THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

APPELLATE CASE NO.: 2016-001773

West/Hobby, LLC . . . . .Respondent,

v.

County of Newberry . . . . .Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR WHEN IT FOUND AND CONCLUDED THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE 3-YEAR STATUTE OF LIMITATIONS?

II. DID THE TRIAL COURT ERR WHEN IT FOUND AND CONCLUDED THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF ASSUMPTION OF THE RISK?

III. DID THE TRIAL COURT ERR WHEN IT FOUND AND CONCLUDED THAT THE COUNTY COMMITTED AN AFFIRMATIVE, AGGRESSIVE AND POSITIVE ACT SUFFICIENT TO SUPPORT A CLAIM FOR INVERSE CONDEMNATION WHEN IT PLACED A CLAY CAP ON THE CLOSED LANDFILL IN 1994?

STATEMENT OF FACTS

This is an inverse condemnation case against Newberry County ("the County") for a physical taking of real property owned by the Respondent. The County owned and operated a solid waste landfill from 1970 until December 1993 on Cockrell Road near the intersection of Interstate I-26 and Highway 219 in Newberry County. (R. pp. 676-679.) In December 2000, former owners of the Respondent company[1] bought 40.7 acres across Cockrell Road from the closed landfill ("the Property") for investment purposes. They paid $290,000 for the Property. (R. p. 90, lines 5-15; R. p. 300; R. pp. 303-312.)

On January 19, 2011, Respondent signed a contract to sell the Property to Kiswire, Inc. for $520,000, or a profit of $230,000. (R. p. 92, line 24 - p. 93, line 14; R. pp. 383-391.) An examination of the Property for Kiswire by S&ME in March 2011 revealed the presence of volatile organic compounds ("VOC's") in landfill gas on the Property. (R. p. 93, line 15 - p. 94, line 14; R. pp. 392-465.) The VOC's detected included the carcinogens benzene, tetrachlorothene and trichlorothene. *Id.* The landfill gas had migrated laterally from the closed landfill over Cockrell Road to West/Hobby's Property because the County had installed a clay cap on top of the closed landfill. (R. p. 167, lines 20-23; R. p. 177, line 14 - p. 178, line 22.) The clay cap, by design, prevented landfill gas from migrating vertically directly into the atmosphere and caused it instead to migrate horizontally to Respondent's Property. (R. pp. 896-927; R. p. 164, line 15 - p. 178, line 22; R. p. 210, lines 19-25.) As a result, the clay cap, which performed as intended, resulted in landfill gas contaminating the Property. *Id.*

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[1] Billye West and Ray Hobby first purchased the property together, then transferred it into the Respondent company in 2002. At the time of trial, West was the sole owner of the company.

Kiswire terminated its contract to buy the Property when it learned of the presence of carcinogens on the Property. (R. p. 133, line 14 - p. 136, line 15; R. p. 431.) Because of the cancelled contract, the Respondent lost its profit on the sale to Kiswire of $230,000. (R. p. 99, line 11 - p. 100, line 1.) Respondent contacted the County Administrator and the Chairman of County Council to get the County to do something to stop the contamination problem or to buy the Property. (R. p. 282, line 23 - p. 285, line 5.) The County replied that they were "not interested." *Id.* This suit followed.

A timeline provides good context for the facts of the case:

April 1, 1994:	Newberry County ("County") stops accepting waste at the solid waste landfill on Cockrell Road. (R. p. 299.)
August 19, 1996:	Methane Gas Monitoring Plan submitted to DHEC by the County's engineer, C&L Consultants, Inc. (R. pp. 468-478.)
January 10, 1997:	C&L conducts interim methane gas monitoring on landfill property. (R. pp. 479-485.)
April 25, 1997:	C&L completes installation of seven (7) gas monitoring wells on the landfill property. (R. p. 486.)
May 8, 1997:	1st quarterly gas monitoring tests conducted on landfill property; all methane readings are below the lower explosive limit of 5% ("LEL"). (R. pp. 487-499.)
March 17, 1998:	C&L conducts 1st Qtr 1998 methane gas monitoring on landfill property; all readings are below LEL.
November 1, 2000:	Messrs. West & Hobby buy Property from Cockrells. (R. pp. 300-302.)
June 18, 2002:	Messrs. West & Hobby convey Property to West/Hobby, LLC. (R. pp. 303-312.)
December 4, 2003:	Methane readings exceed the LEL at all 5 monitoring points on the landfill property. (R. p. 643.)

