The Supreme Court of South Carolina

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September 26, 2018

The Honorable Alma Y. White
PO Box 479
Georgetown SC 29442-0479

REMITTITUR

Re: David M. Repko v. County of Georgetown
Lower Court Case No. 2012CP2200558
Appellate Case No. 2016-001300

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

Cc:
Robert L. Widener, Esquire
Stephen Lewis Goldfinch, Jr., Esquire
Thomas William Winslow, Esquire
Ryan Patrick Compton, Esquire
David J. Mills, Esquire
John K DeLoache, Esquire
Robert E. Lyon, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David M. Repko, Respondent,

v.

County of Georgetown, Petitioner.

Appellate Case No. 2016-001300

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27837
Heard March 27, 2018 – Filed August 29, 2018

REVERSED

Robert L. Widener, of Columbia, and David J. Mills, of Charleston, both of McNair Law Firm, PA, for Petitioner.

Ryan Patrick Compton, Thomas William Winslow, and Stephen Lewis Goldfinch Jr., all of Goldfinch Winslow LLC, of Murrells Inlet, for Respondent.

Robert E. Lyon, Jr. and John K. DeLoache, Sr., both of Columbia, for Amicus Curiae, South Carolina Association of Counties.

JUSTICE JAMES: We granted Georgetown County's petition for a writ of certiorari to review the court of appeals' decision in *Repko v. County of Georgetown*, 416 S.C. 22, 785 S.E.2d 376 (Ct. App. 2016). Georgetown County argues the court of appeals erred in (1) construing the County Development Regulations as creating a private duty of care to Respondent David Repko; (2) holding the South Carolina Tort Claims Act[1] (TCA) preempted certain language contained in the Regulations; (3) applying the "special duty" test; (4) finding *Brady Development Co., Inc. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), distinguishable from the instant case; (5) reversing the trial court's ruling that the County is entitled to sovereign immunity under the TCA; and (6) rejecting the County's additional sustaining ground that Repko's claim is barred by the statute of limitations. We address only issue (5) and hold the court of appeals erred in reversing the trial court's determination that the County was immune from liability under subsection 15-78-60(4) of the TCA (2005); we therefore reverse the court of appeals and reinstate the directed verdict granted to the County by the trial court. We vacate the court of appeals' opinion.

I.

In the early 2000s, Harmony Holdings, LLC (the Developer) began developing Harmony Township (Harmony), a residential subdivision in the County. In South Carolina, most localities will not allow a developer to sell lots in a residential development without the required infrastructure—roads, water, drainage, and sewer—being completed. The County adopted regulations addressing the completion of infrastructure in major residential subdivisions. The record on appeal contains only Article V of the Regulations (Article V). Article V, Section 3-1 (Section 3-1) provides:

> Financial guarantees may be posted in lieu of completing improvements required by [the Regulations] to allow for the recording of a final plat or to obtain building permits for properties for which ownership will be transferred. . . .
>
> Acceptance of financial guarantees is discretionary and [the] County reserves the right to refuse a financial guarantee for any remaining improvements and require that such improvements be completed before the recording of a final plat or issuance of building permits. Acceptance of a financial guarantee by [the] County shall not be

[1] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2017).

> construed as an obligation to any other agency, utility or property owner within affected developments.

Therefore, in the discretion of the County, a developer could post cash, bonds, letters of credit, or other financial guarantees instead of completing the infrastructure before selling lots. When the Developer began developing Harmony Phase 2-D-1 in 2006, the County determined it would allow the requirement of a financial guarantee to be satisfied by the Developer's posting of a letter of credit (LOC) to cover the remaining cost of completion of infrastructure. An LOC is a letter issued by a bank that entitles the person named in the letter to draw up to a specified sum from the bank. The County had policies and procedures in place that governed its oversight of the completion of infrastructure and reductions in the LOC. One such policy was the requirement that the LOC be at least equal to 125% of the cost of completing the remaining infrastructure. If the County handled LOC procedures properly, as the Developer completed certain stages of infrastructure, the County would take steps to verify the completion of the work, and the County would notify the issuing bank that the LOC could be reduced accordingly. If handled properly, this arrangement would allow the County to draw on the LOC if the Developer failed to complete or properly complete the required infrastructure.

In 2006, the Developer submitted an LOC from Wells Fargo in the amount of $1,301,705.63—representing 125% of the projected cost of completing the infrastructure—to the County planning department for Harmony Phase 2-D-1. By April 2007, the County had approved the Developer's requests to reduce the LOC four times; after the fourth reduction, the LOC totaled $156,704.03. However, the cost of completing the remaining infrastructure was over one million dollars. In August 2007, the cost of unbuilt infrastructure remained over one million dollars, and the Developer informed the County it no longer had the financial means to complete any additional infrastructure. At that point, the LOC was approaching its expiration date. Shortly thereafter, the Developer declared bankruptcy. A new developer took over the project and requested the County to authorize the release of LOC funds to help complete the infrastructure; however, the County deemed this new developer to be untrustworthy and refused to allow the release of the LOC funds. The new developer withdrew from the project. Those who purchased lots in Harmony Phase 2-D-1 are unable to build on their lots because the infrastructure has not been completed.

II.

