDOT, the City of North Charleston, and the Charleston Water System. As with inverse condemnation, the basic legal premises of a cause of action for trespass are well settled:

"[T]respass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property...." *Hedgepath v. Am. Tel. Tel. Co.*, 348 S.C. 340, 356, 559 S.E.2d 327, 337 (Ct.App.2001) (quoting *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001), cert. denied (citing *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct.App.1993))). "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion."

Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct.App.1991); *accord Mack v. Edens*, 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct.App.1995).

Hawkins, 594 S.E.2d at 565-66.] . Relying upon Hawkins, the Trial Court dismissed the trespass claims as to each Governmental Entity because trespass will not lie for failure to perform a duty.

Tipperary argues that that the Trial Court erred because its amended complaint pleads affirmative and intentional acts. As to CWS, Tipperary contends that allegations that the flooding had been a problem for decades and that CWS controls the Reservoir amounts to intentional mishandling of the water level and constitutes a sufficiently affirmative, intentional act to support a claim for trespass. As to SCDOT and the City, Tipperary contends that allegations that they knew full well of the history of flooding and still proceeded with road projects that would exacerbate the flooding constitutes affirmative and intentional actions to state a claim for trespass.

In Snow v. City of Columbia, as cited in Hawkins, the Court found that the plaintiff had not established a trespass claim where “the immediate cause of the entry on the Snows' land was the discharge of water from the leaking pipe joint. However, the City did not intentionally discharge the water.... Since the event which constituted the entry was not a voluntary act of the City, an action for trespass will not lie.” 409 S.E.2d at 802. Here, the immediate cause of the entry of the storm water onto the La-Z-Boy store was the heavy rainfall which by no means can be considered an affirmative act by any of the Governmental Entities. To the extent that some of the storm water from the heavy rain pooled down in Tipperary's store because the drainage system could not carry it away quickly enough, the failure to provide an adequate drainage system at the core of

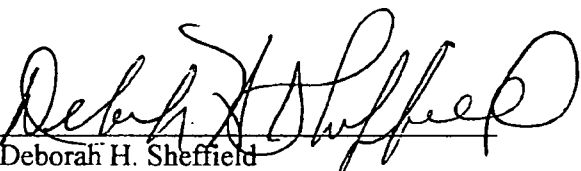
Tipperary's case is a failure to act that is not cognizable in trespass. Finally, even if the act of installing the pipes or building roads was affirmative, none of the Governmental Entities intentionally discharged water into the La-Z-Boy property.

CONCLUSION

The Trial Court properly granted judgment on all of Tipperary's claims under provisions of the S.C. Tort Claims Act, S.C. Code § 15-78-60 and the precedent of Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The Governmental Entities are immune from claims of negligence/gross negligence arising from the exercise of their quasi-judicial duties related to the design and maintenance of the drainage system under § 15-78-60(1). The Defendant SCDHEC is immune from claims of gross negligence related to the issuance of permits for development and construction in the Mall Area under § 15-78-60(12). The claims of gross negligence against Charleston Water System for failing to lower the water level in the Reservoir during the periods of heavy rainfall also fail as a matter of law. Likewise, the claims for inverse condemnation fail because Tipperary does not allege any affirmative, positive, aggressive acts by the Governmental Entities, and the trespass claims fail because Tipperary does not allege any affirmative, intentional action of invasion onto its property.

Therefore, the Respondents respectfully request that the Court affirm the Trial Court's orders.

Respectfully submitted,


Deborah H. Sheffield
For all Respondents with Permission

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

Deborah H. Sheffield, SC #2757
117 Brook Valley Rd.
Columbia, SC 29223
(803) 419-7837

**Attorneys for Respondent
Charleston Water System**

Andrew S. Halio, SC # 2459
Halio & Halio
P.O. Box 747
Charleston, SC 29402-0747
(843) 577-5200

**Attorney for Respondent
SC Department of Health and
Environmental Control**

Roy P. Maybank, SC # 69643
Amanda Maybank, SC # 69825
Maybank Law Firm, LLC
P.O. Box 12579
Charleston, SC 29422
(843) 408-4272

**Attorney for Respondent
SC Department of Transportation**

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

**Attorney for Respondent
City of North Charleston**

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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

RECEIVED
OCT 30 2015
SC Court of Appeals

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

Appellant,

v.

