

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

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SEP 19 2008

S.C. SUPREME COURT

Claude W. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

And

Vickie B. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

**APPELLANTS' FINAL BRIEF
OF RESPONDENTS/APPELLANTS**

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Facts	2
Arguments	
I. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF LATTA'S AFFIRMATIVE, POSITIVE, AND AGGRESSIVE CONDUCT TO SUPPORT A CLAIM OF INVERSE CONDEMNATION TRESPASS	4
II. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF LATTA'S AFFIRMATIVE CONDUCT TO SUPPORT A CLAIM OF TRESPASS	8
III. THE TRIAL COURT'S DECISION TO RAISE <i>SUA SPONTE</i> THE ISSUE OF AN EASEMENT BY PRESCRIPTION AND THEN TO RULE ON IT ADVERSELY TO THE GRAHAMS WAS CONTRARY TO THE EVIDENCE, WITHOUT LEGAL AUTHORITY, AND DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW	11
Conclusion	13

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Collins</i> , 366 S.C. 204, 230, 621 S.E.2d 368, 381 (Ct. App. 2005).....	12
<i>Brown Jug, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959</i> , 688 P.2d 932 (Alaska 1984).....	10
<i>Byrd v. City of Hartsville</i> , 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005).....	5, 6
<i>Goodwin v. Johnson</i> , 37 S.C. 49, 591 S.E.2d 34 (Ct. App. 2003).....	11
<i>Hardin v. S.C. Dept. of Transp.</i> 371 S.C. 598, 641 S.E.2d 437, 441 (2007).....	5, 8
<i>Hawkins v. City of Greenville</i> , 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).....	5, 8
<i>Hennes v. Shaw</i> , 397 S.C. 391, 403, 725 S.E.2d 501, 509	12
<i>Horry Cnty. v. Laychur</i> , 315 S.C. 364, 434 S.E.2d 259 (1993).....	12
<i>Jowers v. Hornsby</i> , 292 S.C. 549, 357 S.E.2d 710 (1987)	11
<i>Kelley v. Snyder</i> , 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012)	11, 12
<i>Lee v. Stewart</i> , 218 N.C. 298, 10 S.E.2d 804 (1940).....	9
<i>Loftis v. S.C. Elec. & Gas</i> , 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004).....	12
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).....	6, 7
<i>Lucas</i> , 505 U.S. at 1015, 112 S.Ct. 2886.....	6
<i>Moore v. Duke</i> , 84 Vt. 401, 80 A. 194 (1911).....	9
<i>Morrow v. Dyches</i> , 328 S.C. 522, 527, 492 S.E.2d 423 (Ct. App. 1997).....	11
<i>Penn Central</i> , 438 U.S. at 130-31, 98 S.Ct. 246	6

<i>Pittman v. Lowther</i> , 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)	11, 12, 13
<i>Revis v. Barrett</i> , 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996)	11
<i>Slear v. Hanna</i> , 329 S.C. 407, 496 S.E.2d 633 (1998)	11
<i>Smith v. Commissioners of Pub. Works</i> , 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994) ..	11
<i>Snakenberg v. Hartford Casualty Insurance Co.</i> , 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989)	10
<i>Snow v. City of Columbia</i> , 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) ..	9, 10
<i>U.S. v. Dickinson</i> , 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).	8

Rules

Rule 40(j)	1
------------------	---

Other Authorities

1 G. Addison, A TREATISE ON THE LAW OF *553 TORTS, 388 (Wood ed. 1991)	9
Restatement 2d of Torts, 158, comment I, illustration 3 (1965)	9
South Carolina Constitution, Section 3	12

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR WHEN IT GRANTED THE TOWN OF LATTA'S MOTION FOR A DIRECTED VERDICT ON VICKIE GRAHAM'S CAUSE OF ACTION FOR INVERSE CONDEMNATION?**
2. **DID THE TRIAL COURT ERR WHEN IT GRANTED THE TOWN OF LATTA'S MOTION FOR A DIRECTED VERDICT AGAINST VICKIE GRAHAM'S CAUSE OF ACTION FOR TRESPASS?**
3. **DID THE TRIAL COURT ERR WHEN IT, *SUA SPONTE*, DECLARED THE TOWN OF LATTA TO HAVE AN EASEMENT BY PRESCRIPTION FOR A SEWER LINE UNDER THE HOUSE OF THE GRAHAMS?**

STATEMENT OF THE CASE

These actions were initiated by two Complaints filed on November 19, 2008, subsequently amended by Respondent/Appellant Vickie Graham on February 4, 2009, timely answered on May 11, 2009. On December 15, 2010, the Respondents/Appellants initial counsel, Jim Rushton, was replaced by the undersigned with a Notice of Appearance. On January 26, 2011, Vickie Graham filed a Second Amended Complaint, timely answered on February 3, 2011.

The cases were consolidated, stricken from the trial docket pursuant to Rule 40(j), and restored to the jury roster on June 20, 2012.

The case was tried by a jury beginning October 8, 2012. At the close of the Plaintiffs' case, the Defendant moved for a directed verdict on all causes of action and the court granted that motion with respect to the trespass cause of action and the cause of action for inverse condemnation, while at the same time *sua sponte* declaring that the Defendant had an easement by prescription to operate a sewer line through Mrs.

Graham's property and under her house. The court denied the motion as to the negligence cause of action. At the conclusion of all the evidence, the Plaintiffs moved for a reconsideration of the directed verdict rulings, which motion was denied. On October 11, 2012, the jury returned a verdict in favor of Vickie Graham in the amount of \$225,000 and Claude Graham in the amount of \$100,000.

The Defendant filed post-trial motions on October 22, 2012. On March 8, 2013, the court entered two separate Orders, one memorializing its directed verdict on the inverse condemnation cause of action and the other denying the Appellant/Respondent's Motion for Judgment Notwithstanding The Verdict Or In The Alternative For A New Trial.

Appellant/Respondent filed a Notice of Appeal on April 9, 2013. Respondents/Appellants filed a Notice of Appeal on April 12, 2013.

The Respondent/Appellant Vickie Graham appeals from the Trial Court's Order granting the directed verdicts, but not from the verdict, the judgment, or the Order of the Trial Court denying the Appellant/Respondent's post-trial motions.

FACTS

Vickie Graham purchased her home on Rice Street in Latta, South Carolina in the late 1980's, following which she and her husband spent substantial money and time remodeling and renovating a fine home built in the 1960's, but fallen into disrepair, into one of the very finest homes in Latta. (R. pp. 75-77). Subsequently her husband, Claude Graham, discovered that there was a sewer line located on her land that had been there

since the mid 1920's. It is the main sewer line for the Town of Latta and runs from a ditch constituting the northern border of her property, under her house, and to Rice Street. (R. pp. 80-84). There is no written or recorded instrument conveying an easement for that portion of the sewer system which crosses the subject property. (R. p. 291, ll. 15-25).

On September 5th and 6th 2008, more than six inches of rain fell on Latta, as Tropical Storm Hanna passed along the coast of the Carolinas. Latta's sewer line leaked and overflowed onto the Graham property and under their house on that night and on multiple subsequent dates. The sewage outflow included all the usual, customary, and expected contents of sewage and were visible on the Graham lawn, pool, garage floor, in the tool shed, and under the home. The Grahams spent thousands of dollars repairing the damage from the September 5/6 2008 rain event. On multiple occasions thereafter, however, various heavy rains occurred and the sewage leakage and outflow repeated itself. (R. pp. 85-99, l. 18; 186-190, l. 12). The Grahams' doctor not only treated them for maladies resulting from their exposure to the sewage and mold, etc. arising from the overflows but also recommended they not go back into the house. (R. pp. 294-296). The house was contaminated. (R. pp. 745-749).

The Town of Latta, through its system operator and its mayor, was fully informed of the September 5/6 and subsequent events. (R. pp. 92, l. 7 - 96). The Town of Latta is responsible for the maintenance and repair of its waste water system and chose to continue to run its sewage through the line under the Graham house. (R. pp. 347-348, l. 11; 230).

On at least one, and more likely than not several, occasion(s) the Town shut down its main sewer line. When shut down, obviously, no sewage passed through the line under the Grahams' house. Each time the Town of Latta restarted its sewage system, however, it chose and affirmatively acted to begin draining new sewage through and on the Grahams' property, under their house. The Town chose to continue pumping its sewage through the Grahams' property, to undertake no repair of its line, and not to reroute its line. With full knowledge of the consequences to the Grahams' property and to them, the Town, knowing it had a duty to repair the line, instead chose to remove its own instrumentalities which had stopped the sewage flowing, thus to unplug the line. (R. pp. 585, l. 11 – 587, l. 13).

The Town of Latta did not produce any map of its main sewer line, but instead its engineer testified that it runs between the Grahams' house and their swimming pool, not under their house. Claude Graham testified that it runs under the house. (R. pp. 549-550; 584, ll. 1-5; 590-596; 754).

The Grahams suffered medical injuries but mitigated them by moving from the house so long as the sewer line runs under it (which it does still) and renting a substitute home. The cost of building that same house on a different piece of property, one without a sewer line running under its house, would be approximately \$478,280. (R. pp. 398-399, l. 9).

ARGUMENTS

I. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF

**LATTA'S AFFIRMATIVE, POSITIVE, AND AGGRESSIVE CONDUCT
TO SUPPORT A CLAIM OF INVERSE CONDEMNATION.**

The trial court granted the Appellant/Respondent's motion for a directed verdict on Mrs. Graham's inverse condemnation cause of action relying upon a line of cases from the South Carolina Court of Appeals beginning 1992 and culminating in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The consistent theme through these cases from this Court of Appeals was that an inverse condemnation plaintiff must show "an affirmative, positive, aggressive act on the part of the governmental agency," *supra* at 358 S.C. 290. In 2005 and 2007, however, the South Carolina Supreme Court began the process of defining and refining the nature of a plaintiff's right to recover in an inverse condemnation case: It is premised upon the ability to show that he or she has suffered a taking. *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005); *Hardin v. S.C. Dept. of Transp.* 371 S.C. 598, 641 S.E.2d 437, 441 (2007).

In *Hardin* our Supreme Court recognized that this state has "*embraced* federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." *supra* at 641 S.E.2d 441. (emph. supp.).

Although no set formula exists for determining whether property has been "taken" by the government, the relevant jurisprudence does provide significant guideposts. Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a

whole. *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 246. Stated more specifically, these "*ad hoc*, factual inquiries" involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646); *Byrd*, 365 S.C. at 658-59, 620 S.E.2d at 80 (quoting the same). Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves. See *Loretto*, 458 U.S. at 426-28, 102 S.Ct. 314; see also *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. Additionally, the enforcement of a government regulation will usually effect a taking when the regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886.

ibid.

The federal jurisprudence *embraced* by the Supreme Court of South Carolina includes a broad view of what constitutes a "taking" by the government, a view which compels concluding that the Town of Latta's continued unauthorized use of the Respondents/Appellants' property not only for its main sewer line but also as a dumping ground for raw sewage is a taking. The United States Supreme Court, Justice Marshall delivering the opinion, held that a permanent physical occupation authorized by the government is a taking according to the Fifth Amendment to the United States Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). He observed that no set formula exists which can determine, in all cases, whether compensation is constitutionally due for a government restriction of the property and that the court must ordinarily engage in *ad hoc* factual

inquiries. His opinion went on to observe that such inquiries are not standardless: the economic impact of the government activity, especially the degree of interference with financial expectations, is of particular significance in determining whether the government activity constitutes a taking, as also is the character of the governmental action. When physical intrusion by the government reaches the "extreme form of a permanent physical occupation", held the Court, a Fifth Amendment taking has occurred and in such case the character of the government act not only is an important factor in resolving whether the action works as a taking but also is determinative. The Court went on to hold that the historical rule that a permanent and physical occupation of another's property is a taking has more than tradition to commend it, for such an appropriation is the most serious form of invasion of an owner's property interest. An owner suffers a special kind of injury when a third party directly invades and occupies her property; the traditional rule has the added benefit of avoiding otherwise difficult "where do we draw the line" problems. *Loretto* held that once the fact of occupation of the property is shown, a court should consider the extent of the occupation as one relevant factor in determining the compensation due and for that reason there is "less need to consider the extent of occupation" in determining whether there is a compensable taking in the first place. *Loretto* at 458 U.S. 426-28. The United States Supreme Court has also held, Justice Frankfurter delivering the opinion, that property is taken in the constitutional sense when inroads are made on an owner's use of his property to an extent that, as between private persons, a servitude would have been acquired either by

agreement or over the course of time. *U.S. v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).

Such is the federal rubric within which the South Carolina Supreme Court began taking a holistic view of inverse condemnations in 2005, 2007. The trial court's rote reliance upon pre-2004 Court of Appeals jurisprudence is misplaced in the light of the "no set formula" pronouncement of law in *Hardin*, 371 S.C. at 441. The appropriate factual inquiry should have been into the character of the government's action and the extent to which this action interferes with the owners' rights. The "permanent physical occupation" here is beyond dispute. The trial court erred when it ruled otherwise.

II. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF LATTA'S AFFIRMATIVE CONDUCT TO SUPPORT A CLAIM OF TRESPASS.