September 2005:	County's new engineers, B.P. Barber, propose a Methane Remediation Plan for the closed landfill. (R. pp. 313-340.) No notice of plan provided to Respondent.
2005:	Methane readings above the LEL persist at all 5 monitoring points on the landfill property; DHEC approves Methane Remediation Plan. (R. p. 643.) No notice of either provided to Respondent.
February 6, 2006:	County writes West/Hobby asking for permission to "perform subsurface testing" on Property. (R. pp. 341-342.) No notice provided to Respondent of landfill gas in excess of LEL.
March 23-24, 2006:	B.P. Barber conducts tests on West/Hobby Property and another adjacent property revealing methane readings above the LEL at all test holes on the two adjacent properties. (R. p. 354.) No notice of conditions provided to West/Hobby.
May 24, 2006:	B.P. Barber proposes installation of methane remediation trench to SCDHEC. (R. pp. 363-364.)
May 30, 2006:	County writes West/Hobby asking for permission to install two (2) monitoring probes on Respondent's Property. (R. p. 365-366.) County does not disclose to Respondent presence of landfill gas in excess of LEL on Property, and County never installs monitoring probes. (R. p. 182, lines 2-10.)
Summer 2006:	Passive remediation trench installed on Southeast border of landfill (along property line shared with another landowner, not Respondent)
January 24, 2008:	Terry (new County engineer) recommends installation of passive methane gas vents. (R. p. 684.) No notice provided to Respondent of landfill gas in excess of LEL.
February 26, 2008:	DHEC approves County's plan to install 32 passive methane gas vents to facilitate discharge of built-up landfill gas. (R. pp. 369-370.) No notice of this plan is provided to Respondent.
June 2009:	Terry issues Revised Methane Corrective Action Plan for installation of 6 passive methane gas vents rather than 32. (R. p. 378.) No notice of this revised plan is provided to Respondent.
December 2010:	County installs 6 passive gas vents on the landfill. (R. p. 729.)
January 19, 2011:	Kiswire signs contract to buy Property from West/Hobby for $520,000. (R. pp. 383-391.)

March 7, 2011:	S&ME prepares Phase I Environmental Site Assessment for Kiswire. (R. pp. 392-430.)
March 21-22, 2011:	S&ME conducts limited soil gas assessment for Kiswire reporting that "landfill gas has impacted the site interior beyond the property boundary." (R. pp. 438, 441.)
April 14, 2011:	Having received a preliminary report from S&ME (R. p. 135, line 20 – p. 136, line 8), Kiswire meets with West/Hobby and terminates contract (R. p. 93, line 24 – p. 95, line 15; R. p. 431).
April 29, 2011:	S&ME issues final Limited Soil Gas Assessment Report. (R. pp. 432-465.)
January 26, 2012:	West/Hobby files suit against Newberry County. (R. pp. 27-42.)
May 8, 2015:	County completes active gas extraction system on landfill property. (R. pp. 943-946, 952.)
August 7, 2015:	Rogers & Callcott (new County engineers) report that the active gas extraction system has had a significant impact on all monitoring points on the landfill property but one, where methane concentrations have decreased from exceeding the LEL to trace or undetectable levels. (R. p. 954.)

The issue of whether a taking had occurred was tried by the Court non-jury on December 14-15, 2015. On February 25, 2016, the trial court issued Findings of Fact and Conclusions of Law finding that a taking had occurred. The County filed a Motion to Alter or Amend which was heard by the Court and denied. This Appeal followed.

STANDARD OF REVIEW

"An action brought by a property owner against a [governmental entity] for the taking of the owner's property without just compensation is an action at law." *Frampton v. South Carolina Dept. of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 273 (Ct. App.2013). The determination of whether a taking has occurred is "a question of law that is based on factual determinations."

Columbia Venture, LLC v. Richland Cnty., 413 S.C. 423, 442, 776 S.E.2d 900, 910 (2015) (internal quotation omitted).

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.* The appellate court's "standard of review extends only to the correction of errors of law." *Frampton* at 385, 752 S.E.2d at 273-74. An appellate court is not at liberty to decide the case based on its own view of the preponderance of the evidence. Rather, if there is some evidence which, if believed, supports the findings of the trial court, those findings must be affirmed. *Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976). "The judge's findings are equivalent to a jury's findings in a law action." *Columbia Venture*, 413 S.C. at 442, 776 S.E.2d at 910.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE EVIDENCE SHOWED THAT THE TAKING WAS TEMPORARY AND THAT WEST/HOBBY WAS NOT ON NOTICE THAT ITS PROPERTY WAS CONTAMINATED UNTIL 2011.

The County contends that because West/Hobby alleged in its Amended Complaint that the taking was in all likelihood permanent, a single three-year statute of limitations applies. That is so, the County says, because an injury of a permanent nature results in one cause of action which cannot be split. (Appellant's Br. p. 15.) That argument would be correct if the cause of the injury had not been abatable. *See Webb v. Greenwood County*, 229 S.C. 267, 92 S.E.2d 688 (1956) (an abatable nuisance is not presumed to continue and each injury is a new cause of action); *Cutchin v. South Carolina Dep't of Highways & Public Transp.*, 301 S.C. 35, 389 S.E.2d 646 (1990)

(holding inverse condemnation claim was not barred by statute of limitations where the cause of the injury was abatable).

The evidence in the record supports the trial court's finding that the contamination of Respondents' Property was abatable and, therefore, that the statute of limitations did not bar West/Hobby's claim. According to testing conducted on and around the landfill property, landfill gas levels were below the LEL prior to West/Hobby's purchase of the Property. (R. pp. 468-499.) The first time landfill gas exceeded LEL *on the County's property* was in December of 2003, after the property had been conveyed to West/Hobby. (R. p. 643.) Testing in 2005 showed landfill gas levels continued to exceed LEL on the County's property years later. (R. p. 643.) The first testing that occurred on Respondent's Property was on March 25, 2006. (R. p. 341-342.) That testing was conducted by the County, not the Respondent, and the County never told West/Hobby that its testing revealed excessive levels of landfill gas on Respondent's Property. (R. p. 98, line 2 - p. 99, line 3.) After the County installed 6 passive gas vents on the County property in 2010, subsequent testing established the landfill gas continued to contaminate West/Hobby's Property. (R. p. 729; R. pp. 432-465.)