Respondent David Repko, the owner of two lots in Harmony Phase 2-D-1, commenced this action against the County alleging that the County negligently and

grossly negligently failed to comply with or enforce its rules, regulations, and written policies governing its handling of the LOC. The County answered, alleging it did not owe a private duty of care to Repko and alleging that even if it did, the TCA barred Repko's claims. Specifically, the County pled it was immune from liability pursuant to subsections 15-78-60(1), (2), (4), (5), (12), and (13) of the TCA. Only subsections (4) and (12) are pertinent to this appeal. The County also alleged Repko's claims were barred by the two-year statute of limitations in section 15-78-110 of the TCA.

The case went to trial, and at the close of Repko's case, the trial court granted the County's directed verdict motion, finding (1) the Regulations did not create a private duty of care owed by the County to Repko and (2) the County was immune from liability under subsections 15-78-60(4), (5), and (13) of the TCA. The trial court ruled the County was not entitled to a directed verdict pursuant to the TCA's two-year statute of limitations. The trial court agreed with Repko's argument that subsection 15-78-60(12) did not apply to this case and ruled the County was not entitled to immunity under subsection (12). The court of appeals reversed the directed verdict and remanded for a new trial. *Repko v. Cty. of Georgetown*, 416 S.C. 22, 42, 785 S.E.2d 376, 386 (Ct. App. 2016).

We address only the court of appeals' holding that the trial court erred in granting a directed verdict under subsection 15-78-60(4) of the TCA. As our holding on this point is dispositive of the appeal, we need not address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

III.

An appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). When reviewing a ruling on a motion for a directed verdict, this Court, like the trial court, must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Hurd v. Williamsburg Cty.*, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005).

In a negligence action, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "If there

is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Id.* There is a dispute as to whether the Regulations created a private duty of care owed by the County to Repko. We need not resolve that dispute, as we conclude that even if such a duty was created, the County is immune from liability to Repko under subsection 15-78-60(4) of the TCA.

Repko's action against the County is based upon his contention that the County was grossly negligent in allowing the Developer's LOC to be reduced from the original $1,301,705.63 to $156,704.03 without first ascertaining that the LOC continued to cover 125% of the cost of remaining infrastructure. The essence of Repko's claim is that the County was grossly negligent in failing to comply with or enforce its rules, regulations, and policies governing its handling of the LOC. The County maintains that even if it were grossly negligent, it is immune from liability to Repko pursuant to subsection 15-78-60(4) of the TCA. We agree with the County.

In response to our abolition of the doctrine of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the General Assembly enacted the TCA. *See* S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2017). Section 15-78-40 provides that a political subdivision such as the County is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, *subject to the limitations upon liability and damages, and exemptions from liability and damages*" found in the TCA. (emphasis added). Subsection 15-78-20(a) provides in part, "The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions." Subsection 15-78-20(f) provides, "The provisions of [the TCA] establishing limitations on and exemptions to the liability of the [governmental entity or political subdivision], while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the [governmental entity or political subdivision]." Section 15-78-60 lists forty exceptions to the waiver of sovereign immunity.

In its answer to Repko's complaint, the County pled several of the exceptions to the waiver of immunity found in section 15-78-60, namely those in subsections (1), (2), (4), (5), (12), and (13). Of these six, subsection (4) is the centerpiece of the County's claim of immunity. Subsection 15-78-60(4) provides:

> [A] governmental entity is not liable for a loss resulting from[] adoption, *enforcement*, or *compliance* with any law or *failure to* adopt or *enforce any law*, whether valid or invalid, *including, but not limited to, any* charter,

> provision, *ordinance*, resolution, rule, *regulation*, or *written policies*[.]

(emphasis added).

The County also pled it was entitled to immunity pursuant to subsection 15-78-60(12), which provides:

> [A] governmental entity is not liable for a loss resulting from[] licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority *except when the power or function is exercised in a grossly negligent manner*[.]

(emphasis added).

After Repko rested at trial, the County moved for a directed verdict under subsections (4), (5), (12), and (13). Again, only subsections (4) and (12) are at issue in this appeal. During argument of the directed verdict motion, Repko argued subsection (12) did not apply to this case because the County's actions did not involve a licensing power or function. Specifically, Repko argued to the trial court that the duty owed to him by the County "doesn't have anything to do with the licensing function." The trial court agreed and stated in its ruling from the bench, "I don't think [subsection (12)] is applicable, the licensing function." In its written order, the trial court did not grant a directed verdict to the County pursuant to subsection (12) but granted a directed verdict to the County pursuant to subsections (4), (5), and (13).

Repko moved for reconsideration and argued, among other things, that because the County simply pled it was entitled to immunity under subsection (12), the gross negligence standard contained in subsection (12) must be read into the immunity provisions contained in subsections (4), (5), and (13). Repko had never presented this argument prior to the motion for reconsideration. The trial court summarily denied Repko's motion in a form order. It is settled that "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). As we discuss in section B below, even if this issue had been timely raised to the trial court, the County was entitled to a directed verdict as a matter of law.

As we discuss in section A immediately below, Repko never argued to the trial court or even to the court of appeals that the immunity provision in subsection 15-78-60(12) applied to the facts of this case. However, the court of appeals *sua sponte* raised and ruled upon the issue. In so doing, the court of appeals did not squarely address the issue of whether the gross negligence exception contained in subsection (12) must be read into the immunity provision contained in subsection (4). Again, we address the merits of this argument in section B below.

