

**IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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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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**RECEIVED**  
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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..... Petitioner.

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**PETITIONER'S REPLY TO RETURN**

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November 18, 2016

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**STATEMENT OF ISSUES ON APPEAL**

I. BOTH PETITIONER AND RESPONDENT AGREE THAT THE LIMITED ISSUE ON APPEAL IS WHETHER OR NOT A FACTUAL ALLEGATION THAT THE CITY CONSTRUCTED GRADED STREETS WHICH CAUSED STORM WATER TO COLLECT IN FRONT OF TIPPERARY’S STORE, IN AND OF ITSELF, IS AN “AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACT” WHICH SUFFICIENTLY PLEADS THE FIRST ELEMENT OF AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY, WHERE NO FACTUAL ALLEGATIONS ALLEGE THAT THE CITY “COLLECTED, CHANNELLED, OR THRUST WATER IN A MANNER DIFFERENT FROM THE NATURAL FLOW” TOWARDS TIPPERARY’S STORE.....1

II. SOUTH CAROLINA IS A CODE PLEADING STATE.....8

III. PUBLIC POLICY STILL FAVORS THE CITY. ....10

**I. BOTH PETITIONER AND RESPONDENT AGREE THAT THE LIMITED ISSUE ON APPEAL IS WHETHER OR NOT A FACTUAL ALLEGATION THAT THE CITY CONSTRUCTED GRADED STREETS WHICH CAUSED STORM WATER TO COLLECT IN FRONT OF TIPPERARY'S STORE, IN AND OF ITSELF, IS AN "AFFIRMATIVE, POSITIVE, AND AGGRESSIVE ACT" WHICH SUFFICIENTLY PLEADS THE FIRST ELEMENT OF AN INVERSE CONDEMNATION CAUSE OF ACTION AGAINST THE CITY, WHERE NO FACTUAL ALLEGATIONS ALLEGE THAT THE CITY "COLLECTED, CHANNELLED, OR THRUST WATER IN A MANNER DIFFERENT FROM THE NATURAL FLOW" TOWARDS TIPPERARY'S STORE.**

Initially, Tipperary does not object to the "Questions Presented" by the City; rather, Tipperary appears to ignore the City's key argument. The central issue is whether or not the first element of inverse condemnation of "an affirmative, positive and aggressive act" is properly pled by a mere factual allegation that the City constructed graded streets "result[ing] in storm water flowing and collecting directly in front and rear" of Tipperary's store, in and of itself, where no factual allegation alleges that the City "collected, channeled, or thrust water in a manner different from the natural flow" is asserted in Tipperary's Amended Complaint. Significantly, Tipperary's Amended Complaint fails to factually allege that the City "collected, channeled, or thrust water in a manner different from the natural flow"; to the contrary, Tipperary's Amended Complaint factually alleges the opposite.

The Court of Appeals failed to properly consider Tipperary's specific factual allegations, most significantly, including Tipperary's emphatic allegations as to the cause of the increased flooding:

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

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

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

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

Surprisingly, Tipperary's Return generically argues that the law is clear and, for the first element of inverse condemnation, the law has always been that a taking exists if an "affirmative, aggressive and positive act" by the City occurred. The City does not disagree with such proposition; however, Tipperary compares "apples to oranges" and ignores the key issue in this Petition. The cases cited by Tipperary, when read closely, require a "collecting, channeling or thrusting of water in a manner different from the natural flow" to properly assert the first element of inverse condemnation.<sup>1</sup> However, Tipperary's Amended Complaint factually alleges the opposite. It is not that the City seeks to change the law, or ignore the law, or alter the pleading requirements as

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<sup>1</sup> From the 1936 Chicks Springs decision to the more recent 2006 WRB Ltd. decision, and the cases cited in Tipperary's Return, these South Carolina cases expressly or implicitly involve the scenario where waters are collected, channeled or thrust water in a manner different from the natural flow. This case is completely different than the facts applicable to these prior South Carolina cases. This case involves the key factual allegations for the subject property which was/is (1) located at the bottom of a geographic bowl (i.e., as factually alleged, the "low point of the entire watershed" and "the lowest point in the area" which "tend[s] to flood") and (2) suffers an increase of storm water allegedly caused by other Co-Defendants. As such, it is not that Tipperary alleged facts to support an inverse condemnation claim; to the contrary, Tipperary's alleged facts negate the first element of an inverse condemnation cause of action against the City. It is this failure to sufficiently allege an element of the cause of action that entitles the City to the dismissal in this case.