At the time the Amended Complaint was filed in 2014, West/Hobby's Property was still being contaminated by the landfill gas (R. p. 895), and the County had not installed an active gas extraction system to abate the taking. The County did not complete that system until May 2015. (R. pp. 943-946; R. p. 952.) Once the County installed the active gas extraction system, the landfill gas migration was greatly abated. (R. p. 201, lines 5-16; R. p. 267, line 25 – p. 268, line 11.)

Therefore, the evidence at trial supported the trial court's finding of fact that the taking resulted from a cause that was abatable. That being so, the trial court correctly held each day of injury from the landfill gas constituted a separate and distinct injury with a separate statute of

limitations. Accordingly, the evidence presented at trial fully supports the trial court's conclusion that the three-year statute of limitations did not expire before suit was filed in 2012.

Moreover, assuming without conceding that the County is correct, and assuming Respondent's injury is in fact a single and permanent one, the statute of limitations still does not bar Respondent's claim. The County contends that the three-year statute of limitations began to run either in 2000, when the Property was purchased, or in 2006, when the County first asked for permission to test on the Property. The "discovery rule" applies to this question.

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on ***notice*** that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (emphasis in original) (internal citations omitted). A key element in the reasonable diligence test is "notice." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). Under S.C. Code Ann. § 15-3-535 (1976, as amended), the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *See also True v. Monteith*, 327 S.C. 116, 117, 489 S.E.2d 615, 616-17 (1997).

It is axiomatic that for the statute of limitations to be triggered, there first must be an "injury" from which the injured party can reasonably conclude that a claim against another exists. *Id.* In other words, there must first be an injury of which the party has actual knowledge before

that party can be charged with actual or constructive notice of a claim against another. Indeed, it is "the facts and circumstances of the injury" which give rise to notice.

Here, the County failed to present any evidence that the statute of limitations was triggered in 2000, in 2006, or for that matter prior to 2011. The County argues the statute was triggered in 2000 because Mr. West knew the land he was buying was across the road from a closed landfill and because Mr. West should have ordered a Phase I environmental site assessment. That proposition is simply not true. The evidence presented at trial demonstrated, and the trial court found accordingly, that had Mr. West commissioned a Phase I environmental site assessment in 2000 when he bought the Property, he would not have learned anything he did not already know – that there was a closed landfill across the road. The record is clear that at the time Mr. West bought the Property in 2000, there was no landfill gas being detected at the boundary of the landfill. (R. p. 171, lines 3-12; R. p. 250, lines 6-25.) The County's expert, Nina Marshtein, agreed that even if a Phase I had been conducted in 2000, there would have been no contaminants to detect on the Property. (R. p. 288, lines 1-22.)

The question then is whether a person of common knowledge and experience who purchases land across the road from a closed landfill, without anything more, is on notice that he or she has been injured and has a claim against the owner of the landfill such that the statute of limitations begins to run. No person of common knowledge and experience would have known in 2000 that excessive amounts of colorless, odorless landfill gas would contaminate the Property over a decade later. Indeed, both the County and West/Hobby introduced expert testimony on the issue of landfill gas migration. The County's argument requires that the law charge a person of common knowledge of experience with the same specialized, technical knowledge of the experts who testified at trial. That cannot be the law.

Alternatively, the County argues that the statute of limitations was triggered in 2006 when Mr. West received a letter from the County requesting permission to perform subsurface testing on his Property. (R. pp. 341-342.) Again the County misses the point. At the time of the County's February 6, 2006 letter, neither Mr. West nor the County were aware of any injury to West/Hobby's Property, let alone was either party aware at that time that the Property was contaminated by excessive levels of colorless, odorless landfill gas. The County clearly intended in 2006 to determine whether landfill gas had migrated across Cockrell Road to the West/Hobby Property, but the County was wary of alarming West/Hobby to a claim. In fact, the County's carefully crafted correspondence omitted any mention of landfill gas, methane or even contamination. (*Id.*; R. p. 95, line 22 – p. 96, line 11.)

The month after that correspondence, the County's engineers, B. P. Barber & Associates, conducted subsurface tests on March 23-24, 2006. (R. pp. 343-362.) The report that followed confirmed that methane in excess of its LEL was detected on all of the off-site properties adjacent to the landfill. (R. pp. 354-355.) While B. P. Barber sent its report to the County and to DHEC, it did not provide the report, or any notice of the report's existence, to West/Hobby, to Mr. West or his daughter, Misty West. (R. p. 96, lines 2-13.) Not one individual from the County wrote or called any representative of West/Hobby to discuss the results of that report. *Id.*

Even the County's expert, Mr. Lamb, testified that the reasonable thing to have done under the circumstances was for the County to give Mr. West a copy of the report, especially if it contained something that negatively impacted his Property. (R. p. 253, line 10 – p. 254, line 9.) Mr. West did not inquire about the results because he trusted that the County would tell him if they found anything negative. (R. p. 115, line 12 – p. 116, line 5.) Mr. West testified:

Q All right. Did you call them and ask them what they had found?

A No.

Q Why?

A I felt like with DHEC and Newberry County testing, that they would definitely come to us if they found anything not to -- in operating procedure.

Q And did either of them come to you?

A No.

Q Did their consultant come to you?

A Did not hear from anybody.

Q Did you consider that no news in this instance was good news?