A.

We first conclude the court of appeals erred in *sua sponte* raising and ruling upon an issue that Repko never advanced to the trial court. As noted, Repko successfully argued at the directed verdict stage that the duty owed to him by the County "doesn't have anything to do with the [County's] licensing function." At no time before the trial court or in his brief to the court of appeals did Repko argue that his loss resulted from the County's exercise of its licensing powers or functions, as contemplated by subsection (12).[2] Despite the fact that Repko never took such a position, the court of appeals raised the argument *sua sponte* and concluded:

> Subsection 15-78-60(12) grants immunity for losses resulting from the "renewal" of a permit. The County approved reductions of the letter of credit and, in doing so, allowed the renewal of the permit to sell lots even though the letter of credit had been improperly reduced. Based on this evidence, a jury could have found subsection 15-78-60(12) applied.

Repko, 416 S.C. at 41, 785 S.E.2d at 385-86.

This was error. An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level. In *I'On, L.L.C. v. Town of Mt. Pleasant*, we noted "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). We also clarified that while an appellate court may affirm a lower court judgment

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[2] Though not dispositive of this issue, we are compelled to note that Repko advanced to the trial court the opposite of the argument the court of appeals *sua sponte* raised and ruled upon.

for any reason appearing in the record, "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record." *Id.* at 421-22, 526 S.E.2d at 724.

The court of appeals *sua sponte* raised and ruled upon an issue Repko never presented to the trial court. Therefore, we reverse the court of appeals' holding that a jury issue exists as to whether subsection 15-78-60(12) applies to the facts of this case.

B.

Because it concluded that "a jury could have found subsection 15-78-60(12) applied," the court of appeals did not address the issue Repko presents to this Court—whether the gross negligence standard contained in subsection (12) must be read into subsection (4) simply because the County initially pled it was entitled to immunity under subsection (12). Repko has advanced no theory of liability other than the County's grossly negligent failure to comply with or enforce its rules, regulations, and policies governing the handling of the LOC. This claim runs headlong into the County's central defense under subsection (4) that it is immune from liability for such a failure.

Repko's very able appellate counsel rightly conceded at oral argument that because subsection (4) does not contain a gross negligence standard, standing alone, subsection (4) would entitle the County to immunity from liability from its failure to comply with or enforce the Regulations. However, Repko claims our case law requires the gross negligence standard contained in subsection (12) to be read into subsection (4) simply because the County initially pled it was entitled to immunity under subsection (12). We disagree.

This Court and the court of appeals have held that when an applicable exception to the waiver of immunity contains a gross negligence standard, that gross negligence standard must be read into all other applicable exceptions that do not contain a gross negligence standard. Consequently, the immunity provision containing the gross negligence standard must actually apply to the case before it can be read into another immunity provision. In *Steinke*, we held:

> In sum, we recognize the trial court often faces Tort Claims Act cases in which at least one of the asserted exceptions contains the gross negligence standard while other asserted exceptions do not. We hold that when an exception containing the gross negligence standard

> applies, that same standard will be read into any other applicable exception.

336 S.C. at 398, 520 S.E.2d at 155 (emphasis added). In *Chakrabarti v. City of Orangeburg*, the court of appeals held that "[w]hen an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions." 403 S.C. 308, 319, 743 S.E.2d 109, 115 (Ct. App. 2013).

In *Plyler v. Burns*, a conservatorship beneficiary sued the Horry County probate court, claiming the probate court mishandled the administration of the conservatorship. 373 S.C. 637, 643-44, 647 S.E.2d 188, 191-92 (2007). The probate court pled it was entitled to immunity pursuant to subsections 15-78-60(1), (2), and (3); none of these subsections contain a gross negligence standard. *Id.* at 651-52, 647 S.E.2d at 196. The trial court dismissed the action, ruling the probate court was immune from liability pursuant to all three subsections. *Id.* at 652, 647 S.E.2d at 196. The plaintiff claimed subsections (12) and (25) also applied to the probate court's actions and that since these two subsections contain a gross negligence standard, the gross negligence standard should have been read into subsections (1), (2), and (3). *Id.* We held the trial court did not err in refusing to read the gross negligence standard into subsections (1), (2), and (3) because subsection (12) had "*no applicability*" to the case and because subsection (25) was "*similarly inapplicable*." *Id.* at 653, 647 S.E.2d at 197 (emphasis added).

Repko argues *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), stands for the proposition that when a governmental entity simply pleads an immunity provision containing a gross negligence standard, the gross negligence standard must be read into all other immunity subsections. In *Jones*, the defendant sheriff pled he was entitled to immunity from suit pursuant to subsections 15-78-60(6) and (21), neither of which contains a gross negligence standard. 387 S.C. at 344-45, 692 S.E.2d at 903. The plaintiff claimed subsection 15-78-60(25), which contains a gross negligence standard, applied to the case; however, the sheriff did not plead subsection (25) as a basis for immunity, and nothing within subsection (25) was applicable to the case. *Id.* at 347-48, 692 S.E.2d at 904-05. We affirmed the trial court's grant of a directed verdict to the sheriff. *Id.* at 349, 692 S.E.2d at 905. While we did conclude in *Jones* that the gross negligence standard in subsection 15-78-60(25) was not to be read into other applicable subsections because the sheriff did not plead subsection (25) as a basis for immunity, we emphasized our holding in *Steinke* 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." 387 S.C. at 347, 692 S.E.2d at 904 (emphasis added) (quoting *Steinke*, 336 S.C. at 397, 520 S.E.2d at 154).

