

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DILLON COUNTY
Alison Renee Lee, Circuit Court Judge

Opinion No. 5398
(S.C. Ct. App. filed March 30, 2016)

RECEIVED
NOV 10 2016
S.C. SUPREME COURT

Claude W. Graham, Respondent,

v.

Town of Latta, South Carolina, Petitioner.

Vickie B. Graham, Respondent,

v.

Town of Latta, South Carolina, Petitioner.

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Petitioner Town of Latta

TABLE OF CONTENTS

Arguments	2
I. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity.	2
II. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict and specifically by allowing the Grahams to rely on the doctrine of <i>res ipsa loquitur</i> to "prove" that the sewer line running across their property was leaking or compromised in some fashion.	7
III. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict and new trial with respect to Vickie Graham's claim for damages to the real property.	11
Conclusion	15

ARGUMENTS

I. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity.

The Petitioner Town of Latta contends that the Court of Appeals erred in affirming the denial of the Town's directed verdict and JNOV motions on the basis of discretionary immunity. In reply, the Respondents Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") offer several arguments, each of which lack merit.

First, the Grahams argue that there is no evidence that the Town "considered" the various options including the options for relocation, replacement and repair that were considered by the Town engineer, as well as the fourth option which was to take no remedial action. The Grahams' argument is incorrect based on the record. Moreover, it is immaterial given Judge Lee's findings, which were not appealed by the Grahams. In her Order filed March 8, 2013, Judge Lee wrote:

Defendant claims that the testimony of Mike Hanna established that Defendant considered and weighed competing alternatives, and then used accepted professional standards in deciding that there was nothing needed to be done regarding the portion of its sanitary sewer and drainage system at issue. Testimony was given at trial that Defendant was presented with several choices to remedy the drainage problem: move the pipe on Plaintiffs' residence, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing.

Testimony was also presented that Defendant conducted smoke tests to determine whether there was a defect, and attempted to snake a camera through the line, then made a decision not to repair the pipe.

(R. 12). Judge Lee found that the Defendant (i.e., the Town) was presented with the various choices and made the decision to take no action. The Grahams did not seek to reconsider that finding, nor did they appeal that finding.¹ *See, Arcadian Shores Single Family Homeowners Association, Inc. v. Cromer*, 373 S.C. 292, 644 S.E.2d 778, 781 (Ct. App. 2007) (recognizing an unappealed finding of the court, right or wrong, is the law of the case and should not be reconsidered on appeal). Thus, the Grahams cannot disregard nor attempt to overturn that finding at this stage of the case. In short, Judge Lee found that the elements of discretionary immunity were shown. However, as discussed in detail in the Town's petition, Judge Lee subsequently erred in finding that discretionary immunity presented a jury question because she confused the breach of duty issue with the immunity issue.

It is also important to point out that the Grahams have entirely disregarded the Town's discussion that the Court of Appeals erred in focusing on issues of infiltration and not those of exfiltration. The Court of Appeals concluded that "[t]he evidence in this case yields the reasonable inference that the Town failed to

¹ The Grahams only appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

utilize accepted professional standards in addressing infiltration and inflow problems identified with respect to its sewer line." (App. 15). However, as the Town has explained, infiltration was not the issue and was not identified as the problem with the line near the Grahams' property following the significant rain event on those dates. The problem that the Grahams raised was exfiltration, i.e., the seepage of sewage from the line alleged to be under their residence. In a footnote, the Court of Appeals had recognized the difference between the concepts. (App. 4). Therefore, discretionary immunity should not have been denied for the absence of evidence addressing any infiltration problem.

The Grahams also take the position that the Town is not entitled to discretionary immunity because the Town's duty was merely a ministerial duty and no discretion or judgment was needed. The Grahams cite to the case of *Jensen v. Anderson County Department of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991), wherein this Court explained that a "duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." 403 S.E.2d at 619, *citing Long v. Seabrook*, 260 S.C. 562, 197 S.E.2d 659 (1979). Within the context of a child abuse investigation, the Supreme Court concluded that the duty to conduct an investigation was ministerial given a mandate by statute; however, "[t]he manner in which the investigation is

conducted is one of discretion" and "the decision to classify a report of abuse as 'unfounded' and close the file is a discretionary act." 403 S.E.2d at 620.