The trial court granted Latta's motion for a directed verdict on Mrs. Graham's trespass cause of action "on the same basis" that it had granted the directed verdict for inverse condemnation. In so doing the court referred to the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency," citing, among others the inverse condemnation case of *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). (R. pp. 489-493, l. 11). The nature of the act required to constitute a trespass, however, is not the same.

The mere entry entitles the party in possession at least to nominal damages. To constitute an actionable trespass, however, 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.

Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) (citations omitted).

The *trespass* act need only be affirmative; it need *not* also be aggressive and positive. As the court correctly noted, an inverse condemnation proceeding is one in equity in which the presiding judge may make the findings of fact and the conclusions of law. Trespass, however, is an action at law, where findings of fact *must* be made by a jury. The landowner presented evidence from which a jury could conclude that the Town of Latta acted affirmatively: it had built and operated a sewage line under her house and on her property with no easement or right to do so, in the course of operating the sewage system it dumped and permitted others to dump fecal and other sewage materials on her land and under her house, and that each shutdown and reopening of the Town's main sewer line was an affirmative act. Although the sewer line had been in operation for decades, Mrs. Graham did not discover that the Town had no easement until 2011. (R. 260-261).

The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. *Lee v. Stewart*, 218 N.C. 298, 10 S.E.2d 804 (1940). The entry itself is the wrong. Thus, for example, if one without a license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure. See, *Moore v. Duke*, 84 Vt. 401, 80 A. 194 (1911); 1 G. Addison, A TREATISE ON THE LAW OF *553 TORTS, 388 (Wood ed. 1991); Restatement 2d of Torts, 158, comment I, illustration 3 (1965). It is immaterial whether any further damage results. See *Brown*

Jug, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984). ... 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. *Snakenberg v. Hartford Casualty Insurance Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. *Id.* 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.

Snow v. City of Columbia, supra at 409 S.E.2d, 802-803

These acts of the Town of Latta could reasonably, be found to be affirmative, thus a trespass. The jury should have decided this factual dispute. Unlike *Snow* the Grahams presented evidence the Town was not only aware of the sewage discharge but also that its failure to keep the main sewer line was advertent, a voluntary act. "(T)he 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. In fact, the City was not aware of the leak until Mr. Snow brought it to their attention. The Snows make no claim to the contrary. Mr. Snow himself testified that the City did *not* intentionally allow the water to escape onto his property. At best, the evidence showed the leak resulted from the City's inadvertent failure to keep its water main in good operating condition. Since the event which constituted the entry was not a voluntary act of the City, an action for trespass will not lie. To hold otherwise on the facts before us would effectively impose strict liability under the guise of trespass to land." *ibid.*

III. THE TRIAL COURT'S DECISION TO RAISE *SUA SPONTE* THE ISSUE OF AN EASEMENT BY PRESCRIPTION AND THEN TO RULE ON IT ADVERSELY TO THE GRAHAMS WAS CONTRARY TO THE EVIDENCE, WITHOUT LEGAL AUTHORITY, AND DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The trial court declared that the Town of Latta had a prescriptive easement over the Graham property. That was a substantial, perhaps determinative, factor in its finding that the Appellant/Respondent was entitled to a directed verdict on the trespass and inverse condemnation causes of action. (R. pp. 441-448, l. 18; 489, l. 8 – 498, l. 12; 622-623).

The existence of a prescriptive easement in an action at law is a question of fact. *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005); *Kelley v. Snyder*, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012); *Slear v. Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1998); *Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996); *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994); *Goodwin v. Johnson*, 357 S.C. 49, 591 S.E.2d 34 (Ct. App. 2003); *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987); *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 423 (Ct. App. 1997).

The party claiming a prescriptive easement bears the burden of proving all of the elements. *Morrow v. Dyches*, *supra* at 328 S.C. 527; *Kelley v. Snyder*, *supra* 396 S.C. at 573. The Town of Latta did not plead a counterclaim that it had a prescriptive easement, nor did it seek during the trial to amend its pleadings to assert such a counterclaim. At the time the trial court granted its motion for a directed verdict, at the conclusion of the

Plaintiff's case, the Town of Latta had advanced no evidence in support of an entitlement to a prescriptive easement. The parties did not expressly consent to try the issue of a prescriptive easement, so the Circuit Court's *sua sponte* ruling not only deprived Mrs. Graham of the opportunity to prepare for the issue of a prescriptive easement and raise appropriate affirmative defenses at trial but also denied her due process of law. See *Hennes v. Shaw*, 397 S.C. 391, 403, 725 S.E.2d 501, 509; *Armstrong v. Collins*, 366 S.C. 204, 230, 621 S.E.2d 368, 381 (Ct. App. 2005) ("In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised.")

Article I of the South Carolina Constitution, Section 3 of the Declaration of Rights provides, "nor shall any person be deprived of life, liberty, or property without due process of law" Notice, opportunity to prepare, and the right to have a factual dispute (the existence of prescriptive easement) determined by a jury are each fundamental to the concept of ordered liberty in South Carolina. The trial court's ruling deprived Mrs. Graham of her property without due process of law.

To establish prescriptive easement the Town of Latta needed to prove (1) a continued and uninterrupted use or enjoyment of the right for a period of twenty years, (2) the identity of the thing enjoyed, and (3) the use was adverse or under a claim of right. *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Pittman v. Lowther*, *supra*; *Kelley v. Snyder*, *supra*; *Loftis v. S.C. Elec. & Gas*, 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004).

There is some evidence, albeit disputed, from which a finder of fact could determine elements 1 and 3. For example, Mr. Graham described one occasion when the Town's system supervisor and he may have caused the use of the line to be discontinued in 1998, and there is evidence that the Grahams did not learn of the adverse use (it not being open and obvious) until 1998. As to the "identity of the thing enjoyed", unique among the prescriptive easement cases, here there is a direct and incontrovertible *dispute* about the identity of the easement. Does it run from the ditch of the Graham property to Rice Street *under* their house or does it run near their house but *not under* it? (R. pp. 751-754; 549-553; 583, l. 21-584, l. 5; 590, l. 9 - 596).

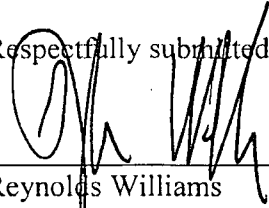
That disputed fact should have been presented to the jury for resolution, not decided by the presiding judge. When the existence of the easement is in issue, it is a question of fact in a law action. The jury should have determined whether "the claimant has established that the use was open, notorious, continuous, and uninterrupted" and the "identity of the (easement)". *Pittman v. Lowther, supra*.

CONCLUSION

Since material facts were in dispute, this Court should reverse the directed verdicts of the circuit court on the trespass and inverse condemnation causes of action and affirm the circuit court's denial of the Appellant/Respondent's post-trial motions.

May 12, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Reynolds Williams', written over a horizontal line.

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**PROOF OF SERVICE AND
211(b) CERTIFICATION**

I certify that I have served the **Appellants' Final Brief of Respondents/Appellants** on the *Appellant/Respondent*, through its attorney of record, by depositing three (3) copies of same in the United States Mail, postage prepaid, to:

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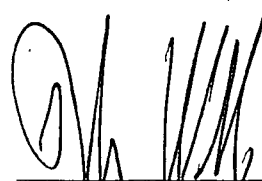
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I do also certify that the Appellants' Final Brief of Respondents/Appellants complies with Rule 211(b) SCACR.

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	2
Arguments	5
I. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity.	5
A. Overview of Discretionary Immunity	5
B. Testimony Supports Finding of Discretionary Immunity	7
C. Circuit Court's Rulings on Discretionary Immunity	10
D. Errors in the Circuit Court's Rulings on Discretionary Immunity	12
II. The Circuit Court erred in denying 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.	18
III. The Circuit Court erred in denying 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. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or	

replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.	21
IV. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.	25
Conclusion	28

TABLE OF AUTHORITIES

Cases

<i>Babb v. Lee County Landfill SC, LLC</i> , 405 S.C. 129, 747 S.E.2d 468 (2013).	22
<i>Billups v. Leliuga</i> , 303 S.C. 36, 398 S.E.2d 75 (Ct. App. 1990).	22
<i>Denene, Inc. v. City of Charleston</i> , 352 S.C. 208, 574 S.E.2d 196 (2002).	14
<i>Eagles v. South Carolina National Bank</i> , 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990).	18
<i>Folkens v. Hunt</i> , 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986).	18
<i>Foster v. South Carolina Dept. of Highways and Public Transportation</i> , 306 S.C. 519, 413 S.E.2d 31 (1992).	7
<i>Giannini v. South Carolina Dept. of Transportation</i> , 378 S.C. 573, 664 S.E.2d 450 (2008).	13
<i>Gray v. Southern Facilities, Inc.</i> , 256 S.C. 558, 183 S.E.2d 438 (1971).	23
<i>Hawkins v. City of Greenville</i> , 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).	16, 17, 18
<i>Jensen v. Anderson County Dept. of Social Services</i> , 304 S.C. 195, 403 S.E.2d 615 (1991).	14
<i>McCall v. Batson</i> , 285 S.C. 243, 329 S.E.2d 741 (1995).	5, 6, 13

<i>Murphy v. Richland Memorial Hospital</i> , 317 S.C. 560, 455 S.E.2d 688 (1995).	6
<i>Pope v. Heritage Communities, Inc.</i> , 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011).	22
<i>Rayfield v. South Carolina Dept. of Corrections</i> , 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988).	13
<i>Snow v. City of Columbia</i> , 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).	19
<i>Steinke v. South Carolina Dept. of Labor, Licensing and Regulation</i> , 336 S.C. 373, 520 S.E.2d 142 (1999).	12, 15, 16

Statutes and Rules

S.C. Code Ann. § 15-33-125.	24
S.C. Code Ann. § 15-78-60(5).	6, 7, 16

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity?

II. Did the Circuit Court err in denying 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?

III. Did the Circuit Court err in denying 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? In the alternative, is the Town of Latta entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired?

IV. Did the Circuit Court err in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room? In the alternative, is the Town of Latta entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages?

STATEMENT OF THE CASE

This is an appeal from a negligence action arising from a sewer overflow occurring in the Town of Latta on September 5-6, 2008.

The Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") filed companion civil actions on November 19, 2008. Those actions were later consolidated for discovery and trial.

This litigation involves a residence owned by Vickie Graham in the Town of Latta located at 220 East Rice Street. The home was purchased in 1989 for \$60,000.00. (R. 138, 275). On the night of September 5, 2008 and the morning of September 6, 2008, Tropical Storm Hanna dumped 7.5 inches of rain on the Town of Latta causing severe flooding throughout the Town. (R. 170, 233, 279, 370, 501-502). The Grahams alleged that their property was flooded on those dates. The record reflected that the property is located within a flood plain as determined by the Federal Emergency Management Association (FEMA). (R. 539-540). In addition, the Grahams maintain that the flood waters included sewage from nearby sewer lines including a manhole that overflowed on East Rice Street. The evidence further reflects that a sewer line crosses the Grahams' property. The Grahams maintain that the sewer line traveled underneath the house, while the

Town contends that the line was not underneath the house but rather ran underground between the house and the Grahams' swimming pool.

In their original complaints, the Grahams alleged that on the night of September 5-6, 2008, the municipal wastewater/sewer system operated by the Appellant-Respondent Town of Latta backed up, overflowed, and flooded their property causing damage to their residence and vehicles. (R. 24-25). Specifically, Vickie Graham alleged damages to the residence, which was titled in her name alone. (R. 35). Claude Graham also alleged damages to two vehicles which were titled in his name only. (R. 25).

The Grahams additionally alleged that on September 13, 2008, the Town's municipal wastewater/sewer system again backed up, overflowed, and flooded their property again causing damage to the residence. (R. 25, 34). Moreover, the Grahams alleged they became physically ill as a result of these events. (R. 26, 36). No other flooding or overflow events were alleged in the original complaints or any amended complaint.

Claude Graham raised only a claim for negligence in his complaint. Vickie Graham raised a negligence claim and an inverse condemnation claim in her original complaint. She amended her complaint twice during the pendency of this litigation, and in the Second Amended Complaint she added a cause of action for trespass.

After completion of discovery, the consolidated cases were tried beginning on October 8, 2012, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on October 11, 2012. During the trial, Judge Lee granted a directed verdict in favor of the Town of Latta with respect to the trespass and inverse condemnation claims. (R. 6-9, 489-493). Additionally, Judge Lee directed a verdict in favor of the Town as to any claims arising out of the events that occurred on September 5-6, 2008. (R. 496). As a result, the only remaining claims that were to be submitted to the jury were the negligence claims related to the events occurring subsequent to September 5-6, 2008. The jury ultimately returned a verdict in favor of Vickie Graham in the amount of \$225,000.00 and a verdict in favor of Claude Graham in the amount of \$100,000.00. (R. 20-23).

The Town of Latta timely filed post-trial motions, which included both a motion for a judgment notwithstanding the verdict (JNOV) and a motion for a new trial absolute. (R. 52-61). Those motions were denied by Judge Lee in her Order filed March 8, 2013. (R. 10-19).

