

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

OCT 27 2016

R. Markley Dennis, Jr., Circuit Court Judge S.C. SUPREME COURT

Case No. 2012-CP-10-06922  
Appellate Case No. 2016-001964

Court of Appeals 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 is .....Petitioner.

**RESPONDENT'S RETURN TO THE CITY OF NORTH CHARLESTON'S  
PETITION FOR WRIT OF CERTIORARI**

Michael S. Seekings, S.C. # 64850  
Yancey A. McLeod III, S.C. #80911  
Leath, Bouch & Seekings, LLP  
P.O. Box 59  
Charleston, SC 29402  
(843) 937-8811

*Counsel for Respondent Tipperary Sales  
d/b/a/ La-Z-Boy Furniture Gallery*

October 24, 2016

## QUESTIONS PRESENTED BY PETITIONER CITY OF NORTH CHARLESTON

- I. DID THE COURT OF APPEALS ERR BY HOLDING THAT THE CITY'S CONSTRUCTION OF GRADED STREETS CAUSING STORM WATER TO COLLECT IN FRONT OF TIPPERARY'S STORE, IN AND OF ITSELF, WAS AN "AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACT" REQUIRED TO SUPPORT AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY?
- II. DID THE COURT OF APPEALS ERR BY HOLDING THAT MERELY CONSTRUCTING GRADED STREETS, IN AND OF ITSELF, SATISFIES THE FIRST ELEMENT OF AN INVERSE CONDEMNATION ACTION AGAINST A GOVERNMENTAL ENTITY WHERE NO ALLEGATIONS ALLEGE THAT THE CITY "COLLECTED, CHANNELED, OR THRUST WATER IN A MANNER DIFFERENT FROM THE NATURAL FLOW?"
- III. DID THE COURT OF APPEALS ERR BY IGNORING ITS OWN PRECEDENT SET FORTH IN HAWKINS AND GRAHAM AND MISAPPLYING THE SUPREME COURT'S PRECEDENT FOR AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY?
- IV. DOES PUBLIC POLICY FAVOR THE CITY?

### STATEMENT OF THE CASE

This case arises from the now catastrophic flooding that occurs at the Northwoods Pointe Shopping Center in North Charleston, South Carolina. The Respondent Tipperary Sales d/b/a La-Z-Boy Furniture Gallery's store has been subject to flooding repeatedly over the years. After the various government entities performed upgrades, construction work and improvements to the immediate surrounding roads and interchanges adjacent to the property, the flooding was exacerbated. After the Respondent's property suffered a severe flood in October of 2008, it brought an 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 ("the City"), alleging causes of action for Negligence, Gross Negligence, Trespass and Inverse Condemnation.

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 the City filed motions to dismiss pursuant to the *Hawkins* decision and the Tort Claims Act.

A hearing on the various motions was held on January 7, 2014 and the circuit court, relying on the *Hawkins* decision, ruled from the bench and requested the Defendant government agencies to submit proposed orders. By way of separate orders, the circuit court granted summary judgment to SCDHEC and SCDOT, and granted CWS and the City's motions to dismiss. On March 17, 2014, the Respondent filed a Notice of Appeal with the South Carolina Court of Appeals. After briefing and oral arguments, the Court of Appeals issued an unpublished *per curiam* opinion, which Affirmed in Part, Reversed in Part, and Remanded the case for trial. Specifically, the Court of Appeals ruled as to each government agency as follows:

- **SCDHEC:** Affirmed the grant of Summary Judgment on all counts.
- **SCDOT:** Affirmed the grant of Summary Judgment on Negligence/Gross Negligence; Affirmed the grant of Summary Judgment on Trespass; Reversed the grant of Summary Judgment on Inverse Condemnation.
- **City of North Charleston:** Affirmed the dismissal of Negligence/Gross Negligence; Affirmed the dismissal as to Trespass; Reversed the dismissal as to Inverse Condemnation.
- **Charleston Water Systems (CWS):** Reversed the dismissal on Negligence/Gross Negligence; Affirmed the dismissal on Inverse Condemnation; Reversed the dismissal on Trespass.