In their return, the Grahams write: "Latta had a duty to conduct a thorough investigation and utilize accepted professional standards before deciding what to do." *See*, Grahams' Return, p. 8. Assuming that to be true (although no statute is cited mandating the duty to investigate), the investigation may be ministerial, but the "deciding what to do" is clearly not. As in *Jensen*, where the decision to close the investigation after concluding the report of abuse was unfounded was discretionary, here the Town's ultimate decision that the sewer line was not leaking based on the smoke testing and that no remedial action was needed is an exercise of discretion and *not* a ministerial act. Clearly, given this Court's guidance in *Jensen*, there is no question that the Town's conduct was discretionary and thus supported a finding of discretionary immunity.

Finally, the Grahams argue that "the performance of discretionary duties does not give rise to immunity if the governmental entity acted in a grossly negligent manner." *See*, Grahams' Return, p. 8. There are several flaws with that argument. First, Judge Lee never charged the jury that discretionary immunity was subject to a gross negligence exception. (R. 696). The jury was never charged even with the concept of "gross negligence." Second, there was no reason for the jury to be charged that discretionary immunity was subject to a gross negligence

exception, because it is not. Section 15-78-60(5) does not include a gross negligence exception, and the Town never pled an immunity defense under Section 15-78-60 containing a gross negligence exception.² In short, this new argument offered by the Grahams lacks merit. The Town's defense of discretionary immunity is not subject to a gross negligence exception, and the jury's verdict cannot be construed as finding gross negligence when the jury was never even charged with that concept.

In sum, based on Judge Lee's own findings (which the Grahams have not appealed), the discretionary immunity test was met as a matter of law. The Court is requested to grant a writ of certiorari in order to properly consider the Town's discretionary immunity defense and to conclude that the Town is entitled to discretionary immunity for its decision not to perform any remedial work to the sewer line across the Grahams' property.

² This Court has held that "[w]hen 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." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 904 (2010). In *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), this Court explained that a governmental defendant may select which immunity provisions to plead, and if no gross negligence exception is included, then there is no basis for limiting the immunity to acts of simple negligence. The *Steinke* Court further explained that "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." 520 S.E.2d at 154. Later, in *Jones*, this Court found that Section 15-78-60(21) was not subject to a gross negligence exception "because [defendant] did not plead a section containing a gross negligence standard." *Jones*, 692 S.E.2d at 905. The same is true in the present case. The Town asserted discretionary immunity under Section 15-78-60(5) and never pled nor relied on any other immunity provision within Section 15-78-60 containing a gross negligence exception.

II. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict and specifically by allowing the Grahams to rely on the doctrine of *res ipsa loquitur* to "prove" that the sewer line running across their property was leaking or compromised in some fashion.

The Town of Latta contends that the Grahams relied on the doctrine of *res ipsa loquitur* as a substitute for proof of any actual defect in the sewer line. The Grahams never presented any evidence establishing that the sewer line on their property is cracked or otherwise compromised such that sewage has been discharged from the pipe they allege to be beneath the house. The Grahams, in fact, made no effort to present any such evidence. The Court of Appeals likewise was unable to point to any specific evidence in the record that states that the pipe alleged to be beneath the Grahams' house was cracked or otherwise compromised.

In response, the Grahams claim that they never directly stated that they were relying on the doctrine of *res ipsa loquitur* and that they never sought a jury charge based on the doctrine. Well, of course not. The doctrine is rejected in South Carolina. No plaintiff in his right mind would admit he was relying on a doctrine that is clearly contrary to accepted law. Nor would a plaintiff ask that a rejected doctrine be charged. That does not mean that the doctrine is still not the basis of the Grahams' proof.

As the Town has demonstrated, *the Grahams have presented absolutely no evidence that the sewer line on their property was cracked, broken, compromised*

or leaking. Claude Graham testified that the sewer line is under the crawl space to his knowledge, but he also conceded that he has taken no steps to determine whether the pipe was leaking. (R. 148-149). The Grahams' engineering expert, Roger Davis, admitted that he has never seen the sewer line underneath the house. (R. 340-341). He opined that it was under the house only because Claude Graham told him that it was there. (R. 341). Davis likewise never performed any testing on the sewer line to determine whether it was cracked or leaking. He agreed that one could determine the condition of the pipe by using a camera or by performing a smoke test, among other options. (R. 355-356). But Davis did no such testing. (R. 356).³ He further conceded that he never observed any leaks nor any sewage in the crawl space. (R. 372). Davis contends that he reviewed DHEC records, but those records showed only that the Town was experiencing infiltration – not exfiltration -- in their lines as a general issue in its system and not that there was any such issue in the line specifically at the Grahams' property. (R. 373-374). Davis, in fact, conceded that he had not located any specific point of infiltration in the system as a whole, which is inclusive of the pipe running across the Grahams' property. (Tr. 375-376). Davis could not and did not opine to a reasonable degree

³ The only testing incidentally was the smoke testing performed by the Town, but that testing did not reveal any leaks in the line running across the Grahams' property. (R. 533-534).

of engineering certainty that most probably the line underneath the Grahams' home was cracked, compromised or leaking.