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

Defendants,

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

Respondents.

Certification of Counsel

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


Deborah Harrison Sheffield, SC Bar # 2757
Law Office of Deborah Harrison Sheffield, PA
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837
Attorneys for Charleston Water System

October 29, 2015

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Respondents.

CERTIFICATE OF SERVICE

I, Deborah Harrison Sheffield, Counsel for the Respondent Charleston Water System, do hereby certify that on October 29, 2015, I served a copy of the Final Brief of Respondents, on Counsel for Appellant, via U.S. Mail, first class, postage prepaid to the following address:

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


Deborah Harrison Sheffield, SC Bar # 2757
Law Office of Deborah Harrison Sheffield, PA
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

Appellate Case No. 2014-000582

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-351
Heard May 2, 2016 – Filed June 30, 2016

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Michael S. Seekings and Yancey Alford McLeod, III,

both of Leath Bouch & Seekings, LLP, of Charleston for Appellant.

M. Dawes Cooke, Jr., and Phillip S. Ferderigos, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Andrew Steven Halio, of Halio & Halio, PA, of Charleston; Roy Pearce Maybank and Amanda R. Maybank, both of Maybank Law Firm, LLC, of Charleston; Gordon Wade Cooper, of Buyck, Sanders & Simmons, LLC, of Mt. Pleasant; Deborah Harrison Sheffield, of Columbia; for Respondents.

PER CURIAM: Appellant Tipperary Sales d/b/a La-Z-Boy Furniture Gallery (Tipperary) sued the South Carolina Department of Health and Environmental Control (DHEC), the South Carolina Department of Transportation (DOT), the City of North Charleston (the City), and the Charleston Water System (CWS) (collectively Respondents) on various causes of action after a heavy rain resulted in flooding to its store. In separate orders, the circuit court (1) granted summary judgment on Tipperary's claims against DHEC and DOT¹ and (2) dismissed Tipperary's claims against the City and CWS on the pleadings. Tipperary appeals. We affirm in part, reverse in part, and remand.

In 2000, Tipperary began leasing retail space at a shopping center in North Charleston for its furniture store. Tipperary, at its own expense, installed fixtures and various interior upgrades to upfit the property for its business purposes.

¹ In the order granting summary judgment to DOT, the circuit court held (1) Tipperary's claims for damages arising out of any flooding events before April 8, 2008, were time-barred pursuant to section 15-78-110 of the South Carolina Code (2005); and (2) Tipperary failed to allege facts sufficient to state claims for relief in its causes of action against DOT for negligence, inverse condemnation, and trespass. Although Tipperary appeals only the holdings concerning the sufficiency of its allegations against DOT, we will treat this order as one granting summary judgment pursuant to DOT's motion. *See* Rule 56(b), SCRPC ("A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor . . .").

In 2003, during construction undertaken by DOT to improve the interchange at I-26, Ashley Phosphate Road, and the Highway 52 Connector in North Charleston, a heavy rainfall resulted in considerable flooding downstream, adversely affecting Tipperary's store. In July 2005, while the project was still in progress, another flood occurred, adversely affecting Tipperary's store. After a third storm in 2008, which resulted in loss of revenue and damage to Tipperary's store premises, inventory, and displays, Tipperary sought this action against Respondents and others, alleging, *inter alia*, causes of action for negligence and gross negligence, trespass, and inverse condemnation. After all Respondents filed individual responsive pleadings, DHEC and DOT each moved for summary judgment, and the City and CWS each moved for judgment on the pleadings pursuant to Rule 12(c), SCRPC. Following a hearing on Respondents' motions, the circuit court issued orders granting summary judgment to DHEC and DOT and dismissing the claims against the City and CWS.