The Town of Latta thereupon filed this appeal. Subsequently, the Grahams filed a cross-appeal whereby they have appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

ARGUMENTS

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

The Town of Latta moved for a directed verdict at the close of the Grahams' case-in-chief and at the close of all evidence on the basis of discretionary immunity. Those motions were denied by Judge Alison Renee Lee. After the verdicts were returned, the Town moved on the same basis for a JNOV, which was also denied. On appeal, the Town submits that the Circuit Court erred in failing to rule as a matter of law that discretionary immunity bars the Grahams' remaining negligence claims.

A. Overview of Discretionary Immunity

Discretionary immunity has historically protected discretionary decisions made by governmental officials acting in their official capacity. Discretionary immunity actually survived the abrogation of sovereign immunity by the Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1995). The Supreme Court explained that "discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by

public officials." 329 S.E.2d at 742. As a result, the Supreme Court "expressly decline[d] to allow tort liability for these discretionary acts" and specifically acknowledged that "[t]he exercise of discretion includes the right to be wrong." *Id.*

In response to the Supreme Court's partial abrogation of sovereign immunity in *McCall*,¹ the General Assembly enacted the South Carolina Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated. In *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995), the Supreme Court explained as follows:

In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Citations omitted).

In enacting the Tort Claims Act, the General Assembly codified discretionary immunity. Section 15-78-60(5) exempts governmental entities from liability for losses resulting from "the exercise of discretion or judgment by the

¹ *McCall* has been described as resulting in the absolute abrogation of sovereign immunity. See also, *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) ("[i]n *McCall* we abolished the doctrine of sovereign immunity"). That is not entirely correct because the *McCall* Court did not abolish discretionary immunity as it existed pre-*McCall*. In effect, *McCall* represents only a partial abrogation of sovereign immunity because discretionary immunity was left intact.

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." S.C. Code Ann. § 15-78-60(5). The Supreme Court has interpreted Section 15-78-60(5) as requiring "[p]roof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice." *Foster v. South Carolina Dept. of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31, 35 (1992). In addition, "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." *Id.* "It is not enough to say the defect was noted and a decision was made not to repair it." *Id.*

B. Testimony Supports Finding of Discretionary Immunity

At trial, the evidence demonstrated that the Town of Latta exercised discretion in deciding not to perform any work on the sewer pipe that crosses the Grahams' property. The Town had several options including the option not to take any remedial action, which is ultimately the option chosen by the Town per the advice of its engineers. That exercise of discretion was based upon accepted

professional standards as was testified to by the Town's consulting engineer, Mike Hanna.

Mike Hanna is employed by B.P. Barber Company, which is an engineering firm, and has served as the Town's consulting engineer on its water and sewer systems since 1997. (R. 519). In response to the Grahams' complaint, Hanna recommended several steps to be taken. First, B.P. Barber under Hanna's direction performed a physical survey of all manholes and then followed that with smoke testing of the entire sewer system, including the areas in the vicinity of the Graham residence. (R. 528-531). Hanna explained that in conducting the smoke testing they paid particularly close attention to the area around the Graham residence. (R. 532-533). The smoke testing, however, did not reveal any problems with the sewer line on the Grahams' property or any lines near their residence. (R. 533-534). The engineers prepared a report for the Town and made recommendations. (R. 534-535). At trial, Hanna also identified a map that depicted the areas where leaks were found during the study, but he confirmed, as does the map, that no leaks were found at or near the Graham residence. (R. 541, 548, 751).

Hanna testified that there were a number of different options available. When told that the Grahams contended that the sewer line was underneath their house and was leaking sewage, he looked at options to relocate the line. (R. 560-561). He testified that he "drew up a couple of scenarios, but there were no good

alternatives there." (R. 561). In addition, he testified that there are different methods that can be used to rehabilitate a sewer line including replacement of the line, the placement of a liner in the existing line, or the use of technology called "pipe bursting." (R. 555). However, based on the testing that was performed, a decision was made to take no remedial action because it was not needed. Hanna specifically testified that he did not find any evidence that there was a problem with the sewer line running across the Grahams' property, and as a result, in his professional opinion there were no repairs or other remedial action that were needed. (R. 555-556).

The evidence thus reflects that the Town did not ignore the Grahams' complaint. The Town engaged Mike Hanna and B.P. Barber, its consulting engineers, to investigate the complaint, perform testing, and make recommendations. Hanna offered his professional opinions to a reasonable degree of engineering certainty. (R. 584). The actions taken by Hanna and the options he considered were consistent with those discussed by the Grahams' engineering expert, Roger Davis. Although he himself performed no testing, Davis agreed that smoke testing could be done to look for infiltration and leaks in a sewer line. (R. 356-366). He further discussed various options including relocation of the line, replacement of the line, or repair of the line in the event a leak was found. (R. 347, 366-367). As for repairs, he mentioned several options including the use of

pressure grouting or slip lining the pipe. (R. 347). These were the same options considered and deemed not necessary by Mike Hanna.

In sum, the Town presented evidence of several options for relocation, replacement and repair that were considered by the Town engineers, as well as the fourth option which was to take no remedial action. The Town further showed that such options were accepted in the engineering field, and in fact, Roger Davis agreed to the same remedial options. Mike Hanna explained the smoke testing that was performed and the conclusions reached based upon that testing. Davis agreed that the smoke testing was an accepted method for assessing infiltration and leaks in a line. Finally, Hanna explained that no remediation or relocation was deemed necessary based on the results of that testing. Consequently, the Town proved based upon undisputed evidence that discretion was exercised – the Town acting through its engineers weighed its options and concluded in the exercise of professional judgment that no remedial action was needed. Accordingly, the Town is entitled to discretionary immunity from liability.

C. Circuit Court's Rulings on Discretionary Immunity

In denying the Town of Latta's directed verdict motions, Judge Lee stated: "while I believe that there has been some exercise of discretion or judgment, I

think it becomes a jury question to determine whether or not there would have been a breach of duty in failing to take action." (R. 651). Judge Lee further ruled:

The way I view the evidence is that there were basically four competing choices in addition to the underlying dispute as to whether or not there is a leak or not. But if the considerations of the Town would – there would have been four options. The three that were discussed was move the line, put a sleeve in it, or I think put some glue or whatever in it or whatever was the appropriate terminology is or do nothing. While I understand that they weighed those options, I still believe that the jury could make the decision. I understand that they weighed the options, and their option was to do the fourth; that was to do nothing.

And I understand that that was primarily because they did not believe that there was a leak in the line. So I think it becomes a question for the jury to decide, first of all, whether or not there was a leak; and second of all, whether exercising that particular option would have been a breach of the duty. And the duty is to maintain the system and [to] maintain the lines. And so I think that becomes a jury question.

(R. 651-652).

That oral ruling denying the directed verdict motion was later echoed by Judge Lee in her written order denying the JNOV motion. 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 then viewed the issue as one of duty rather than immunity. She concluded:

Whether Defendant breached its duty to maintain its drainage system by failing to exercise one of the options available to fix the flooding at Plaintiffs' residence was a question for the jury. *See Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). The jury considered the evidence of whether Defendant's inaction constituted maintenance and rejected the discretionary immunity provision of the Tort Claims Act. Because there is evidence to support the jury's verdict, Defendant's Motion for JNOV on the grounds that Plaintiffs' negligence claim is barred by application of the South Carolina Tort Claims Act is DENIED.

(R. 13).

D. Errors in the Circuit Court's Rulings on Discretionary Immunity

In denying discretionary immunity to the Town of Latta, Judge Lee committed several errors of law.

First and foremost, Judge Lee failed to recognize that discretionary immunity does not require that the discretion be exercised without error. Consequently, she confused the distinct concepts of duty and immunity. In *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), this Court explained that "[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability." 374 S.E.2d at 916. Therefore, the assertion of any immunity defense, including discretionary immunity, assumes a breach of the duty of care but nonetheless serves as a bar to liability. If a defendant is entitled to immunity, the court need not determine whether there was a breach of a duty – it is assumed. For that reason, it is a fundamental error to tie any entitlement to immunity to whether there is a breach of a duty of care. They are mutually exclusive concepts. If there is no breach of duty, the issue of immunity need not be reached. Conversely, to properly consider a defendant's entitlement to discretionary immunity, the court should assume negligence. In other words, the existence or non-existence of negligence does not preclude a governmental entity's entitlement to discretionary immunity.

As has been recognized by our Supreme Court, "the exercise of such discretion includes the right to be wrong." *See, Giannini v. South Carolina Dept. of Transportation*, 378 S.C. 573, 664 S.E.2d 450, 454, n.1 (2008). *See also, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 742 (1985) ("[t]he exercise of

discretion includes the right to be wrong").² The discretionary immunity defense, therefore, does not require a showing that discretion was exercised without error, or that a correct decision was actually made as a result of the exercise of discretion. If that were what is required, there would obviously be no need for an immunity defense. *See, Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196, 198 (2002) ("[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something"). The governmental entity does not need immunity where it acted reasonably or made a correct decision – in that instance, the entity was not negligent and would not be liable irregardless of immunity. Instead, a governmental entity is entitled to discretionary immunity *especially* in those instances where it is alleged that errors were made in the exercise of discretion, or where it is alleged that an incorrect decision was ultimately made.

Importantly, in the case at bar, Judge Lee found all of the elements of discretionary immunity present. Both at trial and in her post-trial order, Judge Lee found that the Town was presented with four choices, one of which was to take no remedial action. She further found that the Town weighed those options and consciously chose to do nothing because, based on the smoke testing and the exercise of professional judgment, the Town's engineer concluded that the sewer line was not

² *See also, Jensen v. Anderson County Dept. of Social Services*, 304 S.C. 195, 403 S.E.2d 615, 619 (1991) ("[g]enerally, a government official may not be held liable for the negligent performance of a discretionary duty").

leaking at the Grahams' property. Judge Lee, in fact, stated on the record that the Town "weighed the options, and their option was to do the fourth [--] that was to do nothing." (R. 652).

Therefore, the discretionary immunity test has been met as a matter of law, and Judge Lee's analysis should have ended there. Instead, she looked at whether the Town breached its duty of care by failing to choose one of the three repair options. She decided that was an issue of fact for the jury. However, to reiterate, that confuses the breach of duty issue with the immunity issue. Contrary to Judge Lee's reasoning, the Town cannot lose its discretionary immunity by selecting what may arguably have been the wrong option. The Town decided to take no remedial action based on the smoke testing that showed no leak in the sewer line on the Grahams' property. Whether that decision was correct or not is not determinative. The Town had the right to make that decision based on the testing that was done and the professional judgment of its engineer. If that decision was correct, there is no negligence. But, if that decision was incorrect, the Town is entitled to discretionary immunity for its erroneous exercise of judgment. Thus, there was no jury question that precluded a ruling on discretionary immunity.

Judge Lee also erred in her reliance on *Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), which she found supported her decision to send the defense of discretionary immunity to the

jury. In *Steinke*, however, the Supreme Court did not address in its decision whether the elements of discretionary immunity were demonstrated by the evidence. To the contrary, the Court noted that "[t]he record contains scant evidence Department officials exercised their discretion." 520 S.E.2d at 154. In contrast, in the present case, Judge Lee found that the elements of discretionary immunity were shown. In addition, in *Steinke*, the Supreme Court held that discretionary immunity needed to be read in conjunction with a gross negligence exception because other immunity provisions, including one with a gross negligence exception, had been raised as a defense. The issue of gross negligence thus made discretionary immunity one for the jury. In contrast, in the present case, the Town did not allege a Tort Claims Act immunity provision that includes a gross negligence exception, and as a result, discretionary immunity could not be defeated by proof of gross negligence.³ Discretionary immunity was not properly a jury question. Instead, the defense should have been decided as a question of law at directed verdict.

Finally, Judge Lee disregarded the one dispositive case. The present case is remarkably similar to the case of *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), in which this Court affirmed summary judgment for a

³ As further evidence of this distinguishing point, Judge Lee never charged the jury on the concept of "gross negligence." Moreover, her charge on discretionary immunity did not include an explanation of any gross negligence exception to Section 15-78-60(5). (R. 696-697).

municipality on causes of action for negligence and trespass arising out of allegations that the municipality failed to properly design and maintain its stormwater drainage system which resulted in flooding of the plaintiff's building. Similar to the case at bar, the facts in *Hawkins* show multiple flooding events and include the allegation that the City failed to take the appropriate remedial action to address the increased water flow through the existing drainage pipes. Citing discretionary immunity under the Tort Claims Act, this Court found that "a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgment required to build and maintain an adequate municipal sewer and drainage system in Greenville." 594 S.E.2d at 564. This Court further concluded that "the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." *Id.*

This case is no different from *Hawkins*, which surprisingly was not even discussed – let alone distinguished – by Judge Lee. The Grahams allege that the Town of Latta was negligent in failing to properly construct, operate, and maintain its municipal wastewater/sewer system. (R. 25, 34). The Grahams also allege that the Town failed to take remedial measures to prevent flooding at their residence after a prior flooding event. Those allegations are no different than those

in *Hawkins*. This Court in *Hawkins* found as a matter of law that discretionary immunity barred liability. That should likewise have been the ruling in this case.

For each of the reasons discussed above, the Town of Latta respectfully submits that it is entitled to discretionary immunity for its decision not to perform any remedial work to the sewer line across the Grahams' property. The Circuit Court therefore erred in failing to grant a directed verdict or JNOV on the remaining negligence claims.