Nonetheless, in their return, the Grahams claim that Roger Davis testified that the "sewer line was compromised by age" and "open joints or cracked joints or cracked pipe or things like that." *See*, Grahams' Return, p. 10. The Court is urged to read that excerpt of testimony very closely. The Grahams suggest that Davis is addressing the line beneath their property. That is not the case. Instead, Davis was providing a general explanation of the concept of "infiltration" and was *not describing a specific condition of the pipe beneath the Grahams' property*. The following is Davis' complete response:

Infiltration and inflow are typically what happens to a sewer line as it ages over time. It will no longer be watertight. Particularly at things like joint. You get extraneous water coming in.

Infiltration is leaks at those joints and sewer lines that occur as a result of ground water rising up above the level of the sewer so that you've got ground water around the sewer line and it runs into the sewer line through those *open joints or cracked joints or cracked pipe or things like that*. So infiltration is ground water, and ground water rises and lowers with the seasons. So somewhat variable.

Inflow, however, is typically surface water or storm water that enters into the sewer line through things like a down spouts that somebody has illegally connected to the sanitary sewer through open holes in the pipe where surface water can run into it. Things of that type. So that's inflow. And, typically, inflow is very obvious if

you look at the -- if you look at flow records at the Waste Water Treatment Plant that you will see on days when you've got a lot of rainfall. You will see a big spike in the flow.

Changes in flow due to infiltration are a little more gradual. So that's how we determine whether a system is subject to excessive infiltration and inflow.

(R. 343-344). (Emphasis added). The highlighted phrase is what the Grahams cite in their return as testimony by Roger Davis that the pipe at the Grahams' house was cracked and compromised. Clearly, Davis was not describing the pipe at the Grahams' property, and indeed, he could not have been because he never inspected the pipe at the Grahams' property.

In sum, as the Town has explained, this case represents a classic application of the doctrine of *res ipsa loquitur*. The Grahams failed to prove an issue with the sewer line underneath or near their house – that it was cracked or otherwise compromised -- and likewise failed to show that the Town was negligent in failing to take any remedial action to repair the line. Thus, the Town is entitled to judgment as a matter of law.

III. The Court of Appeals erred in affirming the denial of the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Vickie Graham's claim for damages to the real property.

The Town of Latta further contends on appeal that Judge Lee and the Court of Appeals erred in allowing the Grahams to present the expert testimony of John Benton, who offered his opinion as to the cost of rebuilding the exact house at a different location. More specifically, the lower courts erred in allowing the jury to consider the replacement cost of the house as evidence of damages when there was no expert testimony that the Grahams' residence was totally and permanently damaged and/or needed to be razed. In essence, the jury was allowed to consider evidence of the wrong measure of damages for either temporary or permanent injury to real property.

In response, the Grahams insist that there is "ample evidence" from which the jury could have concluded that the Grahams' residence was totally and permanently damaged and/or needed to be razed. Despite promising "ample evidence," the Grahams remarkably cite to the testimony of the Grahams' physician, Dr. David Culpeper, who advised the Grahams to seek other living arrangements until the issue with the sewage was corrected. (R. 296). Dr. Culpeper, however, was never identified nor presented as a construction expert. He never offered the opinion, nor could he, that the residence was totally and

permanently damaged and/or needed to be razed. The Grahams further cite to their own testimony regarding the clean-up efforts after the September 5-6, 2008 flooding event. That is the extent of the "ample evidence" cited.

The Grahams also argue that the jury should have been allowed to consider evidence of the replacement value of the house. However, the jury was never charged that replacement value – which was John Benton's estimate – was an appropriate measure of damages, which it was not. In actuality, Judge Lee properly charged the jury that "[w]here real estate has been damaged, the measure of damages is the difference between the value of the entire premises before and after the injury." (R. 699). She further charged as follows: "If repairing the building would put it in as good a condition as before the damage, then the measure of damages would be the cost of the repair plus any amount by which the building has been decreased due to the damages." (R. 699).

Nonetheless, the jury was erroneously allowed to consider the monetary figure of \$478,280 as the cost to *rebuild* the exact same house at a different location. That figure represents neither the diminution of fair market value before and after the injury nor the cost of *repair*. John Benton offered no opinions regarding the repair of the existing house, the scope of any such repair, or the costs of such repairs. Instead, at best, his estimate is the replacement value, which is not

the appropriate measure of damages under Judge Lee's charge or applicable case law.