1. Tipperary argues it should have been allowed to proceed on its negligence claims against DHEC because ample evidence was presented to support a jury finding that DHEC was grossly negligent in issuing permits. We disagree.

Contrary to Tipperary's assertion that DHEC permitted numerous developments while intentionally ignoring the historical and ongoing flooding concerns, a DHEC engineer testified that DHEC was unaware of the flooding problem around Tipperary's store when it approved the permits at issue in this case. The engineer further explained in his deposition that the storm water permit applications included, as required by the applicable regulations, a drainage analysis from a consulting engineer hired by the developer. Tipperary did not provide evidence that DHEC failed to follow the proper procedure in approving the permits at issue, and the only support Tipperary provided in its brief for its position that DHEC was aware of the flooding problem were references to its amended complaint. We therefore affirm the circuit court's finding that Tipperary's negligence claim failed as a matter of law. *See SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) ("Rule 56(e), SCRPC requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings."); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 297, 628 S.E.2d 496, 504 (Ct. App. 1996) (defining gross negligence as "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" and noting "[n]egligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care").

2. Tipperary also argues DHEC's issuance and approval of the development permits constituted an "affirmative, positive, aggressive act" sufficient to withstand a summary judgment motion on its inverse condemnation claim against DHEC. We disagree. *See Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 562 (Ct. App. 2004) (finding the allegedly improper approval of neighboring developments and subsequent failure to upgrade affected drainage pipes were "merely failures to act"); *id.* (stating "[a]llegations of mere failure to act are insufficient" to support a claim for inverse condemnation).

3. Tipperary challenges the grant of summary judgment on its negligence claim against DOT, arguing (1) the circuit court erred in finding the claim required an affirmative, positive, and aggressive act and (2) DOT's conduct in not only failing to correct the flooding problem but exacerbating it as well amounts to gross negligence.

We agree with Tipperary that the circuit court erred in discussing the requirement of an affirmative, positive, and aggressive act in dismissing Tipperary's negligence claim against DOT. *See Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016) ("To prove a cause of action for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages."); *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562 (recognizing "an affirmative, positive, aggressive act on the part of the governmental agency" is an element of an inverse condemnation claim).

Nevertheless, we hold Tipperary's arguments on appeal concerning DOT's handling of the flooding problem do not present any reversible error on the dismissal of Tipperary's negligence claim. In arguing that DOT's conduct amounted to gross negligence, Tipperary only noted that DOT installed and constructed the twin pipes beneath the parking lot of the shopping mall where its store is located and alleged that DOT "has done nothing" even though it knew for three decades that they were installed improperly. DOT's design and construction of the drainage system servicing Tipperary's property, however, are quasi-judicial, discretionary functions for which it is not liable under the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-60(1) (2005) ("The governmental entity is not liable for a loss resulting from . . . legislative, judicial, or quasi-judicial action or inaction[.]"); *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564 (following the rule that the design and planning of drainage systems "are considered quasi-judicial, discretionary functions for which a government entity is not liable" (citing

City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997))). Although Tipperary argued in its brief that DOT's conduct constituted gross negligence, it supported this position by referencing the allegation in its complaint that although DOT had been on notice about the flooding problems, it had done nothing to correct them and in fact exacerbated them. Tipperary, however, did not direct our attention to any evidence that would support these allegations or its position that DOT was grossly negligent; therefore, we conclude summary judgment to DOT on Tipperary's negligence claim was proper.

4. As to the dismissal of its trespass claim against DOT, Tipperary argues on appeal that it alleged sufficient affirmative and intentional acts by DOT to constitute an action for trespass, namely, that DOT was aware of the flooding problems and despite this knowledge, proceeded with a road project knowing that it would exacerbate the flooding. However, contrary to Tipperary's argument in its brief that it alleged in its complaint that DOT, "in spite of its knowledge of the existing flood issues, proceeded with a road project knowing that doing so would result in the exacerbation of the flooding," Tipperary alleged only that DOT "conducted no significant analysis of the effect the planned improvement would have on downstream flooding, which [DOT] knew or should have known was a recurring problem" and refused to accept responsibility even after Tipperary, based on information it received after the 2003 flood, determined this event resulted in large part from the DOT construction. Tipperary never alleged in its pleadings that DOT had prior knowledge that the roadwork would be likely to result in water damage to Tipperary's property. Therefore, we decline to disturb the circuit court's conclusion that Tipperary failed to set forth sufficient facts in its complaint to maintain a trespass claim against DOT. See *Snow v. City of Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) ("Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land."); *Restatement (Second) of Torts* § 158 cmt. i (1965) ("[I]t is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.").