II. The Circuit Court erred in denying 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 Grahams' negligence claims are premised on their allegation that a sewer pipe is located beneath their house and has leaked sewage on several occasions since September 6, 2008.⁴ The Grahams, however, presented no 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

⁴ Judge Lee granted a directed verdict for the Grahams' negligence claims arising from the September 5-6, 2008 flooding event. (R. 496). The Grahams have not appealed from that ruling, and it is the law of the case. See, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986); *Eagles v. South Carolina National Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990).

evidence. Instead, they rely on the doctrine of *res ipsa loquitur* as a substitute for proof of any actual defect in the sewer line.

It is well settled that South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 803, n.7 (Ct. App. 1991). As a result, a plaintiff's burden of proving each element of negligence "cannot be met by relying on the theory that the things speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." *Snow*, 409 S.E.2d at 803. "No inference of negligence arises from the mere fact of injury." *Id.*

As indicated, the Grahams have presented no evidence that the sewer line on their property is 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 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). 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 in their lines as a general issue and not that there was any such issue in the line at the Grahams' property. (R. 373-374). Davis could not and did not opine to a reasonable degree of engineering certainty that most probably the line underneath the Grahams' home was leaking.

In contrast, Mike Hanna, the consulting engineer for the Town, did have smoke testing performed under his direction by employees of B.P Barber. Those smoke tests did not reveal any leaks in the line running across the Grahams' property. (R. 533-534).

In sum, the Grahams did not meet their burden of proving that the sewer line running underneath or near their house was leaking or compromised in any respect. The Grahams' expert conceded that such evidence could have been obtained through camera or smoke testing, but no testing was pursued. Instead, the Grahams seek to rely on the injury – Claude Graham's self-serving testimony of sewage in the crawl space – as evidence that the sewer pipe is leaking. That is a classic application of the doctrine of *res ipsa loquitur* where the proof of injury is used to provide "proof" of a breach of care. Here, the Grahams have not established any breach of care by the Town that proximately resulted in sewage underneath their house at any point after September 6, 2008. "Proof" based on the

doctrine of *res ipsa loquitur* must be rejected. Consequently, the Grahams failed to prove an issue with the sewer line underneath or near their house and likewise failed to show that the Town was negligent in failing to take any remedial action to repair the line. For this additional reason, the Town is entitled to judgment as a matter of law.

III. The Circuit Court erred in denying 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. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.

Judge Lee also erred in several rulings with respect to the actual damages claimed by Vickie Graham for the damage to the real property. Over objection, Judge Lee allowed the Grahams to present the expert testimony of John Benton, who is former contractor. Benton offered his opinion as to the cost of rebuilding the exact house at a different location. Benton admitted that he was not qualified or prepared to offer any opinions on the condition of the Grahams' home or that it could not be repaired or that it needed to be razed. (R. 387). The error in allowing Benton's testimony was two-fold.

First, Judge Lee allowed 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. It is well settled that "[t]o recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765, 781 (Ct. App. 2011). "The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation." *Id.* See also, *Billups v. Leliuga*, 303 S.C. 36, 398 S.E.2d 75, 77 (Ct. App. 1990) (in the absence of expert testimony, evidence of proximate cause must "rise above mere speculation or conjecture"). Yet, in this case, the jury had no basis upon which to conclude that the Grahams' house could not be repaired or remediated but needed to be razed. Therefore, there was no evidentiary basis for Vickie Graham's claim that the house was permanently and totally damaged.⁵

Second, Judge Lee allowed the jury to consider evidence of the wrong measure of damages for either temporary or permanent injury to real property. In *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468 (2013), the

⁵ To the contrary, Danielle Watson with the South Carolina Department of Health and Environmental Control (DHEC) testified that sewage overflows as she observed at the Grahams' house are not uncommon and can be cleaned. (R. 238-239). In fact, DHEC provides an information sheet to homeowners with recommendations on clean-up procedures. (R. 241-245, 756).

Supreme Court addressed the appropriate measure of damages for both temporary and permanent damage to real property. The Supreme Court recognized that "lost rental value of property is the proper measure of damages for a temporary harm to real property." 747 S.E.2d at 475. Moreover, "the measure of damages for permanent injury to real property ... is the diminution in the market value of the property." *Id.*, citing *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 443 (1971).

In the present case, 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).

Despite properly charging the measure of damages, Judge Lee erred in allowing the Grahams to present evidence of a different measure. Specifically, she allowed the jury 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 can be characterized as a replacement value, which is not the appropriate measure of damages under Judge Lee's charge or applicable case law.

Furthermore, Judge Lee erred in failing to grant a directed verdict or JNOV based on Vickie Graham's failure to present competent evidence of actual damages to the real property. In any negligence action, damages are an element of the cause of action on which the plaintiff has the burden of proof. The failure to prove damages is fatal to the claim. The Town was entitled to judgment as a matter of law based on (1) Vickie Graham's failure to present proof that the real property was permanently injured and could not be repaired and (2) her failure to present proof of the diminution of the fair market value of the property. Similarly, Vickie Graham failed to present evidence that the property could be repaired and what the reasonable repair costs would be. In sum, the Town was entitled to judgment as a matter of law on these damages issues or in the alternative a new trial absolute.⁶

⁶ The new trial must include both issues of liability and damages. *See*, S.C. Code Ann. § 15-33-125. The Grahams did not move for nor were they entitled to a directed verdict on liability.

IV. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

As discussed above, Judge Lee granted a directed verdict on the Grahams' negligence claims related to the events of September 5-6, 2008. (R. 496). That ruling is now the law of the case. Therefore, the Town cannot be liable for any damages to real or personal property occurring on those dates. Claude Graham, however, pled in his complaint that he sustained damages to two motor vehicles on September 5-6. (R. 24-25). He does not allege in his complaint any damage or injury to personal property since that date.

At trial, Claude Graham testified to the loss of hand tools, golf equipment, two lawnmowers, and other equipment that was located in a storage room on the property. (R. 120-121). He never testified, however, that those items of personal property were damaged subsequent to the flooding of the yard that occurred on September 5-6, 2008. Moreover, he never offered testimony that those items were undamaged in the September 5-6, 2008 event.

There was, in fact, no evidence by which the jury could have even inferred that the damage to the personal property resulted from any events occurring after September 5-6, 2008. Claude Graham testified to subsequent events where he

observed sewage underneath the house, but on each occasion, he testified that there was little or no flooding or sewage in the yard. (R. 96-97, 104-107). On each occasion, he only described flooding or sewage underneath the house and never described it being in the storage room. There is no evidence even as to the location of the storage room relative to the house or the condition of the storage room after the alleged subsequent events. Given that the personal property was located in a storage room, which was never described as underneath the house, Claude Graham never offered competent evidence that he was entitled to recover the value of the personal property because of damage incurred after September 5-6, 2008.

On that basis, Judge Lee erred in denying a directed verdict and later a JNOV with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

As a related point, a new trial absolute is also warranted because Judge Lee never instructed the jury that it could not consider any damages occurring on September 5-6, 2008, because she had directed a verdict on all claims, including the negligence claims, related to those dates. In her post-trial order, Judge Lee explains that "[t]he Court provided an instruction to the jury on the September 5-6

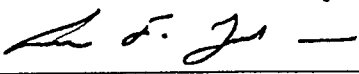
events as it deemed appropriate." (R. 17). But, Judge Lee does not specifically point to any such "appropriate" instruction in the record nor could she – because there is none. After the court directed the verdict, her explanation of her rulings at directed verdict made no mention that the events of September 5-6, 2008 were no longer at issue. (R. 499). This issue was addressed during the charge conference, but Judge Lee nonetheless did not give any further explanation to the jury nor include any limiting instruction regarding the lack of liability for damages proximately resulting from the events of September 5-6, 2008. (R. 681-685).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Latta respectfully requests that this Court reverse the orders of Circuit Court Judge Alison Renee Lee denying the Town's motion for JNOV and motions for directed verdict on the negligence cause of action. In the alternative, the Town of Latta requests that the Court remand for a new trial absolute on the negligence claims.

Respectfully submitted,

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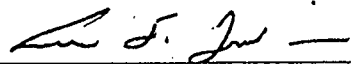
Columbia, South Carolina

May 13, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Appellant's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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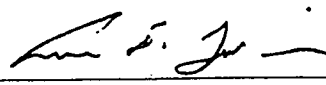
MAY 13 2014

SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Appellant's Brief of Appellant-Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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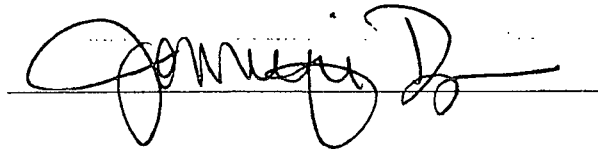
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SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Latta, does hereby certify that service of **Appellant's Brief of Appellant-Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 13th day of May 2014:

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MAY 13 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Alison Renee Lee, Circuit Court Judge

Case Nos. 2008-CP-17-0376
2008-CP-17-0377

RECEIVED

SEP 19 2016

S.C. SUPREME COURT

Claude W. Graham, ... Respondent-Appellant,

v.

Town of Latta, South Carolina, ... Appellant-Respondent.

Vickie B. Graham, ... Respondent-Appellant,

v.

Town of Latta, South Carolina, ... Appellant-Respondent.

RESPONDENT'S BRIEF
OF APPELLANT-RESPONDENT

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MAY 13 2014

SC Court of Appeals

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of the Case	1
Arguments	4
I. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's inverse condemnation claim.	4
II. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's trespass claim.	9
III. The Circuit Court correctly ruled that the Town of Latta had a prescriptive easement for the sewer line running beneath Vickie Graham's property.	11
Conclusion	17

TABLE OF AUTHORITIES

Cases

<i>Babb v. Lee County Landfill SC, LLC</i> , 405 S.C. 129, 747 S.E.2d 468 (2013).	9
<i>Belue v. City of Spartanburg</i> , 276 S.C. 381, 280 S.E.2d 49 (1981).	8
<i>Burke v. AnMed Health</i> , 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011).	13
<i>Carolina Chloride, Inc. v. Richland County</i> , 394 S.C. 154, 714 S.E.2d 869 (2011).	6
<i>Carolina Chloride, Inc. v. South Carolina Dept. of Transportation</i> , 391 S.C. 429, 706 S.E.2d 501 (2011).	6
<i>Carolina Convenience Stores, Inc. v. City of Spartanburg</i> , 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012).	6
<i>Gurganious v. City of Beaufort</i> , 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995).	5
<i>Hawkins v. City of Greenville</i> , 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).	7, 9, 11
<i>Kelley v. Snyder</i> , 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012).	13, 15
<i>Loftis v. South Carolina Electric & Gas Co.</i> , 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004).	12, 13, 15
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).	6

<i>McKissick v. J.F. Cleckley & Co.</i> , 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996).	5
<i>Rolandi v. City of Spartanburg</i> , 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987).	7, 8
<i>Snow v. City of Columbia</i> , 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).	9, 10

STATEMENT OF THE CASE

This is an appeal from an inverse condemnation, trespass, and negligence action arising from a sewer overflow occurring in the Town of Latta on September 5-6, 2008.

The Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") filed companion civil actions on November 19, 2008. Those actions were later consolidated for discovery and trial.

This litigation involves a residence owned by Vickie Graham in the Town of Latta located at 220 East Rice Street. The home was purchased in 1989 for \$60,000.00. (R. 138, 275). On the night of September 5, 2008 and the morning of September 6, 2008, Tropical Storm Hanna dumped 7.5 inches of rain on the Town of Latta causing severe flooding throughout the Town. (R. 170, 232, 279, 370, 501-502). The Grahams alleged that their property was flooded on those dates. The record reflected that the property is located within a flood plain as determined by the Federal Emergency Management Association (FEMA). (R. 539-540). In addition, the Grahams maintain that the flood waters included sewage from nearby sewer lines including a manhole that overflowed on East Rice Street. The evidence further reflects that a sewer line crosses the Grahams' property. The Grahams maintain that the sewer line traveled underneath the house, while the

Town contends that the line was not underneath the house but rather ran underground between the house and the Grahams' swimming pool.

In their original complaints, the Grahams alleged that on the night of September 5-6, 2008, the municipal wastewater/sewer system operated by the Appellant-Respondent Town of Latta backed up, overflowed, and flooded their property causing damage to their residence and vehicles. (R. 24-25). Specifically, Vickie Graham alleged damages to the residence, which was titled in her name alone. (R. 35). Claude Graham also alleged damages to two vehicles which were titled in his name only. (R. 25).

The Grahams additionally alleged that on September 13, 2008, the Town's municipal wastewater/sewer system again backed up, overflowed, and flooded their property again causing damage to the residence. (R. 25, 34). Moreover, the Grahams alleged they became physically ill as a result of these events. (R. 26, 36). No other flooding or overflow events were alleged in the original complaints or any amended complaint.

Claude Graham raised only a claim for negligence in his complaint. Vickie Graham raised a negligence claim and an inverse condemnation claim in her original complaint. She amended her complaint twice during the pendency of this litigation, and in the Second Amended Complaint she added a cause of action for trespass.