Repko also argues *Proctor v. Department of Health & Environmental Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), supports his argument that the gross negligence standard of subsection 15-78-60(12) should be read into the other subsections simply because the County pled subsection (12). In *Proctor*, Mr. Proctor owned a DHEC-permitted waste tire recycling and processing facility. The permit greatly enhanced the delivery of waste tires to his facility by new tire wholesalers and retailers. *Id.* at 287-88, 628 S.E.2d at 500-01. DHEC concluded Proctor was in violation of the regulations governing his permit, levied a fine against him, and removed him from the rebate list of approved facilities. *Id.* at 288, 628 S.E.2d at 501. Proctor sued DHEC pursuant to subsection 15-78-60(12), alleging DHEC was grossly negligent in revoking its approval for him to be on the rebate list. *Id.* at 289-90, 628 S.E.2d at 502. As noted, subsection (12) contains a gross negligence standard. DHEC claimed it was entitled to immunity under subsections 15-78-60(1), (2), (3), (4), (5), (12), and (13). *Id.* at 297, 628 S.E.2d at 506. At trial, DHEC did not challenge the applicability of subsection (12) as it was squarely applicable to the facts of the case; rather, DHEC argued it was entitled to a directed verdict because its conduct did not rise to the level of gross negligence. The trial court denied DHEC's motion for a directed verdict under all subsections, and the trial court charged the jury that the gross negligence standard in subsection (12) was to be read into all other applicable subsections providing for immunity. The court of appeals affirmed, holding that since Proctor proceeded on the theory that DHEC was liable under subsection (12), the trial court's charge was proper. *Id.* at 312, 628 S.E.2d at 514. *Proctor* is of no assistance to Repko, because in *Proctor*, subsection (12)—with its gross negligence standard—was applicable to the facts of that case. In the instant case, subsection (12) is not applicable in the first instance, and no other immunity subsection containing a gross negligence standard is applicable to this case.

Plyler and *Steinke* clearly dictate that in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence standard must first apply to the case. We disavow any suggestion to the contrary in *Jones*. In many instances, a governmental entity may initially plead entitlement to immunity pursuant to a subsection containing a gross negligence standard. In many of those instances, that particular immunity may ultimately not apply to the facts of the case. In such a case, the gross negligence standard contained in that immunity is not to be read into applicable immunity subsections that do not

contain a gross negligence standard. We reaffirm our holding in *Steinke* "that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception." 336 S.C. at 398, 520 S.E.2d at 155.

Here, at the directed verdict stage, Repko argued—correctly we must add—that subsection 15-78-60(12) did not apply to this case. The trial court agreed and so ruled. Repko is left only with the argument that the gross negligence standard in subsection (12) should be read into subsection 15-78-60(4) simply because the County originally pled subsection (12) as a defense. This argument fails as a matter of law; standing alone, subsection (4) provides immunity to the County. Therefore, we find the trial court correctly directed a verdict for the County pursuant to subsection 15-78-60(4).

IV.

The trial court properly granted a directed verdict to the County on the ground that the County is immune from liability pursuant to subsection 15-78-60(4) of the TCA. We therefore **REVERSE** the court of appeals and reinstate the directed verdict. We vacate the opinion of the court of appeals.

BEATTY, C.J., KITTREDGE, J., and Acting Justice Gordon G. Cooper, concur. HEARN, J., concurring in result only in a separate opinion.

JUSTICE HEARN: I concur in the result reached by the majority but write separately, as I believe the first question we must address is whether the County owed a private duty to Repko. *Arthurs ex rel. Estate of Munn v. Aiken Cty.*, 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001) ("Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue."). Because I agree with the trial court that the County owed no such duty, I would reverse the court of appeals on that ground, thus ending the inquiry.

As the majority discussed, the County promulgated regulations concerning the completion of infrastructure in certain residential communities. Section 3.1 of the ordinance expressly states, "Acceptance of a financial guarantee by Georgetown County shall not be construed as an obligation to any other agency, utility or property owner within the affected developments."

In viewing this provision, it is important to note that this Court has recognized that the public duty rule and the South Carolina Tort Claims Act are not incompatible. *Arthurs*, 346 S.C. at 103, 551 S.E.2d at 582 (holding the public duty rule is still applicable where the plaintiff's claim is grounded upon a statutory duty, even after the enactment of the Tort Claims Act). Under the public duty rule, where a statute levies a duty on public officials to "discharg[e] their statutory obligations," they generally are not liable in a private cause of action because the statute is presumed to be for the benefit of the public rather than any individual member. *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 446, 697 S.E.2d 575, 577 (2010). Because this rule forecloses a finding of a legal duty, it is a negative defense that strikes at the core of a plaintiff's negligence claim, unlike the affirmative defense of immunity, which bars liability for an otherwise prima facie case of negligence. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 389, 520 S.E.2d 142, 150 (1999).