5. However, we hold the circuit court erred in dismissing Tipperary's inverse condemnation claim against DOT. In concluding Tipperary's allegations against DOT amounted to only a mere failure to act, the circuit court referenced Tipperary's allegations about DOT's construction and installation of developments upstream from Tipperary's store as well as DOT's alleged failure to remedy drainage defects caused by the flooding on Tipperary's store premises. Citing

Hawkins, the court held that DOT's purported failure to act or to remedy the drainage defects did not constitute the type of affirmative, positive, aggressive acts by a governmental agency that would result in liability for inverse condemnation. The court, however, appeared to ignore Tipperary's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding Tipperary's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that DOT had installed; (3) in September 2002, DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by DOT's resident engineers indicated the project would add 13.7 acres of impermeable surface adjacent to the choke point in DOT's right-of-way, which in turn could result in flooding that would exceed the capacity that the existing drainage system could handle. We hold DOT's alleged conduct could constitute an affirmative, positive, and aggressive act that would support Tipperary's inverse condemnation claim. See *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, was "an affirmative, aggressive, positive act"), *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); *Kline v. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597, 599-600 (1967) (finding that improving and widening a public street is an affirmative, aggressive, and positive act).

6. We agree with Tipperary that the circuit court, in dismissing its negligence claim against the City, incorrectly based this ruling on the absence in Tipperary's complaint of any allegation of an affirmative, positive, and aggressive act. As we have previously noted, proof of such an act by a governmental entity is necessary to prevail on an inverse condemnation claim but not on a negligence cause of action. Nevertheless, we hold Tipperary failed to allege sufficient facts in its complaint that, if proved, would support a finding of gross negligence that would expose the City to liability under the South Carolina Tort Claims Act. Specifically, Tipperary alleged the City fell short of its responsibility to provide an adequate and appropriate drainage system in the vicinity of its store; however, Tipperary did not allege the City intentionally disregarded its duties or failed to exercise at least slight care in discharging them. See *Jinks v. Richland Cty.*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) ("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."); *id.* (stating gross negligence "is the failure to exercise slight care").

7. We decline to reverse the circuit court's dismissal on the pleadings of Tipperary's trespass claim against the City. In its brief, Tipperary argues only that its amended complaint alleged the City was aware of the flooding problem for three decades and in spite of its knowledge of the existing flooding issues, proceeded with road projects knowing that doing so would result in exacerbating and further contributing to flooding in the vicinity of Tipperary's store. Such allegations do not rise to the level of a trespass. *See Graham v. Town of Latta*, Op. No. 5398 (S.C. Ct. App. filed March 30, 2016) (Shearouse Adv. Sh. No. 13 at 91, 113) (rejecting the appellants' argument that the respondent's construction and operation of a municipal water system was sufficient evidence of trespass and noting there was no evidence the respondent intentionally released sewage on to the appellants' property).

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).

9. Tipperary further challenges the circuit court's dismissal on the pleadings of its negligence claim against CWS. We agree with Tipperary the dismissal was premature.