After completion of discovery, the consolidated cases were tried beginning on October 8, 2012, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on October 11, 2012. During the trial, Judge Lee granted a directed verdict in favor of the Town of Latta with respect to the trespass and inverse condemnation claims. (R. 6-9, 489-493). Additionally, Judge Lee directed a verdict in favor of the Town as to any claims arising out of the events that occurred on September 5-6, 2008. (R. 496). As a result, the only remaining claims that were to be submitted to the jury were the negligence claims related to the events occurring subsequent to September 5-6, 2008. The jury ultimately returned a verdict in favor of Vickie Graham in the amount of \$225,000.00 and a verdict in favor of Claude Graham in the amount of \$100,000.00. (R. 20-23).

The Town of Latta timely filed post-trial motions, which included both a motion for a judgment notwithstanding the verdict (JNOV) and a motion for a new trial absolute. (R. 52-61). Those motions were denied by Judge Lee in her Order filed March 8, 2013. (R. 10-19).

The Town of Latta thereupon filed this appeal. Subsequently, the Grahams filed a cross-appeal whereby they have appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

ARGUMENTS

I. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's inverse condemnation claim.

The Respondent-Appellant Vickie Graham contends that Judge Alison Renee Lee erred in granting a directed verdict on her inverse condemnation cause of action.¹ On appeal, Graham bases her inverse condemnation claim on a factual basis that was never pled and legal arguments that were never made during the trial. Graham further argues that Judge Lee relied on outdated case law and a test that is no longer applied by the South Carolina Supreme Court, both of which contentions are without merit.

As a threshold matter, it is critical to examine the factual basis for Graham's inverse condemnation claim as pled. On appeal, Graham argues that the Town's placement of the sewer line in 1924 constitutes a "permanent physical occupation" of Graham's property that gives rise to an unconstitutional taking. That claim, however, was never pled. In her second cause of action, Vickie Graham alleges as follows:

¹ The inverse condemnation and trespass claims were filed by Vickie Graham only. Claude Graham did not plead those claims in his complaint. Therefore, it is incorrect for Claude Graham to be identified as an Appellant with respect to the cross-appeal filed in this action. To the extent that Claude Graham has filed a cross-appeal, his appeal should be dismissed.

19. On the evening of September 5, 2008 and the subsequent day of September 6, 2008 and on subsequent dates, the Defendant's municipal wastewater/sewer system backed up and overflowed causing severe, permanent, and irreparable damage to the Plaintiffs property and residence. The Defendant had prior notice of problems with the operation and maintenance of its municipal wastewater/sewer system.

20. The failure of the Defendant to properly construct, operate, and maintain its municipal wastewater/sewer system has resulted in a *de facto* taking of the property of the Plaintiff.

(R. 37). Vickie Graham never pled that a taking resulted prior to September 5-6, 2008, or that it resulted from the placement of a sewer line across the property in 1924. Moreover, in directing a verdict on the inverse condemnation claim, Judge Lee never addressed any allegation that the sewer line's construction or placement on the property constitutes a taking. (R. 6-9). Therefore, on appeal, Graham is impermissibly arguing a new theory of liability – one that was not pled nor adjudicated by the trial court. It is well settled that "[t]he same ground argued on appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (a party may not argue one ground at trial and a different theory on appeal).

Furthermore, Graham is basing her legal argument on appeal on federal case law that was never argued or presented during trial. Graham contends that the

existence of the sewer line itself is a taking because it represents a "permanent physical occupation" under the Fifth Amendment case of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Neither that legal argument nor the supporting authority was ever cited by Graham's counsel in the trial court.

In addition, Graham misstates the current status of inverse condemnation law in South Carolina. Graham maintains that there was some dramatic transformation in the applicable case law in the mid-2000s and that the South Carolina Supreme Court has abandoned the requirement of an "affirmative, positive, and aggressive act" as an element of an inverse condemnation claim. That is simply not correct. Indeed, in 2011, the Supreme Court still described the elements of an inverse condemnation claim as "(1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use." *Carolina Chloride, Inc. v. South Carolina Dept. of Transportation*, 391 S.C. 429, 706 S.E.2d 501, 504 (2011). *Accord, Carolina Convenience Stores, Inc. v. City of Spartanburg*, 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012). Moreover, in *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011), which was another 2011 inverse condemnation case, the Supreme Court still explained that "[t]o 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." 714 S.E.2d at 877.

Therefore, the South Carolina Supreme Court did not abandon the test on which Judge Lee based her ruling and furthermore has not overruled the case law specifically cited by Judge Lee.

Relying on such cases as *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) and *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987), Judge Lee ruled that Vickie Graham failed to establish her claim for inverse condemnation arising from the alleged sewage overflow or leaks on September 5-6, 2008 and thereafter. Judge Lee specifically wrote:

The Plaintiffs have set forth no evidence that the Defendant Town of Latta, or any agent or representative thereof, undertook any affirmative, aggressive or positive act, which resulted in the damages alleged by the Plaintiffs. At most, the Plaintiffs have asserted that the Defendant failed to act with regard to the subject sewer line located on the Plaintiffs' property. As is stated above, mere failures to act are an insufficient basis upon which to maintain a claim for inverse condemnation.

(R. 8). On appeal, because Graham has now changed her theory of liability, she does not challenge Judge Lee's actual rulings in that regard.

Nonetheless, to the extent still germane to Graham's cross-appeal, the cases cited do fully support Judge Lee's analysis and rulings. In *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), this Court affirmed summary judgment for a municipality on an inverse condemnation claim arising out of allegations that the municipality failed to properly design and maintain its

stormwater drainage system which resulted in flooding of the plaintiff's building. Similar to the case at bar, the facts in *Hawkins* show multiple flooding events and include the allegation that the City failed to take the appropriate remedial action to address the increased water flow through the existing drainage pipes. This Court emphasized that "[a]llegations of mere failure to act are insufficient" to establish the requirement of an "affirmative, positive, aggressive act" by the municipality. 594 S.E.2d at 563.

Likewise, in *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987), this Court agreed with the trial court that the plaintiff "failed to allege the damage resulted from an affirmative, aggressive, positive act on the part of the City." 363 S.E.2d at 387. The plaintiff had alleged damage to real and personal property resulting from the backup of sewage from a sanitary sewer line. This Court explained:

The effort of Rolandi to allege a "taking" of her property is similar to the effort of the plaintiff in *Belue*. In that case, the damage to the property arose from a burst water line. The South Carolina Supreme Court rejected the unauthorized taking claim of the plaintiff. We believe this is an analagous situation.

*Id.*²

² The reference in *Rolandi* was to the case of *Belue v. City of Spartanburg*, 276 S.C. 381, 280 S.E.2d 49 (1981), where the South Carolina Supreme Court rejected an inverse condemnation claim for damage resulting from a burst water main.

In sum, the trial court correctly directed a verdict on Vickie Graham's inverse condemnation claim. The alleged failure to act by the Town of Latta was not sufficient to satisfy the requirement that an "affirmative, positive, aggressive act" by the Town resulted in an unconstitutional taking of Graham's real property.³

II. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's trespass claim.

Vickie Graham has also appealed the directed verdict on the trespass cause of action. "Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property." *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 565 (Ct. App. 2004). "To constitute an actionable trespass, ... there must be an affirmative act, 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." *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 802 (Ct. App. 1991).

³ Even if this Court were to consider Vickie Graham's new, unpled theory of liability – that the placement of the sewer line underneath her property in 1924 and its continued use constitutes a "permanent physical occupation" – that claim still fails on two bases. First, as also determined by Judge Lee, the Town enjoys a prescriptive easement that allowed for the presence of the sewer line on the property. Second, Graham never presented any evidence of damages attributable specifically to the alleged presence of the sewer line. As the Supreme Court has held, the measure of damages in an inverse condemnation claim is the diminution in the market value of the property. *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468, 475 (2013). Graham, however, never presented any evidence of any diminution in the market value of her property as a result of the presence of the sewer line.

Judge Lee granted a directed verdict on the basis that "there is not an affirmative act on the part of the Defendant for the same reasons as inverse condemnation." (R. 489). She did not incorporate the element of an "affirmative, positive, and aggressive act," as Graham contends on appeal. But Judge Lee did require proof of an affirmative act, which is an element of a trespass claim. The failure to act is not sufficient to support a trespass claim. That is supported by the *Snow* case, where this Court specifically stated that "[t]respass does not lie for nonfeasance or failure to perform a duty." *Snow*, 409 S.E.2d at 802.

Yet, that is the basis for Graham's trespass claim. She insists that the operation of the municipal sewer system by the Town of Latta is sufficient evidence of a trespass. More specifically, she claims that the failure of the Town to properly maintain the sewer line and its failure to respond to the Grahams' complaints by taking remedial action to the line constitute the "affirmative" act giving rise to the trespass. That argument finds no support in any case law, and not surprisingly, Graham cites no case in support of her position. In actuality, Graham is claiming that the Town's nonfeasance or failure to take appropriate or remedial action constitutes the trespass. However, that is inconsistent with this Court's holding in *Snow* which rejects the notion that nonfeasance or failure to act can support a trespass claim.

Graham's position is likewise contrary to this Court's decision in *Hawkins*, where this Court addressed a similar factual scenario. As Judge Lee did in this case, this Court in *Hawkins* found a similarity in the dispositions of the trespass and inverse condemnation cases:

Hawkins argues the same acts that he claims warrant a finding of inverse condemnation also compel a finding of civil trespass. Hawkins did not offer proof that any action by the City caused the flooding of the Servicemaster property.

Having failed to show any affirmative and intentional act necessary to sustain an action for trespass, we hold the trial court properly granted summary judgment.

Hawkins, 594 S.E.2d at 566.

In sum, Vickie Graham has not shown that Judge Lee committed any reversible error in directing a verdict in the Town's favor on the trespass claim.

III. The Circuit Court correctly ruled that the Town of Latta had a prescriptive easement for the sewer line running beneath Vickie Graham's property.

Finally, Vickie Graham takes issue with Judge Lee's ruling that the Town of Latta had a prescriptive easement for the sewer line running beneath her property. Graham argues that Judge Lee ruled *sua sponte* on the prescriptive easement issue and deprived her of due process by ruling on the issue without allowing her to present evidence on the question. Graham also argues that issues of fact should

have precluded a finding of a prescriptive easement at directed verdict. Graham's position is incorrect on the following bases.

First and foremost, the prescriptive easement issue was not raised *sua sponte* by Judge Lee. The issue was raised and addressed by the Town in its directed verdict argument at the close of the Grahams' case-in-chief related specifically to the trespass claim. (R. 441-443). Graham argued that the placement of the sewer line in 1924 constituted a trespass because the Town had no legal right for its sewer line to cross Graham's property. In response, the Town cited this Court's decision in *Loftis v. South Carolina Electric & Gas Co.*, 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004), and argued the existence of a prescriptive easement. (R. 441-443). Therefore, the issue was not raised *sua sponte*.

Second, at trial, Graham never objected to the trial court's consideration of the prescriptive easement issue. In fact, in her case-in-chief, Graham herself presented evidence related to the elements of a prescriptive easement. Yet, at no time did Graham argue to Judge Lee that the prescriptive easement issue was not properly raised or before the court or that Graham's due process rights were somehow violated by the court's consideration of that issue. Those are all arguments that are improperly raised for the first time on appeal and are therefore not preserved for appellate review. No contemporaneous objection was made at trial, and as a result, Judge Lee did not have the opportunity to consider and rule on

the very procedural objections that Graham now asserts for the first time on appeal. *See, Burke v. AnMed Health*, 393 S.C. 48, 710 S.E.2d 84, 87 (Ct. App. 2011) ("[a] contemporaneous objection is typically required to preserve issues for appellate review").

Third, the evidence presented in the Grahams' case-in-chief fully supports Judge Lee's finding that the Town has a prescriptive easement for its sewer line to cross Graham's property. (R. 489-492). "In order to establish an easement by prescription, a party must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right." *Loftis v. South Carolina Electric & Gas Co.*, 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004). "To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use. *Kelley v. Snyder*, 396 S.C. 564, 722 S.E.2d 813, 817 (Ct. App. 2012). (Emphasis in original). "There is no requirement of exclusivity of use to establish a prescriptive easement." *Id.*

The undisputed facts supporting each of those three elements were presented by the Grahams' witnesses and typically in response to questions posed by the Grahams' counsel. The Grahams' engineering expert, Roger Davis, testified that the sewer line crossing Graham's property "most likely was built in 1924." (R.

341). Based on the records he examined, Davis testified that he saw no evidence that the sewer line had ever been replaced. (R. 342). Thus, the evidence indicated without any contradiction that the line in question was placed in the ground in 1924 and has remained there until the present. That testimony satisfied the first prong. The Grahams' property has been continuously used for the sewer line for a period of at least twenty years.

There was likewise no dispute as to the identity of the thing enjoyed. That "thing" was the sewer line. Graham now argues on appeal that there is a dispute as to the exact location of the sewer line, i.e. whether it travels underneath the house or between the house and the swimming pool. Yet, that disagreement does not impact the finding of a prescriptive easement. The easement exists where the sewer line is located.

Finally, as to the third prong, the evidence demonstrates that the City had used the property under a justifiable claim of right. Vickie Graham testified that she learned from her husband that there was a sewer line across her property, and Claude Graham had learned that from a Town official after they had had some problems pre-dating the September 2008 events. She understood that the Town believed it had an easement for the sewer line. (R. 259). Claude Graham also testified that he was told by a Town official that the sewer line ran across the property, and he was shown where the line exited the ground to cross a ditch at the

rear of the property. (R. 81-82). The existence of the sewer line crossing the Grahams' property was obviously known to the Town.