The City of North Charleston is the only party who is appealing the Court of Appeals' ruling. Specifically, the City is requesting this Court to review whether the Respondent has adequately pled a cause of action for Inverse Condemnation under South Carolina law.

## ARGUMENT

The City's Appeal arises from a Motion to Dismiss based on the Pleadings. The issue before the Court of Appeals – and now this Court – is whether the Respondent adequately pled a cause of action for Inverse Condemnation against the City. The appeal presents no novel question of law. There was no dissent in the Court of Appeals' decision. The Court of Appeals' Decision does not conflict with any opinion of this Court. There is no substantial constitutional issue present. The Court of Appeals' decision does not conflict with any United States Supreme Court opinion. The Petitioner does not cite the standard of review for a Motion to Dismiss. Nor does the Petitioner cite the elements for an Inverse Condemnation cause of action. The instant Petition is merely an attempt to further delay the trial of this case and should be denied.

**I. THE COURT OF APPEALS CORRECTLY REVERSED THE CIRCUIT COURT'S GRANTING OF THE CITY'S MOTION TO DISMISS ON THE INVERSE CONDEMNATION CAUSE OF ACTION WHERE THE RESPONDENT PLEAD AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACTS.**

This is an appeal from a Motion to Dismiss. The issue before the Court of Appeals was whether the Respondent adequately pled a cause of action for inverse condemnation against the City. The Court of Appeals correctly found that that it did. Private property shall not be taken for public use without the payment of "just compensation." S.C. CONST. art. I, § 13. The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005). A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011). "To prevail in such an action, a plaintiff must prove 'an affirmative, aggressive, and positive act'

by the government entity that caused the alleged damage to the plaintiff's property." *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006) (citations omitted).

Here, the Amended Complaint alleges the City "[c]onstruced 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, and North Woods Boulevard." *See* Amended Complaint at pg. 15. The Respondent further alleges this construction and grading "results in storm water flowing and collecting directly to the front and rear of the La-Z-Boy store." *Id.* Finally, the Amended Complaint alleges that the Respondent's loss of property was "magnified and made worse by [the City'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." *Id.* at 16.

The Court of Appeals correctly found that these allegations were sufficiently pled. These allegations describe affirmative, positive, aggressive acts that, if proven, are sufficient to constitute a cause of action for Respondent's Inverse Condemnation cause action against the City. This is absolutely consistent with South Carolina law. *See, e.g., Cutchin v. S.C. Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 38, 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); *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 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).

This is not a novel question. The Respondent pled affirmative acts sufficient to survive a Motion to Dismiss on its Inverse Condemnation cause of action. The Petition should be denied. *See, e.g., Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) ("[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties.") (citing *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)).

**II. THE COURT OF APPEALS CORRECTLY HELD THAT CONSTRUCTING ROADS CONSTITUTES AN AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACTS WHICH IF PROVEN SATISFIES THE FIRST ELEMENT OF AN INVERSE CONDEMNATION ACTION AGAINST A GOVERNMENT ENTITY.**

The Petition for *Writ of Certiorari* should be denied. It is black letter law that the construction and/or repair of public roads that ultimately impairs or impedes an adjacent property of a private citizen can trigger the takings clause, both Federal and State. This is not a novel issue:

When an agency of the government, such as the Highway Department, requires a landowner's property for public use without having condemned the same in keeping with the statutes herein cited, the landowner is not left without relief. In a line of cases, commencing with *Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931), this Court has held that there is no real distinction between a taking of property and the damaging of property. Any action on the part of the State which takes or damages property for public use, deprives a landowner of its full use and is a taking as contemplated by the constitution. *If an independent contractor, in constructing a road or improving the same, trespasses beyond the right-of-way and causes damages to a landowner, relief to the landowner is available by way of a common law action for damages.* Such an action may be instituted against the contractor, or against the highway department, or against the two, depending on the facts. *This we refer to as inverse condemnation.*

*S.C. State Highway Dep't v. Moody*, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976) (emphasis added). The Petitioner has not cited any South Carolina case that stands for the proposition that the construction of roads does not, in and of itself, constitute a positive act from which the takings clause can be triggered. To the contrary, these are precisely the situations where inverse condemnation actions are often brought against government entities:

First. The law applicable to the question here involved is well settled in this jurisdiction. We do not deem it necessary, therefore, to restate it or to discuss it at length. See *Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842, 850, and the many authorities cited. The following from 10 R.C.L. p. 70, was there quoted with approval; it being pointed out that our own cases had been decided upon the principle stated: "*Covering Land with Water or Earth.*-There may be a taking of property in the constitutional sense although there has been no actual entry within its bounds and no artificial structure has been erected upon it. When a public agency acting under authority of statute uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate, belonging to a private owner, is actually invaded by superinduced additions of water, earth, sand or other material so as effectually to destroy or impair its usefulness, there is a taking within the meaning of the constitution.

*Baynham v. State Highway Dep't of S.C.*, 181 S.C. 435, 187 S.E. 528, 530–31 (1936). The question here is whether the Respondent has adequately pled a cause of action for inverse condemnation against the City. South Carolina is replete with case law that supports a case against the City under these circumstances. See e.g., *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989) ("From this evidence the jury could have easily concluded that the building up of Fifth Avenue satisfied the requirement of an overt or positive action by the Town necessary to prove a taking under a cause of action for inverse condemnation."); *Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 476, 556 S.E.2d 693, 696 (Ct. App. 2001) (improper installation of the pipes that damaged his road and caused a diminution in the value of his property); *Sease v. City of Spartanburg*, 242 S.C. 520, 524–25, 131 S.E.2d 683, 685

(1963) ("The protection of [the South Carolina takings clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."); *S.C. Dep't of Highways & Pub. Transp. v. Balcome*, 289 S.C. 243, 246, 345 S.E.2d 762, 764 (Ct. App. 1986) ("When a public agency uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate is destroyed or impaired in its usefulness, there is a taking within the meaning of the constitution."); *see also WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32–33, 630 S.E.2d 479, 481 (2006) ("Here, County undertook a permanent public project in capping the landfill. Whether this action resulted in a taking is not before us. We simply find on the single element of an affirmative, aggressive, positive act that County's action meets this requirement and summary judgment should not have been granted.").

The only question is whether the Amended Complaint adequately alleges a cause of action against the City. Whether Respondent can successfully prove its case is a decision for the trial court. *See Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("Accordingly, in an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request."). The Petition should be denied.

**III. THE COURT OF APPEALS CORRECTLY HELD THAT THE *HAWKINS* DECISION IS DISTINGUISHABLE AND THAT SUPREME COURT PRECEDENT FOR INVERSE CONDEMNATION WARRANTED REVERSING THE CIRCUIT COURT'S DISMISSAL AGAINST THE CITY.**

The instant appeal is from a Motion to Dismiss. The Circuit Court improperly equated *Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 562–63 (Ct. App. 2004) to the

instant case and granted the City's Motion to Dismiss from the bench. The Court of Appeals correctly re-instated this cause of action.

The Court of Appeals correctly found that Hawkins did not control the instant case. *Hawkins* concerned a Summary Judgment Motion where the court was faced not only with pleadings, but factual testimony. *See id.* at 291, 594 S.E.2d at 563. In the instant case, the Circuit Court relied solely on the pleadings when dismissing the inverse condemnation against the City. In any event, unlike *Hawkins*, the Respondent in the instant case has pled affirmative acts by the City. That was not the case in *Hawkins*

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.

*Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 562–63 (Ct. App. 2004). Here, the Respondent has not simply alleged that City failed to act as in *Hawkins*. On the contrary, the Amended Complaint alleges the City "[c]onstruced 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, and North Woods Boulevard." *See* Amended Complaint at pg. 15. The Amended Complaint continues to allege these affirmative acts on behalf of the City "results in storm water flowing and collecting directly to the front and rear of the La-Z-Boy store." *Id.* Finally, the Amended Complaint alleges that the Respondent's loss of property was "magnified

and made worse by [the City'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." *Id.* at 16.

The Court of Appeals correctly found that Hawkins did not apply: "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 . . . Unlike the situation in Hawkins, then, the City's conduct about which Tipperary complains amounted to an affirmative, positive, act that could support a claim for inverse condemnation." *Id.* This was the correct finding.