In dismissing this claim, the circuit court cited *Hawkins* for the proposition that a governmental entity has absolute immunity for design, construction, and maintenance decisions. See *Hawkins*, 325 S.C. at 294, 594 S.E.2d at 564 ("We find a comparable degree of discretion was granted to the City . . . to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville."). Based on this language, the circuit court found that pursuant to various enumerated exceptions to the waiver of immunity under the South Carolina Tort Claims Act,² CWS could not be liable for any alleged negligence arising from the design and maintenance of the drainage system. Tipperary's specifications of negligence against CWS, however, concern CWS's alleged failure to lower the water level of the reservoir to prevent upstream flooding during heavy rainfalls despite its ability to do so. In our view, the alleged acts or omissions on CWS's part are more appropriately classified as operational concerns rather than failures in design, construction, or maintenance. Therefore, we question whether they involve "legislative, judicial, or quasi-judicial action or inaction." S.C. Code Ann. § 15-78-60(1) (2005); see also *Proctor*, 368 S.C. at 306, 628 S.E.2d at 511 (stating governmental functions that are operational in nature are "not the type of discretionary act contemplated in the Tort Claims Act"); *id.* at 306-07, 628 S.E.2d at 511 ("The fact that the [governmental] employees had to make decisions or exercise some judgment in their activities is not determinative [of whether the action at issue is discretionary or operational]").

To the extent that the allegations of negligence against CWS involved discretionary acts, the circuit court acknowledged in its order that "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336

² The circuit court cited exceptions (1), (2), (4), (5), (7), and (13) of section 15-78-60 of the South Carolina Code (2005).

S.C. 373, 393, 520 S.E.2d 142, 152 (1999); *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564 ("The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense." (quoting *Sabb v. S.C. State Univ.*, 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002))). Unlike *Hawkins*, which involved the grant of summary judgment, Tipperary's claim against CWS was dismissed on the pleadings, and CWS did not present evidence to the circuit court that it used discretion in its decisions regarding the water level of the reservoir or exercised at least slight care. See *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992) ("[M]ere room for discretion on the part of the governmental entity was not sufficient to invoke the discretionary immunity provision. *Proof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice is necessary.*" (emphasis added)).

The circuit court also found that a number of allegations of negligence made by Tipperary against CWS did not amount to assertions of affirmative, positive, and aggressive acts and were therefore insufficient. As we have previously noted in this opinion, proof of an affirmative, positive, and aggressive act is not necessary to establish negligence or gross negligence.³

The circuit court further ruled CWS, pursuant to section 5-31-250 of the South Carolina Code (2004), had no control of any design, construction or maintenance of any drainage system and therefore could not be liable in negligence for any problems arising from these responsibilities. However, section 5-31-250 authorizes "[t]he board of commissioners of public works of *any* city or town" to "purchase, build or contract for building *any* waterworks" (emphasis added). Under section 5-31-250, entities such as CWS (1) are granted the right to operate such facilities and (2) "shall have full control and management of them." We therefore disagree with the circuit court's interpretation of section 5-31-250 and hold that this statute does not preclude CWS from being held accountable for the flooding of Tipperary's store premises. Moreover, we question CWS's position

³ We acknowledge that this court in *Hawkins* stated that "unless the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is no cause of action under [section 5-31-450]." *Hawkins*, 358 S.C. at 295-96, 594 S.E.2d at 565 (quoting *Taleff v. City of Greer*, 284 S.C. 510, 512, 327 S.E.2d 363, 364 (Ct. App. 1985)). The circuit court, however, did not discuss section 5-30-450 in this particular order.

that it could not be liable in negligence because it had no duty to open its spillway during heavy rains to prevent upstream flooding. *See Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (recognizing the City of Camden had, pursuant to its contract with a textile company that built a reservoir to aid production at its plant, "complete control of the dam and water level in the event of a weather emergency").

10. We hold the circuit court properly dismissed Tipperary's inverse condemnation claim against CWS because Tipperary failed to allege CWS committed an affirmative, positive, and aggressive act. Tipperary alleged in its complaint against CWS that CWS operated the drainage system and maintained the level of its reservoir in such a manner that the drainage system did not properly drain storm water. We agree with the circuit court that such an allegation amounts to only an assertion of a failure to act, which is insufficient as a matter of law to support an inverse condemnation claim. *See Hawkins*, 358 S.C. at 291, 594 S.E.2d at 563 (stating "[a]llegations of mere failure to act are insufficient" to support a claim for inverse condemnation).