In short, the evidence that supports the trial court's finding of a prescriptive easement is the Grahams' own testimony and their expert's testimony. The existence of that evidence, in fact, was summarized by the Grahams' counsel during the directed verdict arguments:

One is an affirmative act somewhere in the 1920s when the Town of Latta put the sewer line there. ... [The] Grahams at all times thought that the City had – not at all times, but at all times once they were told by the City that the sewer line ran under their house, they thought the City had an easement to have that sewer line there. And the City represented to them they had an easement for that sewer line.

(R. 446). Thus, the evidence shows that the Town believed it had an easement to locate the sewer line across Graham's property. As part of discovery in this litigation, a written instrument could not be located. (R. 291). Yet, a mistaken belief as to the existent of a written easement does not negate the existence of a justifiable claim of right. To the contrary, as this Court explained in *Loftis*, the claim of right may be based on the "mistaken belief" that a legal right exists to use the property. *Loftis*, 604 S.E.2d at 717.⁴

⁴ In her brief, Graham suggests that there is a factual issue in dispute as to whether the use was adverse. However, as this Court explained in *Kelley*, "one need only establish either a justifiable claim of right *or* adverse and hostile use" but not both. *Kelley*, 722 S.E.2d at 817. (Emphasis in original). The evidence here supports a justifiable claim of right by the Town, and

As the foregoing discussion demonstrates, Judge Lee's finding that the Town of Latta enjoys a prescriptive easement for the sewer line is fully supported by the undisputed evidence in the record. To the extent that Vickie Graham raises procedural objections for the first time on appeal that the prescriptive easement issue was not properly before the trial court or that her due process rights were violated by Judge Lee's adjudication of that issue, those objections are simply not preserved for appellate review. Finally, to the extent that Vickie Graham relies on the construction of the sewer line in 1924 as the "affirmative act" for either her inverse condemnation claim or her trespass claim, those claims are barred by the Town's easement by prescription.

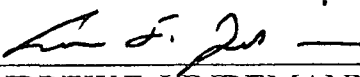
that was the finding by Judge Lee. (R. 490). No finding was made that the use was adverse or hostile, and hence, there is no basis for reversal.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Latta respectfully requests that this Court affirm the oral and written orders of Circuit Court Judge Alison Renee Lee granting the Town's motion for directed verdict on Vickie Graham's inverse condemnation and trespass causes of action.

Respectfully submitted,

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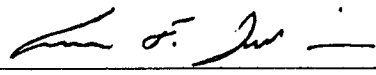
Columbia, South Carolina

May 13, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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May 13, 2014

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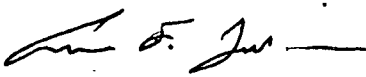
MAY 13 2014

SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Respondent's Brief of Appellant-Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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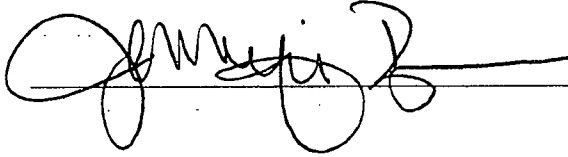
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SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Latta, does hereby certify that service of **Respondent's Brief of Appellant-Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 13th day of May 2014:

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MAY 13 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

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SEP 19 2016

S.C. SUPREME COURT

Claude W. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

And

Vickie B. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

**RESPONDENTS' FINAL BRIEF
OF RESPONDENTS/APPELLANTS**

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MAY 13 2014

SC Court of Appeals

Table of Contents

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
FACTS.....	2
ARGUMENTS	
I. THE RECORD IS DEVOID OF EVIDENCE SUFFICIENT TO SHOW THAT THE TOWN OF LATTA IS PROTECTED FROM LIABILITY FOR ITS OWN NEGLIGENCE BY THE DOCTRINE OF DISCRETIONARY IMMUNITY.....	6
II. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED JOHN BENTON TO TESTIFY AND THE JURY TO CONSIDER HIS TESTIMONY ABOUT THE REPLACEMENT VALUE OF THE GRAHAM RESIDENCE.	9
III. THE TOWN OF LATTA DID NOT PRESERVE ITS OBJECTION TO THE COLLOQUIES ABOUT <i>RES IPSA LOQUITUR</i> OR CLAUDE GRAHAM'S CLAIM FOR DAMAGES TO THE PERSONAL PROPERTY LOCATED IN A STORAGE ROOM...	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Buzhardt v. Cromer</i> , 272 S.C. 159, 162-63, 249 S.E.2d 898, 899-900 (1978)	12
<i>Division of General Services v. Ulmer</i> , 256 S.C. 523, 183 S.E.2d 315 (1971)	10
<i>Faile v. S.C. Dept. of Juvenile Justice</i> , 350 S.C. 315, 330-32, 566 S.E.2d 536, 544 (2002)	8, 9
<i>Foster v. S. C. Dept. of Hwys. & Public Trans.</i> , 306 S.C. 519, 413 S.E.2d 31 (1992)	7
<i>Giannini v. S. Carolina Dep't of Transp.</i> 378 S.C. 573, 580-81, 664 S.E.2d 450, 453-54 (2008)	8
<i>Hill v. Polar Pantries</i> , 219 S.C. 263, 64 S.E.2d 885 (1951)	11
<i>Hutson v. Cummins Carolinas, Inc.</i> , 280 S.C. 552, 557, 314 S.E.2d 19, 22-23 (S.C. Ct. App. 1984)	12
<i>Jensen v. Anderson Cty. Dept. of SS</i> , 304 S.C. 195, 403 S.E.2d 615 (1991)	8
<i>Johnson v. Painter</i> , 307 S.E.2d 860 (S.C. 1983)	11
<i>Niver v. S.C. Dept. of Hwys. & Public Trans.</i> , 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990)	6
<i>Parnell v. Carolina Coca-Cola Bottling Company</i> , 231 S.C. 426, 98 S.E.2d 834 (1957)	11
<i>Pipe v. S.C. Dept. of Trans.</i> , 343 S.C. 224, 232, 540 S.E.2d 87, 91 (2000)	7
<i>Proctor v. Dep't of Health & Envtl. Control</i> , 368 S.C. 279, 321-22, 628 S.E.2d 496, 519 (S.C. Ct. App. 2006)	12

<i>Rowland v. Palmetto Hills</i> , 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992)	10
<i>Rush v. Blanchard</i> , 310 S.C. 375, 426 S.E.2d 802 (1993)	12
<i>Scott v. Fort Roofing & Sheet Metal Works, Inc.</i> , 229 S.C. 449, 385 S.E.2d	
826 (1989).....	10
<i>Steinke v. S.C. Dept. of Labor Licensing & Regulation</i> , 336 S.C. 373, 397-98,	
520 S.E.2d 142, 154 (1999).....	7, 8
<i>Strange v. S.C. Dept. of Hwys. & Public Trans.</i> , 314 S.C. 427, 445 S.E.2d 439 (1994)	7
<i>Summer v. Carpenter</i> , 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997).....	6, 7
<i>Wooten v. SCDOT</i> , 333 S.C. 44, 511 S.E.2d 355 (1999)	8
 Statutes	
§15-78-60(5) S.C. Code Ann.....	6
 Other Authorities	
22 Am. Jur. Second Damages §273.....	10
 Rules	
Rule 40(j).....	1

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TOWN OF LATTA CARRY ITS BURDEN OF PROVING A DEFENSE OF DISCRETIONARY IMMUNITY?**
2. **WAS THE TESTIMONY OF JOHN BENTON, CONTRACTOR, RELEVANT AND MATERIAL?**
3. **WAS THE JURY PROPERLY INSTRUCTED ON THE ESSENTIAL ELEMENTS OF NEGLIGENCE AND THE DAMAGES RECOVERABLE?**

STATEMENT OF THE CASE

These actions were initiated by two Complaints filed on November 19, 2008, subsequently amended by Respondent/Appellant Vickie Graham on February 4, 2009, timely answered on May 11, 2009. On December 15, 2010, the Respondents/Appellants initial counsel, Jim Rushton, was replaced by the undersigned with a Notice of Appearance. On January 26, 2011, Vickie Graham filed a Second Amended Complaint, timely answered on February 3, 2011.

The cases were consolidated, stricken from the trial docket pursuant to Rule 40(j), and restored to the jury roster on June 20, 2012.

The case was tried by a jury beginning October 8, 2012. At the close of the Plaintiffs' case, the Defendant moved for a directed verdict on all causes of action and the court granted that motion with respect to the trespass cause of action and the cause of action for inverse condemnation, while at the same time *sua sponte* declaring that the Defendant had an easement by prescription to operate a sewer line through Mrs.

Graham's property and under her house. The court denied the motion as to the negligence cause of action. At the conclusion of all the evidence, the Plaintiffs moved for a reconsideration of the directed verdict rulings, which motion was denied. On October 11, 2012, the jury returned a verdict in favor of Vickie Graham in the amount of \$225,000 and Claude Graham in the amount of \$100,000.

The Defendant filed post-trial motions on October 22, 2012. On March 8, 2013, the court entered two separate Orders, one memorializing its directed verdict on the inverse condemnation cause of action and the other denying the Appellant/Respondent's Motion for Judgment Notwithstanding The Verdict Or In The Alternative For A New Trial.

Appellant/Respondent filed a Notice of Appeal on April 9, 2013. Respondents/Appellants filed a Notice of Appeal on April 12, 2013.

FACTS

Vickie Graham purchased her home on Rice Street in Latta, South Carolina in the late 1980's, following which she and her husband spent substantial money and time remodeling and renovating a fine home built in the 1960's, but fallen into disrepair, into one of the very finest homes in Latta. (R. pp. 75-77). Subsequently her husband, Claude Graham, discovered that there was a sewer line located on her land that had been there since the mid 1920's. It is the main sewer line for the Town of Latta and runs from a ditch constituting the northern border of her property, under her house, and to Rice Street.

(R. pp. 80-84). There is no written or recorded instrument conveying an easement for that portion of the sewer system which crosses the subject property. (R. pp. 291; 757).

On September 5th and 6th 2008, more than six inches of rain fell on Latta, as Tropical Storm Hanna passed along the coast of the Carolinas. Latta's sewer line leaked and overflowed onto the Graham property and under their house on that night and on multiple subsequent dates. The sewage outflow included all the usual, customary, and expected contents of sewage and was visible on the Graham lawn, pool, garage floor, in the tool shed, and under the home. The Grahams spent thousands of dollars repairing the damage from the September 5/6 2008 rain event. On multiple occasions thereafter, however, various heavy rains occurred and the sewage leakage and outflow repeated itself. (R. pp. 85-99; 186-190). The Grahams' doctor not only treated them for maladies resulting from their exposure to the sewage and mold, etc. arising from the overflows but also recommended they not go back into the house. (R. pp. 294-296). The house was contaminated. (R. pp. 745-749). It made no sense to continue repairing the home so long as the sewer line was going to continue to contaminate. (R. pp. 108-109; 111; 113-116; 136-137; 266; 268-269).

The Town's main sewer line, running under the Graham's house, was put there in the 1920's, probably 1924 and most likely made of terra cotta pipe. The joints in terra cotta pipelines degrade so their typical life span is 50 years. (R. pp. 341-342).

The Town of Latta, through its system operator and its mayor, was fully informed of the September 5/6 and subsequent events. (R. pp. 92-96). The Town of Latta is responsible for the maintenance and repair of its waste water system and chose to

continue to run its sewage through the line under the Graham house. (R. pp. 347-348; 230). DHEC asked the Town of Latta to camera the line running under the Graham house and Latta engaged a contractor for that purpose. (R. pp. 610-611). To camera a line employs an instrument that has a camera on it "that is run into sewer/water lines to look to see what's inside. ... if you want to see actually where it goes or if there is a crack or if there's problems in there or what's in it you need to see. You really can't – I mean you can't crawl in there. And that's a good way to look inside lines." (R. pp. 608). Latta's contractor came up behind the house to camera the line and in the process of doing so encountered an obstruction; they could not get the camera over the obstruction or to go any further forward so they were not able to fully camera the Town's main sewer line running under the Graham house. An obstruction can be caused by many things, for example solids, a rock, a root, anything *inside the line* itself. The obstruction could be "a lot of things, such as one root going through the middle of the pipe so that the camera cannot get over it." (R. pp. 612-613; 615).

On at least one, and more likely than not several, occasion(s) the Town shut down its main sewer line. When shut down, obviously, no sewage passed through the line under the Grahams' house. Each time the Town of Latta restarted its sewage system, however, it chose and affirmatively acted to begin draining new sewage through and on the Grahams' property, under their house. The Town chose to continue pumping its sewage through the Grahams' property, to undertake no repair of its line, and not to reroute its line. With full knowledge of the consequences to the Grahams' property and to them, the Town, knowing it had a duty to repair the line, instead chose to remove its

own instrumentalities which had stopped the sewage flowing, thus to unplug the line. (R. pp. 585-587).

The Town of Latta did not produce any map of its main sewer line, but instead its engineer testified that it runs between the Grahams' house and their swimming pool, not under their house. Claude Graham testified that it runs under the house. (R. pp. 549-550; 584; 590-596; 854). If the jury accepted Mr. Graham's testimony, it must run under the house. (R. p. 584).