However, an exception to the public duty rule applies where the statute demonstrates the drafter's intent to impose a duty upon public officials for the benefit of a specified class of persons. To ascertain legislative intent, this Court has applied the six-factor "special duty test" adopted in *Jensen v. Anderson County Dep't of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991).[3] There, the Court explicitly

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[3] As set forth in *Jensen*, the special duty test encompasses:

> (1) an essential purpose of the statute is to protect against a particular kind of harm;

recognized the test "is in itself an attempt to determine legislative intent;" in other words, the focus of the inquiry is to determine when the legislature intended to create a special duty owed to a particular class of persons. *Id.* at 201, 403 S.E.2d at 618. Because the special duty test is merely a tool of statutory construction, I do not believe it is essential that it be applied when the relevant provision unambiguously demonstrates an intent not to impose a private duty. *Arthurs*, 346 S.C. at 104, 551 S.E.2d at 582 ("[I]t is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach.").

As the majority described, the County passed an ordinance regulating the planning and development of subdivisions whereby a developer could not sell a lot until the infrastructure was completed—including storm water management, grading of the roads, and utilities. However, section 3.1 afforded the County discretionary authority to accept a developer's financial guarantee in lieu of compliance with the required infrastructure, thereby permitting the developer to sell lots while infrastructure work continued. Section 3.1's text expressly provides the County's discretionary authority "shall not be construed as an obligation to any other agency, utility or property owner..." Because that language clearly evinces the County's intent *not* to create a duty to property owners, an analysis under the special duty test in *Jensen* provides minimal, if any, additional guidance in ascertaining the County's intent. While that test is designed to ascertain when the legislature has been "sufficiently specific" to permit an aggrieved party to seek a remedy against a public official, here, the County has been more than "sufficiently specific" that it owes *no* duty to the property owners.

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(2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
(3) the class of persons the statute intends to protect is identifiable before the fact;
(4) the plaintiff is a person within the protected class;
(5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen, 304 S.C. at 200, 403 S.E.2d at 617.

The court of appeals viewed section 3.1 as a disclaimer preempted by the South Carolina Tort Claims Act. *Repko v. Cty. of Georgetown*, 416 S.C. 22, 35, 785 S.E.2d 376, 382 (Ct. App. 2016). However, whether an ordinance creates a duty of care concerns only a threshold element of a negligence claim rather than an immunities analysis. Because the Tort Claims Act does not create causes of action or establish duties of care, it does not conflict with the ordinance. *See Arthurs*, 346 S.C. at 105, 551 S.E.2d at 583 ("The TCA does not create causes of action, but removes the common law bar of sovereign immunity in certain circumstances."). Therefore, I do not believe section 3.1 was preempted by the Tort Claims Act.

Furthermore, this Court's decision in *Brady Development Co., Inc. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), guides our analysis. In *Brady*, pursuant to a Hilton Head Development Standards Ordinance, a developer posted a letter of credit guaranteeing completion of certain infrastructure requirements, including water and sewer service. *Id.* at 74, 439 S.E.2d at 267. The town permitted the developer to draw on the letter of credit as the developer completed installing the infrastructure. *Id.* at 74–75, 439 S.E.2d at 267. Nearing completion of the water and sewer service, the Public Service District denied approval of the infrastructure systems because the developer failed to pay a construction fee, and it eventually declared bankruptcy. Soon thereafter, Brady Development Company purchased a lot and contracted with a builder to construct a house. *Id.* The builder repeatedly inquired about the water and sewer service to no avail. After the house was substantially completed, it remained vacant due to the lack of water and sewer service, and it eventually burned down. *Id.*

Brady filed a lawsuit against the Town of Hilton Head Island, alleging it negligently administered the development ordinance. *Id.* During the trial, the Town moved for a directed verdict, arguing the ordinance did not create a special duty. *Id.* The trial court denied the motion, and the jury found in favor of Brady. *Id.* at 76, 439 S.E.2d at 267. On appeal, this Court reversed, holding the Town did not owe a duty to Brady because the essential purpose of the ordinance was "to protect the public from the dangers of overdevelopment on the Island of Hilton Head" rather than "to protect against a particular kind of harm." *Id.* at 76, 439 S.E.2d at 268. Having failed to satisfy the first element of the special duty test, the Court declined to impose a private duty. Further, the Court concluded if the Town owed a duty, it effectively would be "an insurer of all developments it undertook to inspect and control...and would likely discourage all efforts at such control." *Id.* at 77, 439 S.E.2d at 268.

Significantly, the Court in *Brady* rejected imposing a private duty into an ordinance that was silent on whether such a duty was created. The Court did look to the ordinance to determine the first element of the test—the essential purpose of the statute, as the ordinance stated, "The purpose of this chapter is to promote the public health, safety and general welfare...and to facilitate the timely and adequate provision of transportation, water, sewage disposal, schools, parks and other requirements." *Id.* Citing that provision, the Court concluded the ordinance did not create a special duty because the first element was not satisfied.

The facts here are even more compelling than in *Brady* because the ordinance clearly demonstrates the County's intent *not* to confer a private duty. Finding that a duty existed here would require overruling *Brady*.[4] Therefore, because I believe the County did not owe a duty, I would decline to reach the immunities issue under the Tort Claims Act. Accordingly, I concur in result only.