A Correct. It was farmland. And normally, farmland is not contaminated.

(R. p. 94, line 14 – p. 99, line 3.)

Subsequently, on May 30, 2006, the County wrote to Mr. West again requesting permission to conduct additional subsurface investigation and to place two monitoring probes on the Property. (R. pp. 365-366.) Mr. West, who is not a landfill expert, agreed. Notably, the County never conducted any additional investigation or placed any monitoring probes on West/Hobby's Property. (R. p. 181, line 4 - p. 182, line 10.) Based upon this evidence, the trial court correctly found, as a matter of fact, not only that West/Hobby's Property was contaminated with landfill gas from the Landfill on March 23 and 24, 2006, but also that West/Hobby had no reason to suspect the Property was contaminated. (R. p. 5.)

Mr. West did not find out his Property was contaminated until 2011 (R. p. 93, line 15 – p. 95, line 15) and did not see the Off-Site Methane Investigation Report for the Newberry County Landfill until a few days before the trial (R. p. 96, line 15 – p. 97, line 5). Indeed, no reasonable person of common knowledge and experience would have been on notice that the Property was contaminated by excessive levels of colorless, odorless landfill gas sooner than Mr. West was.

The question then is - did the two letters from the County in 2006 put Mr. West on constructive notice of a claim against the County so as to trigger the statute of limitations? Stated otherwise, would those letters have put a reasonable person of common knowledge and experience on notice that West/Hobby's Property was contaminated? The County argues that the letters did because any reasonable person would have been on notice that some right had been invaded. (Appellant's Br. p.19.) Again, the County completely misses the point.

The uncontested evidence shows that in the spring of 2006, only the County knew of the injury, *i.e.* that landfill gas was contaminating the West/Hobby Property. Second, notwithstanding its *actual* knowledge of the *active* contamination, the County chose not to disclose the contamination to Mr. West or to provide him a copy of B.P. Barber's May 2006 report. Rather, the County opted to withhold news of the contamination when asking permission to conduct testing and to place monitors on West/Hobby's Property.

Witness the May 30, 2006 letter (R. pp. 365-366) written after the County knew the Property was contaminated by landfill gas, and consider that the letter carefully avoids giving Mr. West any indication of contamination on the Property. The reasonable citizen of common knowledge and experience would have interpreted that letter to mean that DHEC wanted the County to keep an eye on the Property, at most as a precautionary measure. Indeed, the reasonable citizen of common knowledge and experience would expect the County to advise one of its citizens of active contamination in the May 30, 2006 letter. However, the County chose to conceal that information. To make matters worse, the County has the arrogance to blame Mr. West, claiming that it's his fault for not asking for the information even though he had no reason to believe he needed to ask for information.

The undisputed facts establish that Mr. West did not learn of the injury to his Property until 2011 when Mr. Minnick told him. (R. p. 93, line 15 – p. 95, line 15.) Mr. West testified that he thought, as any reasonable citizen would, that the County would call him if the tests revealed something he needed to know. (R. p. 98, line 14 – p. 99, line 20.) As to the testimony presented from Billye West and Misty West, the trial court noted, "Not only did the Court find that testimony credible, the County presented no evidence to the contrary." (R. pp. 5-6; R. p. 8.) Based upon those findings, the trial court properly held the statute of limitations was tolled during the period the information was withheld. *Strong v. Univ. of S.C. School of Medicine*, 316 S.C. 189, 447 S.E.2d 850 (1994) (Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations). *See also Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014).

For these reasons, the record fully supports the trial court's findings of fact and conclusion that the statute of limitations did not bar West/Hobby's claim.

II. THE TRIAL COURT CORRECTLY FOUND AND CONCLUDED THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF ASSUMPTION OF THE RISK

A. ASSUMPTION OF THE RISK IS NOT A BAR TO A CLAIM FOR INVERSE CONDEMNATION

The County contends that the doctrine of assumption of risk is "arguably" an absolute bar to West/Hobby's claim for inverse condemnation. However, our appellate courts do not treat the doctrine the same today as they did when they issued the opinions on which the County relies.

The doctrine of assumption of risk is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted

in the injury. *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 77, 508 S.E.2d 565 (1998) ("*Davenport II*") (citing *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988)).

"South Carolina first adopted assumption of risk within the employment context. The doctrine rested in contract and was founded upon a theory of consent whereby the servant assumed those risks of employment that he knew of or should have known about." 333 S.C. at 77-78, 508 S.E.2d at 568-69 (internal citations omitted).

In *Smith v. Edwards*, 186 S.C. 186, 195 S.E. 236 (1938), the Court expanded the doctrine to apply to negligence claims. In *Smith*, the administratrix of an estate sued a beauty shop owner for the wrongful death of the decedent alleging negligence, willfulness and gross negligence. The defendant alleged assumption of risk because the decedent was a diabetic and prone to infections if the permanent wave she applied for went wrong. The plaintiff challenged the applicability of assumption of risk to the facts of the case. The Court held, "We think [assumption of risk] applies to any case <u>of similar nature</u>, where the facts proved show that the person against whom the doctrine of assumption of risk is pleaded knew of the danger, appreciated it, and acquiesced therein." 186 S.C. at 190, 195 S.E. at 237 (emphasis added).