Nor is this a novel issue of law. Government agencies cannot simply build and construct roads that ultimately lead to flooding of adjacent private property. At least, not without paying just compensation for the taking. *See, e.g.*, S.C. CONST. art. I, § 13; *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32–33, 630 S.E.2d 479, 481 (2006); *S.C. Dep't of Highways & Pub. Transp. v. Balcome*, 289 S.C. 243, 246, 345 S.E.2d 762, 764 (Ct. App. 1986); *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (Ct. App. 1989); *S.C. State Highway Dep't v. Moody*, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976); *Baynham v. State Highway Dep't of S.C.*, 181 S.C. 435, 187 S.E. 528, 530–31 (1936).

#### **IV. PUBLIC POLICY DOES NOT SUPPORT CHANGING THE PLEADING REQUIREMENTS FOR INVERSE CONDEMNATION AGAINST A GOVERNMENT ENTITY.**

Public Policy does not support changing the Pleading requirements for inverse condemnations actions against Government entities. The Constitutions of the United States and this State both prohibit the Government from taking property for public use without just compensation. *See* U.S. CONST. amend. V.; S.C. CONST. art. I, § 13. The long line of cases in

this state should not be over-ruled as the Petitioner's appeal seems to suggest. The law is and has always been clear. *See, e.g., Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005) ("The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use."). In this case, the Respondent sufficiently pled a cause of action of inverse condemnation against the City, and the Court of Appeals correctly held that it did.

In *Berry's On Main, Inc.*, 277 S.C. 14, 281 S.E.2d 796, (1981), the court found that the municipality's 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 damage (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.

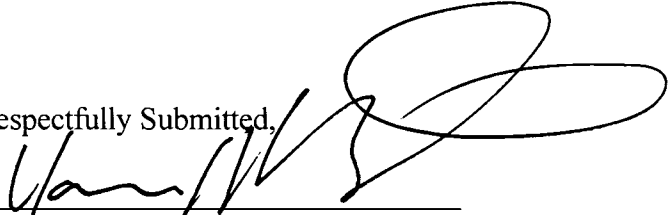
249 S.C. at 536, 155 S.E.2d 597. (*citing Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931)). The allegations in the Amended Complaint contain allegations of sufficient affirmative, positive, and aggressive acts sufficient to state a cause of action against the City. The trial court erred in applying the *Hawkins* decision. Dismissing Appellant's cause of action for inverse condemnation on the pleadings was improper. There is no reason to change the law. The Petition should be denied.

### CONCLUSION

This is an appeal from a Motion to Dismiss. The Circuit Court, from the bench,

dismissed or granted Summary Judgment against every cause of action against each government entity based solely on the *Hawkins* decision. The Court of Appeals correctly reversed several of the Circuit Court's Rulings. The City of North Charleston now requests this court to review the Court of Appeals' reversal concerning the inverse condemnation claim against the City. The Petition should be denied. The Pleadings set forth in the Amended Complaint speak for themselves. The Respondent pled the required affirmative, positive and aggressive acts against the City, and the Petition should be denied. The trial of this case should not be delayed further.

Respectfully Submitted,



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

Charleston, South Carolina  
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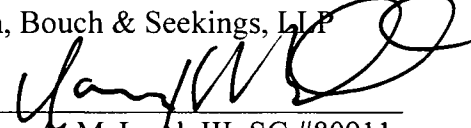
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**PROOF OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of October, 2016, I mailed a copy of the foregoing  
Return to Petition for Writ of Certiorari to Counsel of Record, with sufficient postage, correctly  
addressed as follows:

**M. Dawes Cooke, Jr. SC Bar # 1376**  
**Phillip S. Ferderigos, SC Bar #16709**  
**Barnwell Whaley Patterson & Helms, LLC**  
**P.O. Drawer H**  
**Charleston SC 29402**  
**(842) 577-7700**  
*Counsel for Petitioner*

Leath, Bouch & Seekings, LLP  
By:   
Yancey A. McLeod, III, SC #80911  
P.O. Box 59  
Charleston, SC 29402

(843) 937-8811

*Counsel for Respondent*