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[4] Even an analysis under the special duty test reaches the same result because Repko fails to satisfy the third element—the class of persons the statute intends to protect is identifiable before the fact. Section 3.1 specifically noted, "Acceptance of a financial guarantee by [the County] shall not be construed as an obligation to *any. . . property owner within the affected development.*" Therefore, it would be illogical to consider Repko, as a property owner, as part of a class the County intended to protect when the ordinance expressly provides otherwise.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David M. Repko, Appellant,

v.

County of Georgetown, Respondent.

Appellate Case No. 2014-000156

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5374
Heard September 15, 2015 – Filed January 6, 2016

REVERSED AND REMANDED

Ryan Patrick Compton, Stephen Lewis Goldfinch, Jr., and Thomas William Winslow, all of Goldfinch Winslow, LLC, of Murrells Inlet, for Appellant.

Robert L. Widener, of McNair Law Firm, PA, of Columbia, and David J. Mills, of McNair Law Firm, PA, of Pawleys Island, for Respondent.

LOCKEMY, J.: In this negligence action, David M. Repko appeals the trial court's granting of a directed verdict in favor of Georgetown County (the County). Repko argues the trial court erred in (1) construing Article V, Section 3-1 of the County Development Regulations (the Regulations) to preclude a "tort-like" duty when the plain language of that provision disclaims only a "financial-like"

obligation[1]; (2) relying on the Regulations' "sovereign immunity" provision when that provision is unenforceable because it is preempted by the South Carolina Tort Claims Act (TCA); (3) finding the Regulations did not create a special duty owed to him under the "special duty test"; (4) finding subsections 15-78-60(4), (5), and (13) of the TCA provided the County with immunity to his negligence claim; and (5) not recusing itself based upon prior business relationships concerning the transactions involved.

FACTS

Repko is the owner of two lots in Phase 2-D-1 of the West Stewart Subdivision of Harmony Township—a planned unit development in Georgetown County. In April 2012, he filed a civil action for damages against the County. He alleged the County's gross negligence in handling a financial guarantee posted by the developer, Harmony Holdings, LLC (the Developer), resulted in the loss of most of the funds that were to be used in building the subdivision's infrastructure. Repko asserted (1) the Developer failed to complete the infrastructure, (2) there were insufficient funds to complete the infrastructure (due to the County's gross negligence), and (3) the lack of infrastructure reduced his property value to "zero." As a result of the County's negligence, Repko sought to recover "past and future actual damages."

The County filed an answer, denying liability and raising several affirmative defenses. The County alleged (1) it did not owe a duty to Repko; (2) the TCA[2]—specifically, subsections 15-78-60(1), (2), (4), (5), (12), and (13) of the South Carolina Code (2005)—barred Repko's claims; and (3) the statute of limitations also barred the claims.

Repko's case proceeded to trial, where the following facts developed. Wesley Bryant, the County attorney, explained that in South Carolina, a developer is generally not allowed to sell lots that do not have the requisite infrastructure—

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[1] Our review of the record indicates Repko never raised this argument at trial, in his motion to reconsider, or at the motion to reconsider hearing, and the trial court never addressed these arguments in its orders. Therefore, we find this argument is unpreserved. *See In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Arguments raised for the first time on appeal are not preserved for our review.").

[2] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2015).

roads, water, and sewer—prior to their development. Under the Regulations, however, a developer could post cash, bonds, financial guarantees, or letters of credit in lieu of completing the infrastructure before selling the lots. Bryant stated the purpose of a financial guarantee is to ensure money is available to complete the subdivision's infrastructure "if the developer goes belly up." Bryant explained a letter of credit is "a document . . . from a financial institution to the County as a beneficiary that simply states that the development has a financial guarantee of . . . the proposed total cost of the infrastructure to be placed . . . in that development." Under a letter of credit, the bank is the issuer and the County is the beneficiary. Bryant testified property owners are not beneficiaries on a letter of credit but a letter of credit does protect the property owners. Bryant stated that, under the Regulations, the County is not required to accept a financial guarantee and may require the developer to complete the infrastructure before it is allowed to sell lots in a subdivision.

The County regulates improvements to major subdivisions through Article V of the Regulations. Article V, Section 1-5 provides, "Final plans shall not be approved for recording unless the [developer] has installed the required improvements as specified and required in this Article, or has provided a financial guarantee as specified in Section 3 of this Article." "Required improvements" include installation of monuments at street corners; a storm water management system; specified roadway improvements, including grading and paving; and utilities and services.

Article V, Section 3-1 states as follows:

> Financial guarantees may be posted in lieu of completing improvements required by this Ordinance to allow for the recording of a final plat or to obtain building permits for properties for which ownership will be transferred. . . .
>
> Acceptance of financial guarantees is discretionary[,] and [the] County reserves the right to refuse a financial guarantee for any remaining improvements and require that such improvements be completed before the recording of a final plat or issuance of building permits. Acceptance of a financial guarantee by [the] County shall not be construed as an obligation to any other agency, utility or property owner within affected developments.