Tipperary asserts; rather, the City seeks to hold Tipperary to the exact same standard that all moving plaintiffs must adhere to ... a standard that requires the moving party to plead sufficient facts to set forth a claim for relief.<sup>2</sup> Here, as Tipperary's Amended Complaint's factual allegations negate the first element of an inverse condemnation claim, Tipperary has failed to sufficiently plead facts to assert a claim for relief against the City and, accordingly, the dismissal entered by the circuit court was and still is appropriate.

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

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<sup>2</sup> Indeed, it is Tipperary which seeks to negate the basic pleading requirements required under South Carolina law. See Section II of this Reply.

towards a store, in and of itself, does not satisfy the requirement of factually alleging an inverse condemnation cause of action against a governmental entity. This is especially the case in this present matter where Tipperary alleges the causes of the flooding are (1) the alleged inadequacy of a “choke point” created by inadequate 84” SCDOT drainage pipes, (2) the construction of a highway by SCDOT, and (3) the high reservoir waters of the Goose Creek Reservoir controlled by CWS.<sup>3</sup>

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

... [M]unicipalities are not liable for injury to property “occasioned by the original grading of streets” ... [T]he rights and liabilities of a municipality as to surface water are identical to those of private landowners, and that because surface water is a ‘common enemy’ the municipality may defend itself against it - even to the consequent injury of others.” ...[A] municipality can be liable if “in the course of an authorized construction, it collects surface water by an artificial channel or in large quantities and pours it, in a body, upon the land of a private person, to his injury.”... [W]hile municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in

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<sup>3</sup> Importantly, Tipperary’s Amended Complaint allegations do not allege that the City collected, channeled or thrust water in a manner different than the natural flow; to the contrary, pursuant to the Amended Complaint paragraphs cited above, Tipperary alleged that its store was the lowest point in the area and situated at the low point of the entire watershed, which water would naturally flow towards.

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

Through numerous decisions, our Supreme Court has adopted the common law referenced above. For example, from Taylor v. Lexington Water Power Co., 165 S.C. 120 (S.C. 1932) (where the Supreme Court found an affirmative, positive, and aggressive act where the authority accumulated water behind an unfinished dam and then released it in large and unusual quantities, altering thereby the flow of the stream “in its natural condition” until there had been a “tremendous and dangerous accumulation of water”) to Hoffman v. Greenville County, 242 S.C. 34 (1963) (dealing with constructed ditches and drains that “changed the normal course of drainage” and “increased [the] volume of surface water” which caused impounding of water and the casting/dumping of the increased volume of water on an owner’s realty and where the Supreme Court held “[t]he burden of proof was upon the respondents to show that the appellant so constructed the ditches and drains in a manner as to cause the impounding of water and the casting of

same upon their property....”) to Brown v. School Dist. Of Greenville County, 251 S.C. 220 (S.C. 1968) (where surface waters were wrongfully concentrated onto the landowner’s land where the natural flow of rain water was directed in concentrated form into and across the drive and onto the landowners’ property with great force and volume), the basic inverse condemnation common law cited in DiBlasi, supra, is incorporated into South Carolina law.