The County cites *Smith* for the proposition that assumption of risk "arguably" bars any cause of action. (Appellant Br. p. 21.) However, absent from the County's argument are three critical words from the Court's holding: "of similar nature". The *Smith* court clearly intended to broaden the application of the doctrine to negligence cases only, not to all cognizable claims a plaintiff can assert. *See Davenport II,* 333 S.C. at 78, 508 S.E.2d at 569 ("This Court ultimately extended the defense to negligence cases outside the traditional master-servant context."). Thus, the County's reliance on *Smith* is misplaced.

The County also relies on *Cutchin v. S.C. Dep't of Highways & Public Transp., supra*, for the proposition that South Carolina has impliedly recognized assumption of risk as a bar to an inverse condemnation claim. In *Cutchin*, the plaintiff's home was flooded because a culvert under a nearby road was improperly designed and constructed. The defendant alleged that the plaintiffs assumed the risk because they bought a home in a flood plain. The Supreme Court held that there was no evidence to support the assumption of risk defense because there was no evidence the plaintiffs knew at the time they bought the home that it was in a flood plain or that the culvert was improperly designed. *Id.* at 37. The applicability of the doctrine was not challenged and, therefore, was not an issue on appeal. Seeing no evidence to support the defense, the Court did not discuss it other than to affirm the trial court's findings of fact that the plaintiff had no knowledge of the specific risk (the undersized culvert). Notably, the Court also held that the plaintiff's claim was not barred by the statute of limitations because the cause of the injury was abatable (by installation of additional pipes or one large pipe). *Id.* Therefore, *Cutchin* lends the County no support in this case.

Eight years after the *Cutchin* decision, the Supreme Court prospectively abrogated the defense of assumption of the risk as a complete bar to recovery in South Carolina in *Davenport II.* Since 1998, assumption of risk has not barred a plaintiff's recovery unless the plaintiff's negligence exceeds the negligence of the defendant. *Davenport II,* 333 S.C. at 86-87, 508 S.E.2d at 573-74. Because employment-related claims today are resolved in large part by workers' compensation laws, *id.* at 77 n.1, the current state of the defense is that absent consent in advance assumption of risk bars recovery only where a plaintiff's negligence exceeds the defendant's negligence. *Id.* at 86-87.

This discussion of the evolution of the doctrine of assumption of risk from its common law form to its current state reveals the flaws in the County's argument. First, there is no reported case in South Carolina in which a court has barred an inverse condemnation claim based upon assumption of risk, especially as the doctrine is applied today. A claim for inverse condemnation is not based upon contract or common law duties but rather upon each citizen's constitutional right against property being taken for public use without just compensation. S.C. Const. Art. I, Sec. 13. The cause of action requires proof of affirmative conduct of a governmental entity which effects a taking for a public use. *Byrd v. City of Hartsville,* 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005). A citizen need not prove negligence or breach of a duty owed to prove a taking. We cannot allow governmental entities to assert the affirmative defense of assumption of risk as a complete bar to inverse condemnation claims without injecting comparative fault principles into the analysis, thereby abridging a constitutional right. Thus, the County's argument that the defense of assumption of risk bars West/Hobby's claim is contrary to precedent.

Second, the County makes no effort to compare its own negligence to West/Hobby's alleged negligence. Had the County done so, it would have reached the same inescapable conclusion the *Cutchin* court did. After a thorough review of the evidence presented, the trial court found that while Mr. West knew in 2000 that the Property he was buying was adjacent to the closed landfill, "the record contains no indication that he or anyone else on behalf of the Plaintiff knew colorless, odorless landfill gas was migrating from the landfill to the until over a decade later." (R. pp. 17-18.) Indeed, the County can point to not one shred of evidence indicating the risk it contends West/Hobby assumed existed when the Property was purchased. *See* Section II.B., *infra*. One cannot assume a risk that does not exist.

B. THE EVIDENCE AT TRIAL ESTABLISHED WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF ASSUMPTION OF RISK BECAUSE WEST/HOBBY HAD NO REASON TO BELIEVE ITS PROPERTY WAS CONTAMINATED BY LANDFILL GAS UNTIL OVER A DECADE AFTER THE PROPERTY WAS PURCHASED.

Even if the County is correct that assumption of risk applies, the facts proved at trial do not support the defense.

A party asserting assumption of risk as a defense must show: (1) the plaintiff had knowledge of the facts constituting a dangerous condition; (2) the plaintiff knew the condition was dangerous; (3) the plaintiff appreciated the nature and extent of the danger; and (4) the plaintiff voluntarily exposed himself to the danger. *Davenport II* at 78-79, 508 S.E.2d at 569.

Whether a plaintiff assumed a given risk, like contributory negligence, generally is a question of fact. *Strange v. S.C. Dept. of Highways and Pub. Transp.*, 307 S.C. 161, 165, 414 S.E.2d 138, 140 (1992); *Ballou v. Sigma Nu General Fraternity,* 291 S.C. 140, 151, 352 S.E.2d 488, 495 (Ct. App. 1986). As discussed in the standard of review above, the trial court's findings of fact cannot be disturbed on appeal unless found to be without any evidence which reasonably supports them. *Columbia Venture, supra,* 413 S.C. at 442, 776 S.E.2d at 910.

In this case, the trial judge correctly found:

> The record simply does not support a finding that West/Hobby assumed the risk that the Property would be contaminated because there is no evidence that the contamination existed when the Property was purchased or that Mr. West and Mr. Hobby knew in 2000 that landfill gases were contaminating the Property and bought it anyway. The evidence demonstrates that the contamination of Plaintiff's Property began after Plaintiff took title and was abated years after Plaintiff filed this lawsuit. Consequently, the Court finds no support for the County's assumption of risk defense.