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

Based on the foregoing, we reverse the dismissals of the inverse condemnation claims against DOT and the City and dismissals of the negligence and trespass

⁴ Tipperary made similar allegations in its trespass claims against DOT and the City; however, when addressing on appeal the dismissal of its trespass claims against these respondents, Tipperary did not reference these allegations.

claims against CWS. We affirm the dismissals of Tipperary's other causes of action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 15 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

R. Markley Dennis, Jr., Circuit Court Judge

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

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

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

Appellant,

v.

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

Defendants,

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

Respondents.

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

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

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

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

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

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

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

Negligence Cause of Action against Charleston Water System

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

Tipperary's specifications of negligence against CWS, however, concern CWS's alleged failure to lower the water level of the reservoir to prevent upstream flooding during heavy rainfalls despite its ability to do so. In our view, the alleged acts or omissions on CWS's part are more appropriately classified as operational concerns rather than failures in design, construction, or maintenance. In our view, the alleged acts or omissions on CWS's part are more appropriately classified as operational concerns rather than failures in design, construction, or maintenance. Therefore, we question whether they involve "legislative, judicial, or quasi-judicial action or inaction."

Unlike Hawkins, which involved the grant of summary judgment, Tipperary's claim against CWS was dismissed on the pleadings, and CWS did not present evidence to the circuit court that it used discretion in its decisions regarding the water level of the reservoir or exercised at least slight care. See *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992) ("[M]ere room for discretion on the part of the governmental entity was not sufficient to invoke the discretionary immunity provision. Proof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice is necessary." (Emphasis added)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In Hawkins, this court held the Tort Claims Act barred plaintiff's claims because the design and maintenance of a municipal stormwater system is a discretionary governmental function requiring a city to exercise measured policy judgments. *Id.* at 292-94, 594 S.E.2d at 563-64. Accordingly, the City of Greenville was "immune from liability for [the] negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." *Id.* at 294, 594 S.E.2d at 564.

Hawkins, however, did not address the questions of whether the municipality actually weighed competing considerations or utilized accepted professional standards in designing and maintaining its stormwater drainage system. Instead, Hawkins focused, in pertinent part, upon the degree of discretion granted to the City to "exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville." *To the extent measured policy*

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

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

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

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

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

Trespass Claim Against Charleston Water System

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

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

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

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

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

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

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

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

96. The drainage system under CWS' control, was designed, constructed, and has been maintained such that water does not drain from the watershed in and around Northwoods Mall and Northwoods Pointe Shopping Center, but instead remains approximately half filled at all times because the level of the Goose Creek Reservoir is generally higher than the level of the drainage system.

97. Further, upon information and belief, CWS can manipulate the level of the Goose Creek Reservoir to prevent flooding of upstream properties by lowering the level of the Reservoir to allow water collected in the drainage system in and around Northwoods Mall and Northwoods Pointe Shopping Center to drain properly into the Reservoir.

101. Upon information and belief, the level of the Goose Creek Reservoir is under the purview and control of the Charleston Water System and can be lowered when necessary to abate or prevent flooding upstream from the reservoir.

103. Though CWS had the ability to prevent upstream flooding during heavy rainfalls, it failed or refused to do so resulting in flooding in the Northwoods Mall/Northwoods Pointe Shopping Center area during the ... flood events

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

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

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

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

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

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

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

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

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

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

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

Inverse Condemnation Claim against SCDOT

The well-settled law, as recited in Hawkins v. City of Greenville, holds that:

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

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

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

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

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

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

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

pipes in its drainage right-of-way.

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

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

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

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

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

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

Inverse Condemnation Claim against City of North Charleston

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,



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

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

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

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SC Court of Appeals

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

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

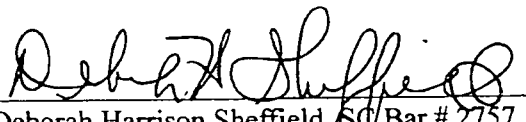
July 15, 2016

CERTIFICATE OF SERVICE

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

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

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


Deborah Harrison Sheffield, SC Bar # 2757

The South Carolina Court of Appeals

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

v.