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

As discussed above, the Court of Appeals has simply misapprehended or overlooked that the affirmative act requisite for imposing liability in flooding cases such as this present case is a collecting and casting of surface water in a manner inconsistent with the natural flow.<sup>4</sup> “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.” If a governmental entity might be liable in inverse condemnation for flooding caused by

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<sup>4</sup> Plainly stated, the Hawkins, Graham and the Unpublished Opinion in this case are inconsistent with South Carolina jurisprudence in this area of the law. Petitioner, a governmental entity, seeks clarity of the law by the Supreme Court on this issue.

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

Importantly, the City's act of previously constructing graded streets is not alleged to have altered the natural flow of the surface waters. The core allegation of Tipperary's Amended Complaint is that the SCDOT original culvert and pipes were not large enough to handle the storm water, and the SCDOT improvement project increased the runoff that the storm water system could not handle. Of course, such factual allegations do not apply to the City. The allegations that DOT constructed a box culvert and drainage pipes at some point prior to 1980 and undertook a construction project in 2002, with knowledge of a history of flooding problems and the possible impact of the new construction on the drainage system, do not amount to the type of affirmative, aggressive, and positive act that will support an inverse condemnation claim against the City.

In this case, Tipperary's allegations against the City do not amount to impounding surface water and casting it onto Tipperary's property contrary to the “natural flow” of

surface waters or a “collecting, channeling, or thrusting” of surface waters in a manner different from the “natural flow.” Accordingly, the City requests this Honorable Court grant its petition to review and reverse the Court of Appeals on this important, albeit limited issue potentially impacting all governmental entities/municipalities which are responsible for the construction, maintenance and operation of roadways in South Carolina.

## **II. SOUTH CAROLINA IS A CODE PLEADING STATE.**

In addition, Tipperary asserts that it should automatically prevail because the circuit court dismissed its case by granting the City’s 12(b)(6) and 12(c) motions to dismiss. In actuality, Tipperary asserts that, because it “alleged” the legal conclusion there was an “affirmative, aggressive, and positive act” in its pleadings, the Supreme Court is ham-strung by such conclusory allegation and Tipperary’s Complaint allegations are unassailable via a dismissal motion.<sup>5</sup> However, Tipperary ignores that South Carolina is a fact-pleading, code state, not a notice-pleading state; unequivocally, the Supreme Court is not bound by conclusory allegations of law, but pleadings must be sufficiently pled with facts in South Carolina. See South Carolina Civil Procedure 2<sup>nd</sup> Ed., 57 – 65.

It is axiomatic that South Carolina retains Code Pleading rather than the notice pleading of the federal rules. SCRCF Rule 8 requires the pleader to state the facts supporting the cause of action or defense alleged. Code Pleading has two concepts: First, each element of the cause of action must be alleged, and a complaint that omits an

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<sup>5</sup> In essence, Tipperary claims that SCRCF Rule 12(b) and 12(c) are inapplicable if a pleading lists the elements of the cause of action, irrespective of the facts alleged in such pleading. Tipperary has failed to provide legal support for such proposition, which would divest Rules 12(b) and (c) of any meaning. Tipperary’s argument is not supported by South Carolina law as set forth herein.

element fails to state a claim.<sup>6</sup> Second, the pleader must describe each element of the cause of action in terms of the facts of the case. The pleader must use “ultimate facts” which are defined as the facts which the evidence will provide at trial.<sup>7</sup> Ultimate facts fall somewhere between the verbosity of “evidentiary facts” and the sparsity of “legal conclusions.” Legal conclusions describe a legal status, condition or offense.<sup>8</sup> Id. at 57 – 65.

As such, South Carolina has retained the Code Pleading requirement that factual detail is necessary to state a claim or defense. Rule 8(f) contains a fundamental principle of the rules: the substance of the pleading governs, rather than its technical form.<sup>9</sup> The rule, however, is not a license because it demands that substantial justice be accorded to all parties. An improper denial, or failure to plead an affirmative defense, or failure to plead an affirmative defense or all the elements of a cause of action still forecloses the pleader. Id. at 57 – 61; see Stroud v. Riddle, 260 S.C. 99, 194 S.E.2d 235 (1973). A demurrer admits facts well pleaded in a complaint, but does not admit conclusions of law. Carrington v. City of Spartanburg, 283 S.C. 298, 322 S.E.2d 28, 29 (Ct. App. 1984), overruled on other grounds, 285 S.C. 243, 329 S.E.2d 741, 746 (1985). See Clark v Clark, 293 S.C. 415 (S.C. 1987).