(R. p. 19.) The trial court's conclusion is based upon ample evidence in the record. The records of testing show no indication that landfill gas was contaminating the Property before it was purchased. The first evidence of contamination was years after West/Hobby took ownership. In

addition, Mr. West and his daughter testified "that prior to Kiswire's termination of the Purchase Agreement, they had no reason to suspect the Property was contaminated with landfill gas. Not only did the Court find that testimony credible, the County presented no evidence to the contrary." (R. p. 8.)

The County argues that Mr. West assumed the risk because "1) he knew of the danger – the adjoining property being a closed landfill -...". (Appellant Br. p. 23.) The only support the County can cite for its argument, however, is that Mr. West knew in 2000 that the Property he was buying was adjacent to a closed landfill. That fact is not contested. Nonetheless, even at this stage of these proceedings, the County fails to appreciate what the specific dangerous condition was: horizontal migration of colorless, odorless landfill gas from the County's property to adjacent properties. The County can point to no evidence that Mr. West knew—or had any reason to appreciate—that specific danger existed when he purchased the Property.

If what the County argues is so, then the County would be free to contaminate land adjacent to a landfill with impunity and without recourse. Adjacent land could not be purchased without the purchaser being deemed to have assumed the risk that the County would contaminate the land, and the County would have no incentive to install remedial measures to avoid migration of the landfill gas. Indeed, if what the County proffers is so, and if the mere presence of a closed landfill constitutes the dangerous condition, then the County's argument about Mr. West not obtaining a Phase I Environmental Assessment before he bought it is irrelevant. West already knew there was a closed landfill across the road. He did not need to hire an engineer to tell him that.

What required experts was investigation of the true dangerous condition: whether the County was contaminating West/Hobby's Property (which it was). At the time Mr. West bought the Property:

(1) he knew it was across the road from a closed landfill;

(2) he did not know there was a clay cap on the landfill (R. p. 103, lines 8-10);

(3) he did not know what the effect of the clay cap on the landfill could be (R. p. 103, lines 11-15);

(4) he knew that the County and DHEC were monitoring the closed landfill (R. p. 104, line 25 - p. 105, line 4; R. p. 127, lines 11-17);

(5) he expected the County to tell him if there was a problem (R. p. 126, lines 16-18);

(6) he expected the County to take steps to address any contamination from methane (R. p. 123, lines 16-18); and

(7) there was no landfill gas being detected (on the County's or West/Hobby's land) at the time (R. p. 288, line 1 - p. 289, line 2).

The trial judge understood that the dangerous condition was the contamination from landfill gas when he found:

> The record simply does not support a finding that West/Hobby assumed the risk **that the Property would be contaminated** because there is no evidence that the contamination existed when the Property was purchased or that Mr. West and Mr. Hobby knew in 2000 that landfill gases were contaminating the Property and bought it anyway. The evidence demonstrates that the contamination of Plaintiff's Property began after Plaintiff took title and was abated years after Plaintiff filed this lawsuit. Consequently, the Court finds no support for the County's assumption of risk defense.

(R. p. 19) (emphasis added).

For these reasons, the record contains ample evidence to support the trial court's factual findings concerning assumption of the risk, and the County failed to present any to support its argument. The trial court's findings should not be disturbed.

C. THE EVIDENCE PRESENTED AT TRIAL SHOWED THAT NEWBERRY COUNTY, NOT WEST/HOBBY, HAD ACTUAL KNOWLEDGE THAT LANDFILL GAS FROM THE CLOSED LANDFILL WAS MIGRATING TO WEST/HOBBY'S PROPERTY; THAT THE COUNTY FAILED TO NOTIFY WEST/HOBBY OF THAT FACT; AND THAT THE COUNTY FAILED TO TAKE REMEDIAL MEASURES TO STOP THE CONTAMINATION UNTIL SUIT WAS FILED.

While the County is busy trying to charge West/Hobby with constructive notice for not making inquiries to the County, it completely overlooks the fact that it had actual knowledge of the dangerous conditions on both its own property and West/Hobby's but failed to disclose it. Instead, the County says sophomorically, "You did not ask for it."

The trial judge correctly found and concluded that the County withheld from West/Hobby the conclusions and information contained in the April 2006 Off-Site Methane Investigation Report. (R. p. 19.) The County continued to withhold information about the contamination of the West/Hobby Property until West/Hobby found out about it in 2011. (R. p. 93, line 15 – p. 95, line 15; R. p. 263, lines 8-11.) The County withheld the information about contamination despite the periodic reports it was getting from its engineers about elevated methane levels at the property boundaries of the landfill. (R. pp. 644-895.) The County continued to withhold information about contamination despite being required by DHEC to take additional measures to control landfill gas at its property boundaries. (R. p. 217, line 16 – p. 218, line 5.) The County's own expert, Steve Lamb, thought it would have been reasonable for the County to give the information about contamination to West/Hobby, an adjacent land owner. (R. p. 253, line 10 - p. 254, line 5.) In fact, the County **never** told West/Hobby that its Property was being contaminated until it answered West/Hobby's discovery requests in this lawsuit.