The Grahams essentially concede that point. In doing so, they focus instead on the argument that Benton's testimony, which injected a damages figure of \$478,280.00 into the case, was mere harmless error.⁴ The Grahams suggest that the jury's award of \$225,000.00 in favor of Vickie Graham may be upheld on the bodily injury portion of the case alone. The Grahams insist that evidence of Mrs. Graham's medical bills, pain and suffering, emotional distress and loss of enjoyment of life support the jury's verdict. The Grahams' position is fatally flawed for several reasons. First, it is entirely speculative to suggest that the jury did not consider the \$478,280.00 damages figure testified to by John Benton. Second, Vickie Graham's medical bills totaled at most \$676.00. (R. 743).⁵ Dr. Culpeper testified that he had not seen Vickie Graham since 2009, except for an unrelated matter. (R. 300).⁶ Vickie Graham herself offered only brief testimony of health issues. (R. 265-267). She mentioned having to be hospitalized for

⁴ The Grahams do not use the term "harmless error," but that is the gist of their argument.

⁵ Plaintiffs' Exhibit 13, which was Vickie Graham's medical bill submitted into evidence, shows several office visits to Palmetto Internal Medicine of Florence crossed through. The visits that were not crossed through and thus appear related total \$234.00. The entire bill including the crossed through entries totals \$676.00 (R. 743).

⁶ The last office visit that was not crossed through on Plaintiffs' Exhibit 13 was dated January 19, 2009. (R. 743).

pneumonia but agreed in response to her own counsel's leading question that the pneumonia was unrelated. (R. 271). Third, the Grahams cannot rely on loss of enjoyment of life as an element of damages *given that Judge Lee never charged that element to the jury*. (R. 697-698).

The Grahams' "harmless error" argument is not supported by the case law they cite. In particular, the case of *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984), does not support their position. The Grahams cite *Hutson* for the proposition that "[t]he fact that damages occurred in one of several ways does not defeat a verdict if the evidence tends to support the reasonable probability of the theory of damages relied upon." *See*, Grahams' Return, p. 12. The Grahams rely on some creative editing of what the *Hutson* Court actually held. *Hutson* actually provides: "In determining whether there was sufficient evidence on which the jury could base its verdict, we are mindful that the fact that damages occurred in one of several ways does not defeat a claim if the evidence tends to support the reasonable probability of the theory relied on." *Hutson*, 314 S.E.2d at 23. This is a statement of law regarding multiple theories of *liability* and not multiple theories of *damages* as the Grahams' creative editing suggests. Further reading of *Hutson* makes that clear. Thus, the Grahams have offered no citation to a case where the Court of Appeals or this Court found that an unsupported damages claim of a substantial amount (in this case \$478,280.00) was

harmless error and allowed a verdict to stand. The reason: no such case exists. However, in the absence of a case on point, it is not appropriate to re-write a case holding by adding words to alter the court's meaning. That should be soundly rejected, and this Court is urged to grant a writ of certiorari to addresses these important issues.

CONCLUSION

Based on the foregoing discussion, the Petitioner Town of Latta respectfully renews its request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:



ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Petitioner Town of Latta

Columbia, South Carolina

November 7, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DILLON COUNTY
Alison Renee Lee, Circuit Court Judge

RECEIVED

NOV 10 2016

Opinion No. 5398
(S.C. Ct. App. filed March 30, 2016)

S.C. SUPREME COURT

Claude W. Graham, Respondent,

v.

Town of Latta, South Carolina, Petitioner.

Vickie B. Graham, Respondent,

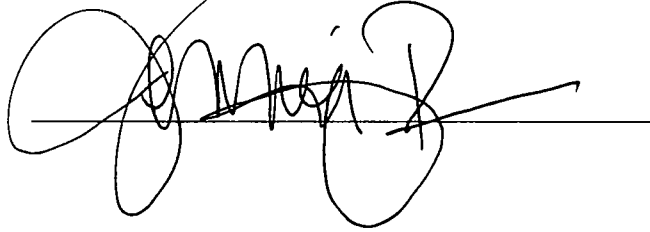
v.

Town of Latta, South Carolina, Petitioner.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioner Town of Latta, does hereby certify that service of the **Reply in Support of Petition for Writ of Certiorari** was made upon opposing counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 7th day of November 2016:

Reynolds Williams, Esquire
Willcox, Buyck & Williams
Post Office Box 1909
Florence, South Carolina 29503-1909

A handwritten signature in black ink, appearing to read "Reynolds Williams", is written over a horizontal line. The signature is highly stylized and cursive.