The Regulations provide a procedure that must be followed if a developer wants to post a financial guarantee. First, the financial guarantee must be submitted to the County's Planning Department along with an "itemized cost estimate" for the improvements the financial guarantee will cover. The itemized cost estimate must (1) bear the original signature and seal of a licensed professional engineer, (2) be on company letterhead, and (3) be in a form acceptable to the Planning Department. Article V, Section 3-2 provides, "Upon receipt of an itemized cost estimate, the Planning Department shall forward such estimate to the appropriate departments or agencies for review."

Under the Regulations, the County may accept a letter of credit as a financial guarantee. Article V, Section 3-3 states an approved letter of credit must (1) be equal to 125% of the approved cost estimate; (2) be issued for an initial coverage period not less than twelve months from the date the final plat is filed for recording; (3) be irrevocable, unconditional, and subject to presentation for drawing within South Carolina; (4) be payable to the County; (5) be for at least $10,000 in construction; and (6) substantially conform to a required format.

If the County accepts a financial guarantee from the developer, it generally holds the guarantee until all covered improvements are completed unless a reduction in the guarantee has been approved pursuant to the following procedure set forth in Article V, Section 3-5:

> A developer may reduce a financial guarantee during the initial coverage period. A request to reduce the financial guarantee shall be submitted to the Planning Department and include a revised construction cost estimate. The Planning Department will forward the revised cost estimate to [the] County Department of Public Works for approval. Reductions of financial guarantees will not be allowed within [six] months of any previous reduction request and shall be no less than 125% of the revised construction cost estimate.

Holly Richardson, the Planning Department's chief planner, stated the County was not required to reduce a financial guarantee or letter of credit. Richardson and the Planning Department's director, Boyd Johnson, both stated that before the County would agree to reduce a letter of credit, it required "a letter from the engineer certifying that the work had been complete[d] and certifying the number[and] the dollar amounts that were left to be done."

In the early 2000s, the Developer began developing the Harmony Township community within Georgetown County. Although roads, utilities, and other required improvements were not constructed in the community, the Developer sought permission from the Planning Department to begin selling the undeveloped lots to buyers. The County allowed the Developer to post letters of credit as financial guarantees in lieu of completing the required improvements. The Developer posted a letter of credit for each phase of Harmony Township, including Phase 2-D-1, the phase at issue in this appeal.

In 2006, the Developer applied to Wachovia Bank to obtain a letter of credit for Phase 2-D-1. Wachovia granted the application and issued a letter of credit on May 23, 2006, in the amount of $1,301,705.63 (Wachovia letter of credit). The Wachovia letter of credit designated the County as the beneficiary and the Developer as the applicant. Shortly thereafter, the Developer submitted the Wachovia letter of credit to the Planning Department. It also submitted an engineer's estimate of $1,040,000.00 as the cost of completing the required improvements. Thus, the $1,301,705.63 Wachovia letter of credit was 125% of the engineer's estimate as required under the Regulations. The Planning Department accepted the letter of credit and permitted the Developer to sell undeveloped lots in Phase 2-D-1.

On July 20, 2006, the Developer requested a reduction in the Wachovia letter of credit. The County approved a request to reduce the letter of credit by $331,311.00. Repko presented evidence that the County approved this request despite noncompliance with the Regulations and the Planning Department's protocol. First, the County approved the request without the required letter of an engineer certifying "the work had been complete[d] and . . . the dollar amounts that were left to be done." Second, the County approved the request without "forward[ing] the revised cost estimate to the Georgetown County Department of Public Works for approval." Third, the County approved the request even though it indicated that the Developer sought to use the letter of credit funds to pay its contractor, contrary to Article V, Section 3-3. Fourth, an engineer's cost of completion estimate made by Earthworks, the engineering firm hired by the Developer, showed the County approved the request without retaining 125% of the funds needed to complete the infrastructure; the estimate showed virtually no work was done at that time on the infrastructure for Phase 2-D-1. Pursuant to the County's letter, Wachovia released $331,000.00, thereby reducing the letter of credit to $970,394.63.

On October 9, 2006, the County approved a second request for reduction and advised Wachovia to reduce the letter of credit by $117,024.42. The County

approved the second request for reduction (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate; (2) without forwarding a cost of completion estimate to the Department of Public Works for completion; (3) without retaining 125% of the funds needed to complete the infrastructure; (4) even though the request indicated the Developer was seeking to use the letter of credit funds to pay its contractor; and (5) even though the reduction was requested within six months of the previous request, contrary to Article V, Section 3-5. Wachovia released $117,024.42, thereby reducing the letter of credit to $853,370.21.

On November 8, 2006, the County approved a third request for reduction and advised Wachovia to reduce the letter of credit by $300,000.00. Richardson testified the third reduction request was approved based upon Earthworks' "letter and approval of the $300,000." The County again approved the request (1) without a letter from an engineer certifying that the work had been done and providing a cost of completion estimate, (2) without having sought approval from the Department of Public Works, (3) without retaining 125% of the funds needed to complete the infrastructure, (4) even though the request indicated that the Developer was using letter of credit funds to pay its contractor, and (5) even though the request was made within six months of the earlier two requests. Pursuant to the County's letter, Wachovia released $300,000.00, thereby reducing the letter of credit to $553,370.21.