“No rule of thumb is possible, but in general it may be said that the pleader should not content himself with alleging merely the final and ultimate conclusion which the court is to make in deciding the case for him. He should go at least one step further back

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<sup>6</sup> Inman v Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988).

<sup>7</sup> Moore v City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct. App. 1985).

<sup>8</sup> Stroud v Riddle, 260 S.C. 99, 194 S.E.2d 235 (1973). There are faint and often-disputed lines of distinction between ultimate facts, conclusions of law, and evidentiary facts which should not be allowed to defeat the ends of justice. Pleading ultimate facts, as distinguished from evidentiary facts, oftentimes involves conclusions. At the same time, legal conclusions cannot be substituted for ultimate facts. Id. at 103.

<sup>9</sup> Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 410 S.E.2d 18 (Ct. App. 1991).

and allege the circumstances from which this conclusion directly followed.” Charles E. Clark, Handbook of the Law of Code Pleading, p. 232 (2d Ed. 1947). SCRPC Rule 12(b) sets the standard: Only the complaint is examined and all reasonable inferences are drawn in favor of the plaintiff. Only if the complaint fails to allege facts sufficient to support relief on any theory will the motion be granted.<sup>10</sup>

In South Carolina, a party may not allege legal conclusions devoid of the facts required to set forth a claim. Here, Tipperary alleged facts which negate its ability to properly set forth a claim. As Tipperary failed to sufficiently plead facts to support the first element of inverse condemnation, Petitioner is entitled to a dismissal under the Rules of Civil Procedure.

### **III. PUBLIC POLICY STILL FAVORS THE CITY.**

Finally, public policy continues to favor the City. Pursuant to the Court of Appeals’ new interpretation of inverse condemnation’s first element, any City or governmental entity would be subject to suit and potentially be an insurer for property owners who have chosen to purchase property in geographical, low lying areas which are prone to flood after any rain event. An inverse condemnation claim, so applied, would open the floodgates of litigation against governmental entities due to inclement weather events. South Carolina can stand for no such proposition. The common law embodies sound public policy which allows an aggrieved party redress in the limited circumstances where a governmental entity alters the natural flow of surface waters which causes damage to the aggrieved party’s property. By eliminating the requirement that the governmental entity must “catch, collect, and thrust surface waters in a manner different

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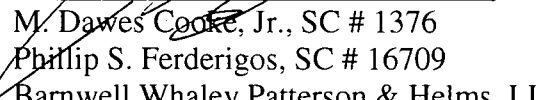
<sup>10</sup> Russell v City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Murrow Crane Co. v T.R. Tucker Constr. Co., 296 S.C. 427, 373 S.E.2d 701 (Ct. App. 1988).

than the natural flow,” the Court of Appeals has literally and figuratively opened the flood gates for endless, ongoing, never ending litigation by property owners against governmental entities, especially for property owners who have purchased property in low-lying areas, which would be prone to flooding based on geographical location alone. Sound public policy, as reflected in the well-developed common law in this area of the law, requires that the Court of Appeals’ new interpretation be reversed.

### CONCLUSION

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

Respectfully submitted,



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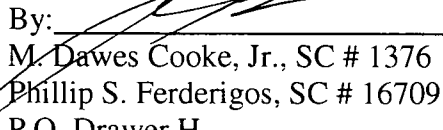
Of Whom  
City of North Charleston..... Petitioner.

PROOF OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of November, 2016, I mailed a copy of the foregoing  
Petitioner's Reply to Return to counsel for the Respondent, with sufficient postage, correctly  
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