At trial, the County's administrator admitted that the reason the County took remedial measures to abate the cause of the injury was *because the County got sued.* (R. p. 237, lines 4–12;

R. p. 239, lines 17-20.) According to its own expert, there was no reason why the County could not have abated the cause of the injury sooner than May 2015. (R. p. 268, lines 14-17.)

Accordingly, the trial court correctly found as a matter of fact that the County withheld information about the dangerous condition from West/Hobby.

III. THE TRIAL COURT CORRECTLY FOUND AND CONCLUDED THAT THE COUNTY COMMITTED AN AFFIRMATIVE, AGGRESSIVE AND POSITIVE ACT SUFFICIENT TO SUPPORT A CLAIM FOR INVERSE CONDEMNATION WHEN IT PLACED A CLAY CAP ON THE CLOSED LANDFILL IN 1994.

A plaintiff must prove three things to establish a claim for inverse condemnation: (1) affirmative conduct of a governmental entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79. While prior to *Byrd* there was a fourth element that a plaintiff prove some degree of permanence, the *Byrd* Court dispensed with that element. *Id.* at 17. The affirmative conduct must take the form of "an affirmative, aggressive, and positive act" by the government entity that caused the alleged damage to the plaintiff's property. *Berry's on Main, Inc. v. City of Columbia,* 277 S.C. 14, 281 S.E.2d 796 (1981); *Kline v. City of Columbia*, 249 S.C. 532, 15 S.E.2d 597 (1967).

In *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 630 S.E.2d 479 (2006), a case remarkably like the case at the bar, the owner of real property adjacent to a closed solid waste landfill sued Lexington County for inverse condemnation because methane gas from the closed landfill contaminated its property. The plaintiff's expert opined that the capping of the landfill by the county diverted the vertical migration of methane and caused the landfill gas to vent horizontally onto the plaintiff's property.

The trial court granted summary judgment to Lexington County, holding that there was no evidence of an affirmative, aggressive and positive act to support a claim for inverse

condemnation. In a unanimous opinion, the Supreme Court reversed, holding that the County undertook a permanent, public project in capping the landfill and that action met the requirement of an affirmative, aggressive and positive act for the purposes of an inverse condemnation claim. *Id.*

The same is true here. The facts of the affirmative conduct in this case are virtually identical to those in *WRB Ltd. P'ship.* Recognizing that, the trial court followed binding precedent and found that West/Hobby had satisfied the first element of its inverse condemnation claim. (R. p. 11.) The County argues West/Hobby's emphasis at trial focused not on the clay cap but on Newberry County's failure to implement an active remediation system in a timely fashion after closing the landfill. (Appellant's Br. p. 26.) In other words, the County claims West/Hobby's real complaint is not the clay cap but the County's failure to act. The failure to act, argues the County, cannot be the basis of an inverse condemnation claim.

The trial court saw through the County's attempt to evade established precedent. West/Hobby alleged that the installation of the clay cap was the affirmative conduct in its Amended Complaint (R. p. 54 ¶ 22); it argued the role of the clay cap in the proximate cause of the injury in its opening argument (R. p. 87, lines 7-11); and it introduced expert testimony on direct (Mr. Clymer) and cross (Mr. Lamb) examination that the clay cap caused the landfill gas to migrate horizontally to the West/Hobby Property.

The County ignores the elements of an inverse condemnation claim – (1) the affirmative conduct, (2) the conduct effects a taking, and (3) the taking if for a public use. *Byrd, supra.* The importance of the *WRB Ltd. P'ship* decision is that it establishes that the capping of a solid waste landfill satisfies the first and third elements of a claim for inverse condemnation. *WRB Ltd. P'ship* specifically refrained from deciding that the capping of the landfill resulted in a taking because

neither the Supreme Court nor the Circuit Court had facts before them from which either could determine whether the aggressive act had resulted in an injury to the effected property which constituted a taking. Whether a governmental entity's affirmative conduct effects a taking is a determined by the facts of each specific case.

South Carolina courts have found several different acts to constitute physical takings:

1. The construction of an embankment which impounds water can constitute a "taking," *Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931);

2. The discharge of large amounts of water from a reservoir destroying a bean crop, *Lindsey v. City of Greenville*, 247 SC 232, 146 S.E.2d 863 (1966);

3. The rupturing of a gas line during construction causing a fire on landowner's property constituted "taking," *Kline v. City of Columbia*, 249 S.C. 532, 535, 15 S.E.2d 597, 599 (1967);

4. The removal of a sidewalk and support during construction with resulting damage from flooding constituted "taking," *Berry's On Main Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981);

5. The diversion of groundwater supply away from landowner's property lowering his lake levels, *S.C. Dep 't of Highways & Pub. Trans v. Balcome*, 280 SC 243, 345 S.E.2d 762 (1986);

6. Rebuilding washed-out portions of a roadway seventeen inches higher than the damaged road's original level making plaintiff's property the lowest point on the roadway and causing the plaintiffs property to flood, *Newsome v. Town of Surfside Beach,* 300 S.C. 14, 386 S.E.2d 274, 275 (1989); and

7. Denying plaintiff access to property for 16 months during construction activities constitutes a "taking," *Frampton v. South Carolina Dep't of Highways & Pub. Transp.,* 406 SC 377, 752 SE2d 269 (2013).