The Town of Latta engages a consulting engineer on occasion, Michael Hanna. He did not consult with regard to the Graham house at the time of the 2008-2011 events, but not until he consulted with its attorneys in preparation for the litigation. (R. pp. 523; 526; 532; 555-560). Although Hanna did testify about options that had been available to the rehabilitation of an existing sewer line in Bennettsville, South Carolina, and about the options available to an engineer (R. p. 555), the only matter he considered with respect to Latta and the Graham house (after having consulted with respect to the litigation) was relocating the line and he "drew up a couple of scenarios, but there were no good alternatives there." (R. pp. 560-561). Mr. Hanna did not communicate any options to the Town for its consideration. (R. pp. 518-587). The only official of the Town of Latta who testified was its Assistant Supervisor, Willie Hooks, who has, since September 2007, been in charge of its sewer system. He did look at the Graham house during the relevant times, and did testing, but he *never* received **any** recommendations from the consulting engineer, considered among the three alternatives described in the Town of Latta's Brief at page 10 or *chose* from among them. (R. pp. 500-517).

The Grahams suffered medical injuries but mitigated them by moving from the house so long as the sewer line runs under it (which it does still) and renting a substitute home. The prospect of encountering additional sickness, their fear, and the emotional distress of the sewage and its odor further motivated the unlivability of the home in its current condition. (R. pp. 108-111; 269-271). The cost of building that same house on a different piece of property, one without a sewer line running under it, would be approximately \$478,280. (R. pp. 398-399).

ARGUMENTS

I. THE RECORD IS DEVOID OF EVIDENCE SUFFICIENT TO SHOW THAT THE TOWN OF LATTA IS PROTECTED FROM LIABILITY FOR ITS OWN NEGLIGENCE BY THE DOCTRINE OF DISCRETIONARY IMMUNITY.

The Town of Latta asserts that it is immune pursuant to §15-78-60(5) S.C. Code Ann. and is not liable for performing or failing to perform discretionary acts. The Town bears the burden of establishing discretionary immunity as an affirmative defense. *Niver v. S.C. Dept. of Hwys. & Public Trans.*, 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990); *Summer v. Carpenter*, 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997).

Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision, it is contingent on proof that the government entity, faced with alternatives, *actually weighed* competing considerations and made a *conscious* choice. Further, the Town must establish, in weighing the competing considerations and alternatives, that it “utilized accepted professional standards appropriate to resolve the

issue.” *Summer v. Carpenter*, *supra*, citing *Strange v. S.C. Dept. of Hwys. & Public Trans.*, 314 S.C. 427, 445 S.E.2d 439 (1994); *Foster v. S. C. Dept. of Hwys. & Public Trans.*, 306 S.C. 519, 413 S.E.2d 31 (1992); *Steinke v. S.C. Dept. of Labor Licensing & Regulation*, 336 S.C. 373, 397-98, 520 S.E.2d 142, 154 (1999).

There is evidence in the record from the Plaintiffs’ engineer and the Town’s engineer that alternatives for correcting the hazardous condition *existed*: patch, add a sleeve inside the pipe, or move the pipe. There is no evidence, however, that consulting engineer Mike Hanna *presented* these alternatives to the Town. The alternatives not having been presented to the Town, there is likewise no evidence that the Town *considered* the alternatives. To the extent that Mike Hanna considered anything, after the litigation he considered alternative routes for a relocation but rejected them without Latta’s involvement. (R. pp. 560-561). Mr. Hanna did not testify that he had considered patching or sleeving the pipe *at the time of or in connection with* the Graham events.

Perhaps there was evidence from which a jury could infer that these three viable alternatives existed using accepted professional standards, but the jury obviously rejected that inference. The standard to prove discretionary immunity is inherently factual. *Pipe v. S.C. Dept. of Trans.*, 343 S.C. 224, 232, 540 S.E.2d 87, 91 (2000).

The Town argues, after verdict and now here, that there were instead four (4) alternatives and its lawyers hypothesize that the Town *chose* a fourth one: do nothing. The Town’s consulting engineer did not testify that doing nothing was an alternative, much less that it was an alternative supported by “accepted professional standards.” The Plaintiffs’ expert witness engineer did not testify that doing nothing was an alternative

supported by accepted professional standards, in fact he testified that the danger to the Grahams and their property might get worse if not remedied and that the Town had been placed on notice of the problem at the Grahams' residence by the South Carolina Department of Health and Environmental Control (DHEC). Whether the Town carried its burden of proving that it exercised one of the accepted professional options available to fix the sewage overflow at the Grahams' residence was inherently factual and the jury rejected that defense. See *Steinke v. S.C. Dept. of Labor Licensing & Regulation*, *supra*.

In determining whether the Town's action was discretionary, it is helpful to determine whether its *duty* was ministerial or discretionary. *Jensen v. Anderson Cty. Dept. of SS*, 304 S.C. 195, 403 S.E.2d 615 (1991). A duty is ministerial "when it's absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Id* at 203, 403 S.E.2d at 619. This is not a claim of defective design or construction, rather one of failure to take corrective action after notice of a defect. Latta had a duty to conduct a thorough investigation and utilize accepted professional standards before deciding what to do. Its turning of a blind eye arose from its failure to complete its investigation, a ministerial, administrative function, rather than a weighing of the competing considerations. *Wooten v. SCDOT*, 333 S.C. 44, 511 S.E.2d 355 (1999); *Giannini v. S. Carolina Dep't of Transp.* 378 S.C. 573, 580-81, 664 S.E.2d 450, 453-54 (2008). See, for similar reasoning, *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 330-32, 566 S.E.2d 536, 544 (2002), in reliance upon the Supreme Court's earlier holding in *Jensen*, *supra*.

From the evidence presented, the jury could have concluded that the Town's failure to act, in the face of an acknowledged duty with a clear and present danger, amounted to gross negligence. The performance of discretionary duties does not give rise to immunity if the governmental entity acted in a grossly negligent manner. "Gross negligence (includes) the intentional, conscious failure to do something which is incumbent upon on to do... ." The Supreme Court has also defined it as a fact-specific, relative term that "means the absence of care that is necessary under the circumstances." *Faile* at 332, 566 S.E.2d 544 (citations omitted).

II. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED JOHN BENTON TO TESTIFY AND THE JURY TO CONSIDER HIS TESTIMONY ABOUT THE REPLACEMENT VALUE OF THE GRAHAM RESIDENCE.

The Appellant-Respondent's Brief, at III, asserts that John Benton's testimony about the cost of rebuilding the Graham house on a different piece of property should not have been allowed, primarily asserting that there was no evidence from which the jury could have concluded that the house needed rebuilding.

There is ample evidence from which the jury could have concluded that it was fruitless for the Grahams to repair their house at its current location, with the Town's leaking sewage running under it, but should instead move. The Grahams presented evidence from John Benton solely on the issue of what it would cost to recreate the made-worthless house on a different piece of land.

Dr. Culpepper testified that the Grahams cannot live in the house so long as the sewage line is continuing to contaminate. (R. p. 296). Claude and Vickie Graham

testified that they cleaned up, at considerable expense that would otherwise have been the Town's, after the events of September 5-6, 2008 but that since the same feculence manifested itself within a week that it was fruitless to attempt further repairs until *after* the Town had lived up to its obligation to maintain the sewer line. (R. pp. 136, l. 20 – 137, l. 5; 266, l. 4 – 269, l. 16; 745-749).

It is proper for a jury to consider a competent estimate of a cost of repair to a building. The owner of a building has the right to consider whether the building is reparable from a practical standpoint, as well as economically feasible, whether to reconstruct, and the issue of whether there is a total loss or partial loss of the building is dependent upon the factual presentation. See, *Scott v. Fort Roofing & Sheet Metal Works, Inc.*, 229 S.C. 449, 385 S.E.2d 826 (1989); *Division of General Services v. Ulmer*, 256 S.C. 523, 183 S.E.2d 315 (1971); *Rowland v. Palmetto Hills*, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992); 22 Am. Jur. Second Damages §273. Citing *Rowland v. Palmetto Hills*, and *Scott v. Fort Roofing & Sheet Metal Works, Inc.*, *supra*, the trial court correctly found

(T)here was sufficient evidence for the jury to infer that the Plaintiffs' house had become a total loss. Ms. Graham testified that she was unable to enter the house due to health concerns. Thomas Manning Robertson presented evidence that testing inside the Plaintiffs' house indicated that a quantity of mold was present. Dr. David Culpepper presented evidence that Plaintiffs had respiratory problems that may have been related to the presence of mold in their house after the flooding events. Therefore, there was evidence for the jury to infer that the house needed to be rebuilt, and because Plaintiffs only asked for damages in the form of the building itself, the correct measure of damages was used.

(R. p. 16).

While the Benton testimony is relevant, material, and appropriate, it is not necessary to justify the jury's award of \$225,000 in damages to Mrs. Graham. She was a retired librarian, living in the town where she had spent, after a transient childhood, her entire adult life, in her dream home where she and her husband intended to stay for the rest of their lives. (R. pp. 255; 116; 76-78; 258; 270-271; 719-730; 733; 734-742). Vickie Graham became ill on several occasions with respiratory distress, experienced the foul odor on the occasions when she did return to her house, has not been able to be inside her dream home from 2009 to now, and has experienced and continues to experience fear. (R. pp. 108-111; 114; 119; 263-266; 268-271; 294-296). Pain and suffering, mental anguish, emotional distress, and loss of enjoyment of life are elements of damages in a negligence action. A reasonable jury, assessing the credibility, demeanor, anxiety, emotional distress, and loss of enjoyment of Mrs. Graham's life could have concluded that the Town's negligence had damaged her by \$225,000 even if no weight were given to Mr. Benton's testimony. The weight to be given testimony is for the jury. *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); *Johnson v. Painter*, 307 S.E.2d 860 (S.C. 1983). It is implicit in its verdict that the jury was persuaded by Mrs. Graham's evidence. A court is not at liberty to reverse the jury's verdict unless the *only* reasonable inferences from the evidence are contrary to the factual findings implicit in the verdict. *Parnell v. Carolina Coca-Cola Bottling Company*, 231 S.C. 426, 98 S.E.2d 834 (1957).

The 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 *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 557, 314 S.E.2d 19, 22-23 (S.C. Ct. App. 1984). The jury's determination of damages is entitled to substantial deference. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 321-22, 628 S.E.2d 496, 519 (S.C. Ct. App. 2006). In determining this issue, the evidence and all reasonable inferences arising from it must be viewed in the light most favorable to the Respondent-Appellant. Since the amount of the verdict falls within the range of damages reflected in the testimony, the trial court was correct when it held that the jury's finding should not be disturbed on the ground of excessiveness. *Buzhardt v. Cromer*, 272 S.C. 159, 162-63, 249 S.E.2d 898, 899-900 (1978). Since there was evidence to sustain the jury's finding as to the amount of damages, the judgment should be sustained.

III. THE TOWN OF LATTA DID NOT PRESERVE ITS OBJECTION TO THE COLLOQUIES ABOUT *RES IPSA LOQUITUR* OR CLAUDE GRAHAM'S CLAIM FOR DAMAGES TO THE PERSONAL PROPERTY LOCATED IN A STORAGE ROOM.

RES IPSA LOQUITUR

The Town of Latta seeks reversal because the Plaintiffs "rely on the doctrine of *res ipsa loquitur* as a substitute for proof of any actual defect in the sewer line." (Brief p. 19). In fact the Plaintiffs have placed no such reliance.

The doctrine of *res ipsa loquitur* was mentioned 14 times in this trial, never once in the presence in the jury, (R. pp. 425; 440; 453; 473; 477; 495; 636; 641; 645; 648; 674). The first 4, and 5 of the remaining 9, mentions of the doctrine were initiated by the Town of Latta's attorneys during colloquies among the attorneys and the court. The

Plaintiffs' attorney mentioned the doctrine twice, both times stating that the Plaintiffs were not relying upon the doctrine. (R. p. 473, "It's not *res ipsa*, your Honor,"; R. p. 641, "... we have not pled that we are *res ipsa loquitur*. I know that South Carolina law does not recognize the doctrine..."). In response to a remark by the Plaintiffs' attorney, generated by his mishearing, the court made clear that it was "not charging a *res ipsa*. ... the language that will be charged would be the mere fact that problems occurred after an incident is not sufficient by itself to show that the incident was caused by the physical problems. ... The plaintiff must establish a natural and obvious relationship between the incident and the physical problems in that the injuries resulted from the incident." (R. pp. 674-675).

Roger Davis, qualified as an expert in mechanical engineering and environmental engineering practicing in the field of waste disposal, testified that, based on the age of the pipe, prior events of leakage, DHEC Investigative Reports, and the foreseeability of continuing deterioration, the Town knew or should have known that it needed to take corrective action with respect to its main sewer line or similar events would recur or get worse. (R. pp. 339-349). The Town knew that it was its responsibility to maintain the main sewer line. (R. pp. 231; 95).