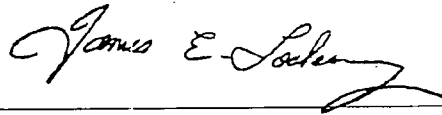
South Carolina Department of Transportation; South
Carolina Department of Health and Environmental
Control; City of North Charleston; Charleston Water
System; Associated Developers, Inc., Parkhill, LLC,
Defendants,

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

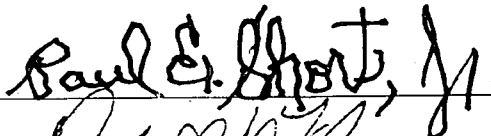
Appellate Case No. 2014-000582

ORDER

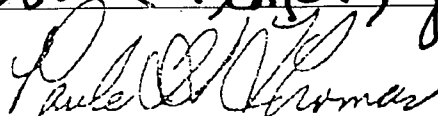
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

FILED

August 18, 2016 27

APPENDIX 000602

Columbia, South Carolina

cc:

Yancey Alford McLeod, III, Esquire

Roy Pearce Maybank, Esquire

Andrew Steven Halio, Esquire

Phillip S. Ferderigos, Esquire

Gordon Wade Cooper, Esquire

Michael S. Seekings, Esquire

Deborah Harrison Sheffield, Esquire

M. Dawes Cooke, Jr., Esquire

Amanda R. Maybank, Esquire

The Honorable R. Markley Dennis, Jr.

Law Office of Deborah Harrison Sheffield, P.A.

117 Brook Valley Road
Columbia, South Carolina 29223

(803) 419-7837
Fax: (803) 419-3519
DHSheffieldAtt@AOL.com

April 26, 2016

US Mail & Email

The Honorable Jenny Abbott Kilchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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APR 26 2016

SC Court of Appeals

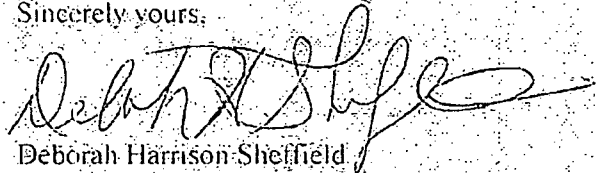
Attn: Claire Allen - callen@sccourts.org

RE: Tipperary Sales d/b/a La-Z-Boy Furniture Gallery v. SCDOT, et al.
Appellate Tracking No. 2014-000582
Oral Argument set: May 2, 2016 11:20am

Dear Madam Clerk:

This letter is sent on behalf of all the Respondents pursuant to Rule 208(b)(7), SCACR, to advise the Court of a new pertinent and significant authority that has been issued since the filing of the briefs. Namely, on March 30, 2016, this Court issued an opinion in Graham v. Town of Latta, Opinion No. 5398 (Petition for Rehearing pending). This opinion is relevant to Issue I regarding discretionary immunity under the S.C. Tort Claims Act (Respondents' Brief, pp. 16-20); and to Issues IV and V addressing the trespass and inverse condemnation claims (pp. 27-35).

Sincerely yours,



Deborah Harrison Sheffield

cc: Yancey Alford McLeod, III, Counsel for Plaintiff (US Mail & email)
G. Wade Cooper, Counsel for Charleston Water System (email)
Amanda Maybank, Counsel for SCDOT (email)
Andrew S. Halio, Counsel for SCDHEC (email)
Phillip S. Ferderigos, Counsel for City of N. Charleston (email)

**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 Appendix to
opposing counsel, with sufficient postage, correctly addressed as follows:

Michael S. Seekings, Esq.
Yancey A. McLeod III, Esq.
Leath Bouch Crawford & Von Keller
PO Box 59
Charleston, SC 29402

RECEIVED

SEP 22 2016

S.C. SUPREME COURT

Barnwell Whaley Patterson & Helms, LLC
By: _____

M. Dawes Cooke, Jr., SC # 1376
Phillip S. Ferderigos, SC # 16709
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700

**Counsel for Petitioner
City of North Charleston**