In *Chick Springs Water Co. v. State Highway Department*, the court held (quoting from 10 R.C.L., p. 70, Sec. 61):

> There may be a taking of property in the constitutional sense although there has been no actual entry within its bounds and no artificial structure has been erected upon it. When a public agency acting under authority of statute uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate,

belonging to a private owner, is actually invaded by superinduced additions of water, earth, sand or other material so as effectually to destroy or impair its usefulness, there is a taking within the meaning of the constitution.

Here, as in *WRB Ltd. P'ship,* the capping of the County's landfill was the affirmative conduct giving rise to a chain of events which proximately caused injury to West/Hobby's adjacent Property. The horizontal migration of the landfill gas generated by the waste material underground from the County's property to the West/Hobby Property was a foreseeable, natural and probable consequence of capping the landfill. The experts so testified.

Steve Lamb, the County's expert, testified:

Q Do you agree with me that a clay cap over a closed landfill, in fact, causes landfill gas to migrate horizontally instead of vertically?

A It's a contributing factor.

(R. p. 263, lines 22-25.)

Q My point is that in 2006, when B.P. Barber tested, that methane gas was moving that far, over 100 feet into the West/Hobby property?

A Yes.

(R. p. 267, lines 21-24.)

Q Did the clay cap contribute to the migration of landfill gas at the Newberry County Landfill?

A Okay. Now, that's the first I've -- time I've gotten that question.

Q Well, there you have it.

A There we -- there we go. Most -- probably, it did contribute to the -- to -- to migration.

(R. p. 269, lines 4-10.)

West/Hobby's expert Charles Clymer removed all doubt:

Q All right. And a clay cap was installed on this closed landfill?

A Yes. On Phase II.

Q Yes, sir. Does the presence of a clay cap have any effect on how landfill gases migrate from the landfill?

A It does. Landfill gases, and predominantly methane, is lighter or less dense than air. So it will have a tendency to go up and out of a landfill. If you have a low-permeability clay cap, then it won't allow the – the landfill gases to escape. So they would try to go up, but then they'd migrate sideways or laterally to -- to try to escape.

(R. p. 167, lines 4-17.)

Q All right. Now, based upon this report and the results we've seen in their tables that we've put up on the screen, do you have an opinion within a reasonable degree of certainty in your field of expertise as to whether the West/Hobby property was most probably contaminated with landfill gas at the time of S&ME's limited soil-gas assessment in 2011?

A The question is do I have an opinion about this ---

Q Yes.

A --- data? Yes.

Q And what is that opinion?

A That the S&ME data indicate that the VOCs have impacted the West/Hobby property and the source is most apparent from the Newberry County Landfill.

(R. p. 190, lines 4-17.)

Q Mr. Clymer, do you have an opinion whether the VOCs that your company found in these four wells on the West/Hobby property most probably came from the landfill? Do you have an opinion about that?

A I do.

Q What is that?

A That the VOCs that were indicated on the West/Hobby property have come from the Newberry County Landfill.

(R. p. 211, lines 7-14.)

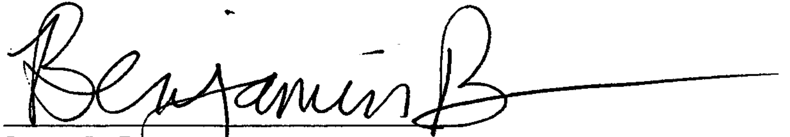
As these excerpts demonstrate, the evidence at trial showed that but for the County's affirmative act of installing the clay cap, the landfill gas would have migrated vertically into the atmosphere; and but for the installation of the clay cap, the County would not need to install an active subsurface soil gas extraction system to abate the injury causing event caused by landfill gas migrating to adjacent land. Evidence about the County's failures and concealment after installing the clay cap was (1) to rebut the County's defense of failure to mitigate damages, (2) to rebut the County's allegation of assumption of the risk (by showing that the County's conduct was more negligent than that of the plaintiff), (3) to rebut the County's statute of limitations defense, (4) to prove the chain of causation from the positive, affirmative act to the injury causing event, and (5) to prove that while the injury causing event was abatable, the County deliberately delayed abatement to save money until it was sued.

For these reasons, the trial court's finding that the County's installation of the clay cap constituted an affirmative, aggressive act is well-supported by the record and should not be disturbed.

CONCLUSION

The trial judge was required to make specific findings of fact supporting his conclusion that there had been a "taking" of West/Hobby's Property. The County chooses to ignore the technical evidence in the record proving no contamination occurred until after the Property was purchased but rather asks this Court to reverse the trial court's findings based on inferences the County argues the trial court should have drawn from the evidence. As set forth above, however, the evidence presented at trial fully supports the trial court's findings of fact and conclusions of law.

Accordingly, the trial court's findings of fact and conclusions of law should be affirmed.



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August 3, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM THE NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

APPELLATE CASE NO.: 2016-001773

West/Hobby, LLC . . . . .Respondent,

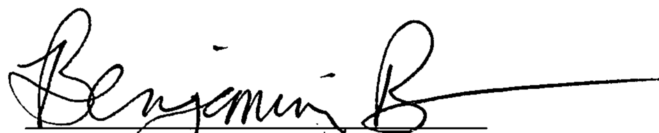
v.

County of Newberry . . . . .Appellant.

CERTIFICATION OF COUNSEL

The undersigned counsel for Respondent certifies that the Final Brief of Respondent filed in this matter complies with Rule 211(b), SCACR.

August 3, 2017



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