As the court stated during the charge conference, it did not charge *res ipsa loquitur* to the jury. Neither the Plaintiffs nor the Defendant made a charge request relating to that doctrine. The court, of course, described to the jury the Plaintiffs' burden of proof and the 4 essential elements subject to that burden: duty, breach, damages, and proximate cause. (R. pp. 692-695). When the court invited exception to be taken to the

charge, the defense attorney requested that mitigation of damages be charged, but “otherwise we don’t take any exception.” (R. p. 705). The Defendant’s post-trial motion for judgment notwithstanding the verdict or in the alternative for a new trial did not mention the court’s giving, or failing to give, an instruction relating to *res ipsa loquitur*. (R. p. 52-61).

The Shed

The Town of Latta argues that there “no evidence by which the jury could have even inferred that the damage to the personal property (outside the house) resulted from any events occurring after September 5-6, 2008.” (Brief, p. 26). In its consideration of the Town of Latta’s post-trial motions, the trial judge addressed this issue:

Evidence was presented at trial that Mr. Graham’s claim for damages to personal property may be related to the flooding event on September 13, 2008. The personal property included hand tools, golf equipment, two lawn mowers, and other equipment stored in a shed on the Plaintiffs property. The shed containing the personal property was not evaluated for damage until after the September 13, 2008 flooding event and subsequent flooding events. Therefore, there is evidence to support that the damage to personal property may not be solely related to the September 5-6 flooding events.

(R. p. 14).

The evidence presented at trial to which the court was referring may be found at R. pp. 120-123, 125-127, and 114. The trial court’s jury instruction on damages of particular pertinence to this issue is:

For personal property any damages that you would award for personal property would include the difference between the value of the property before the damage and the value of the property after the damage.

(R. pp. 699, ll. 4-8).

To that charge, the attorney for the Town took no exception.

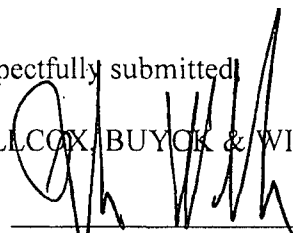
It is not necessary, however, for the personal property to have been a component part of the jury's \$100,000 award to Claude Graham. He had testified to having incurred medical expenses, and to facts indicating he had undergone pain, suffering, inconvenience, loss of enjoyment of life, and also to having incurred a rental obligation of over \$70,000 which the jury could reasonably conclude was an obligation which would continue for the foreseeable future. When a jury's verdict can be sustained as reasonable even if disputed items are disregarded, the trial court is correct in sustaining that verdict. *infra*, at pages 10-11 of this brief.

CONCLUSION

The Town of Latta exercised no immunized discretion in connection with the main sewer line running under the Graham's house. The jury was properly instructed, and there was ample evidence to support its findings of negligence and the damages it awarded to Mr. and Mrs. Graham. The Appellant's-Respondent's appeal from the judgment below should be denied.

Respectfully submitted,

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May 12, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

Claude W. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

AND

Vickie B. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

**PROOF OF SERVICE AND
211(b) CERTIFICATION**

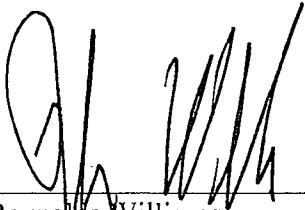
I certify that I have served the **Respondents' Final Brief of Respondents/Appellants** on the *Appellant/Respondent*, through its attorney of record, by depositing three (3) copies of same in the United States Mail, postage prepaid, to:

Andrew F. Lindemann
Michael B. Wren
Daniel C. Plyler
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MAY 13 2014
SC Court of Appeals

I do also certify that the Respondents' Final Brief of Respondents/Appellants complies with Rule 211(b) SCACR.

May 12, 2014



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM DILLON COUNTY
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Town of Latta, South Carolina, ... Appellant-Respondent.

**REPLY BRIEF
OF APPELLANT-RESPONDENT**

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TABLE OF CONTENTS

Table of Authorities	ii
Arguments	1
I. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict on the basis of discretionary immunity.	1
II. The Circuit Court erred in denying 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.	6
III. The Circuit Court erred in denying 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. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.	8
IV. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.	12
Conclusion	15

TABLE OF AUTHORITIES

Cases

<i>Arcadian Shores Single Family Homeowners Association, Inc.</i> <i>v. Cromer</i> , 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007).	2
<i>Hutson v. Cummins Carolinas, Inc.</i> , 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).	11
<i>Jensen v. Anderson County Department. of Social Services</i> , 304 S.C. 195, 403 S.E.2d 615 (1991).	3, 4
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).	5
<i>Long v. Seabrook</i> , 260 S.C. 562, 197 S.E.2d 659 (1979).	3
<i>South Carolina Federal Credit Union v. Higgins</i> , 394 S.C. 189, 714 S.E.2d 550 (2011).	10
<i>Steinke v. South Carolina Department. of Labor, Licensing</i> <i>and Regulation</i> , 336 S.C. 373, 520 S.E.2d 142 (1999).	5

Statutes and Rules

S.C. Code Ann. § 15-78-60.	5
S.C. Code Ann. § 15-78-60(5).	5
S.C. Code Ann. § 15-78-60(21).	5

ARGUMENTS

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

The Appellant-Respondent Town of Latta contends that Circuit Court Judge Alison Renee Lee erred in denying the Town's directed verdict and JNOV motions on the basis of discretionary immunity. In reply, the Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") offer several arguments, each of which lacks 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 do not dispute that Mike Hanna, acting in his capacity as the Town engineer who investigated the Grahams' complaint, considered and weighed those options. Yet, they contend that the governing authority for the Town was required to consider those options. The Grahams have not shown, however, that this was a legislative issue to be decided by Town Council. The defense of discretionary immunity does not require the exercise of discretion by Town Council; the exercise of discretion by the Town engineer is sufficient to trigger the immunity. In fact, many decisions regarding

repair of roads, public utilities and the like are executive decisions, not legislative ones, and many such decisions are made by engineers. By way of example, decisions regarding state road designs or repairs are not decisions made by the General Assembly.

Nonetheless, the Grahams' argument 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

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

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 opening brief, 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.

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 the Supreme 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 brief, the Grahams write: "Latta had a duty to conduct a thorough investigation and utilize accepted professional standards before deciding what to do." *See*, Grahams' Respondent's Brief, 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 the Supreme 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, as a new argument presented for the first time on appeal, 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' Respondent's Brief, 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 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 has been met as a matter of law. The Town is entitled to discretionary immunity for its decision not to perform any remedial work to the sewer line across the Grahams' property. The Circuit Court therefore erred in failing to grant a directed verdict or JNOV on the remaining negligence claims.

² The Supreme 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), the Supreme 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. In *Jones*, the Supreme 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 Circuit Court erred in denying 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.

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. The Grahams relied on the doctrine of *res ipsa loquitur*, despite their protestations to the contrary, because they quite frankly relied on the presence of sewage to claim a breach of duty. Despite the concession of their own expert that the line could have been tested, the Grahams did not test the line to establish that it was leaking. 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.

As the Town has explained, this case represents a classic application of the doctrine of *res ipsa loquitur* where the proof of injury is used to provide "proof" of a breach of care. Here, the Grahams have not established any breach of care by the Town that proximately resulted in sewage underneath their house at any point after September 6, 2008. "Proof" based on the doctrine of *res ipsa loquitur* must be rejected. Consequently, the Grahams failed to prove an issue with the sewer line underneath or near their house 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.³

³ Strangely, the Grahams try to change the issue and focus on the jury charge. The Town does not challenge the charge. Judge Lee did not charge the doctrine of *res ipsa loquitur* nor could she. Instead of challenging the charge, the Town challenges the sufficiency of the evidence. The lack of proof of a leaking pipe required the Grahams to rely on the injury – Claude Graham's self-serving testimony of sewage in the crawl space – as a substitute for actual evidence that the sewer pipe is leaking. Evidence of an injury, however, is not evidence of a breach of duty.

III. The Circuit Court erred in denying 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. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the testimony offered by John Benton as to the cost to totally rebuild or replace the house in the absence of any evidence that the house was permanently and totally damaged and/or could not be repaired.

The Town of Latta further contends on appeal that Judge Lee 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, Judge Lee 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. Further, Judge Lee erred in allowing the jury to consider evidence of the wrong measure of damages for either temporary or permanent injury to real property.

In response, the Grahams make two arguments. First, 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 primarily 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 mention Judge Lee's order on post-trial motions where she concluded that the "total loss" of the house could be inferred from Dr. Culpeper's testimony that the Grahams had respiratory problems that "may have" been related to the presence of mold after the flooding events. (R. 16). Judge Lee also cited to the testimony of Thomas Robertson, a home inspector who was never qualified as an expert. Robertson tested for mold and simply offered a laboratory report suggesting that mold was present in the residence. Robertson, however, never testified that the mold could not be remediated or that the house was a total loss or needed to be razed simply because of the presence of the mold. Frankly, it would be improper for a jury to infer that the presence of mold cannot be remediated and that a house must be razed merely due to the presence of mold. Inferences must be reasonable,⁴ and quite frankly, that is *not* a reasonable

⁴ The applicable standard for directed verdict or JNOV motions requires consideration only of "reasonable inferences." The Supreme Court has explained that "[w]hen considering a directed verdict motion, the trial court should view the evidence and all *reasonable*

inference. Thus, in order for the Grahams to have met their burden of proof, they must have presented expert testimony that the mold could not be remediated and that the residence was a total loss. No such testimony is in this record.

The Grahams essentially concede that point. 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.⁵ 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).⁶ Dr. Culpeper testified that he had not seen Vickie Graham since 2009, except for an unrelated matter. (R. 300).⁷

inferences in the light most favorable to the non-moving party." *South Carolina Federal Credit Union v. Higgins*, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). (Emphasis added).

⁵ The Grahams do not use the term "harmless error," but that is the gist of their argument.

⁶ 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).

⁷ The last office visit that was not crossed through on Plaintiffs' Exhibit 13 was dated January 19, 2009. (R. 743).

Vickie Graham herself offered only brief testimony of health issues. (R. 265-267). She mentioned having to be hospitalized for 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' Respondents' Brief, p. 11. 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 this Court or the Supreme 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 holding by adding words to alter the court's meaning. That should be soundly rejected, and this Court is urged to reverse the lower court's denial of the directed verdict and JNOV motions or, at the very least, grant a new trial on liability and damages.

IV. The Circuit Court erred in denying the Town of Latta's motion for judgment notwithstanding the verdict and motions for directed verdict with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town of Latta should be entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

The Town of Latta has also argued that Judge Lee erred in denying a directed verdict and later a JNOV with respect to Claude Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town seeks a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property located in the storage room as an element of damages.

Specifically, the Town pointed out that Claude Graham testified to the loss of hand tools, golf equipment, two lawnmowers, and other equipment that were located in a storage room on the property. (R. 120-121). Yet, he never testified that those items of personal property were damaged subsequent to the flooding of the yard that occurred on September 5-6, 2008. Moreover, he never offered testimony that those items were undamaged in the September 5-6, 2008 event.⁸

In response, the Grahams baldly assert that evidence exists and then offer a string cite to the transcript without further discussion as to what the cited pages of testimony provide. The eight transcript pages cited (R. 114, 120-123, and 125-127), however, do not support any claim that the damage to the personal property resulted from any events occurring after September 5-6, 2008.⁹

The Grahams then make reference to a jury charge on evaluating the loss of personal property. The significance of that reference is unclear. The Town has not appealed the issuance of that charge.

Finally, the Grahams make the same "harmless error" argument as already discussed with regard to the Vickie Graham verdict. They argue that the

⁸ It is important to recall that Judge Lee granted a directed verdict on the Grahams' negligence claims related to the events of September 5-6, 2008. That ruling is now the law of the case. Therefore, the Town cannot be liable for any damages to real or personal property occurring on those dates.

⁹ That testimony includes a reference to photographs that were taken on September 6, 2008, but that testimony does not discuss the property in the storage room. (R. 126-127).

\$100,000.00 verdict may be upheld because of other elements of damages including bodily injury damages including loss of enjoyment of life, an element that was never charged to the jury.¹⁰ The "harmless error" argument is unsupported by any case law cited by the Grahams and does not justify the affirmance of a verdict based on a damages claim that had no evidentiary support.

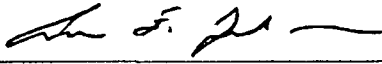
¹⁰ Claude Graham's sole medical bill in evidence shows charges of \$350.00 but two of the charges are crossed through. The charges which are not crossed through total \$201.00. (R. 731).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Latta respectfully renews its request that this Court reverse the orders of Circuit Court Judge Alison Renee Lee denying the Town's motion for JNOV and motions for directed verdict on the negligence cause of action. In the alternative, the Town of Latta requests that the Court remand for a new trial absolute on the negligence claims.

Respectfully submitted,

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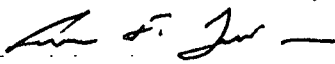
Columbia, South Carolina

May 13, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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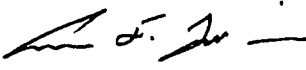
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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Reply Brief of Appellant-Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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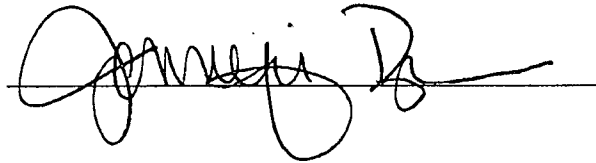
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SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Latta, does hereby certify that service of **Reply Brief of Appellant-Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 13th day of May 2014:

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.

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