In December 2006, Earthworks advised the County's Public Works Department that it "reviewed and accepted the following changes in price to [Phase 2-D-1 and Phase 2-D-2]." An "Opinion of Probable Cost" for Phase 2-D-l provided an estimated cost of $1,153,205.45 to complete the sewer and water systems and the remaining improvements for the roads, site, and drainage. Thus, the cost of completing the infrastructure for Phase 2-D-l in December 2006 was higher than the original estimate of $1,040,000.00.

On March 9, 2007, the Developer requested a fourth reduction in the Wachovia letter of credit by an amount of $396,666.18. On April 5, 2007, the County approved the request and advised Wachovia to reduce the letter of credit by $396,666.18. The County approved this request (1) without having sought approval from the Department of Public Works, (2) without retaining 125% of the funds needed to complete the infrastructure, (3) even though the Application and Certificate for Payment indicated that the Developer was using letter of credit funds to pay its contractor, and (4) even though the request was made within six months of the earlier two requests. Pursuant to the County's letter, Wachovia released $396,666.18, thereby reducing the letter of credit to $156,704.03.

In April 2007, the County Water and Sewer District advised the County that an inspection of the water and sewer lines in Phase 2-D-1 was completed. The letter stated, "Based upon this inspection, it appears that construction of the sewer mainlines, manholes[,] and sewer service laterals as permitted for the project have been completed." The letter did not give an estimate of the cost to complete the infrastructure.

At some point before the Wachovia letter of credit expired on May 23, 2007, the Developer gave the County a $140,000.00 check. The County placed these funds in a separate account to be used at Harmony. The County cashed in a letter of credit covering Phase 2-D-2, but it did not cash in the letter of credit for Phase 2-D-1. In August 2007, the Developer informed the County that it "no longer had the financial means to put any infrastructure within any phase of Harmony," and because the letters of credit were about to expire, the Developer advised the County "to call all the letters of credit that were still in good standing."

The Developer subsequently declared bankruptcy. At that time, the Developer had failed to complete basic infrastructure, such as utilities or roads, within Phase 2-D-1. A new owner later took over the project, hired his own contractor, and requested the County release funds for payment to the contractor after work was completed. The County released funds "quite a few times and maybe for a year after that"; however, the County ultimately deemed the new owner untrustworthy and stopped the release of funds. As a result, the new developer quit. Bryant testified the County does not have enough money to complete the infrastructure for Phase 2-D-1.

Repko testified there is no prospect of anybody completing the infrastructure for Phase 2-D-1. He described his lots as "woods" accessible by a path cleared out seven years ago but inaccessible by road. Because of the missing infrastructure, Repko believes the value of his property is "zero." He claimed that within the last eighteen months, only one lot in the development has sold and the sale price was $500. Repko has paid the property taxes for his lots, but the County will not allow him to build on his property because of the absence of basic utilities.

The County moved for a directed verdict at the close of Repko's case. The trial court directed a verdict in favor of the County on the following grounds: (1) the Regulations did not create a private duty owed to Repko and (2) the County was

immune from liability under subsections 15-78-60(4), (5), and (13) of the TCA.[3] Repko filed a motion to reconsider, which the trial court denied by form order.

STANDARD OF REVIEW

"The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Jones v. Lott*, 379 S.C. 285, 288-89, 665 S.E.2d 642, 644 (Ct. App. 2008), *aff'd*, 387 S.C. 339, 692 S.E.2d 900 (2010). "In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Id.* "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Id.*

In a negligence action, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Id.*

LAW/ANALYSIS

I. Duty

A. Role of Article V, Section 3-1

Repko argues the trial court erred in relying on Article V, Section 3-1 to find the County did not owe him a duty because that provision is preempted by the TCA and is therefore unenforceable. Specifically, Repko asserts the TCA governs the County's tort liability and the County cannot override application of the TCA by enacting an ordinance that waives liability for its negligent conduct. We agree. "[S]overeign immunity historically acted to protect a governmental entity from all liability for loss in a negligence action." *Adkins v. Varn*, 312 S.C. 188, 190, 439 S.E.2d 822, 823 (1993). In *McCall v. Batson*, 285 S.C. 243, 244, 329 S.E.2d 741,

[3] The trial court rejected the County's argument that it was immune from liability under subsection 15-78-60(12) of the TCA.

741 (1985), our supreme court abolished sovereign immunity, and as a result, the General Assembly enacted the TCA. *Adkins*, 312 S.C. at 190, 439 S.E.2d at 823.

Under the TCA, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). Notwithstanding any provision of law, the TCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (2005).

"Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006).

We find the County cannot avoid application of the TCA by disclaiming a duty through Article V, Section 3-1 for two reasons. First, the TCA preempts Article V, Section 3-1's disclaimer of liability. We disagree with the trial court's finding that the County could waive its tort liability by including disclaimer language in a county ordinance. Article V, Section 3-1 is a county ordinance, and it cannot dictate the application of the TCA, which the General Assembly expressly stated "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." *See* § 15-78-200; *see also* § 15-78-40 (stating a governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances"); *S.C. State Ports Auth.*, 368 S.C. at 397, 629 S.E.2d at 628 ("Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area."). A governmental entity cannot override application of the TCA through language in a local ordinance disclaiming all liability. Accordingly, the trial court's construction of Article V, Section 3-1 was erroneous because Article V, Section 3-1 is preempted by the TCA.

The second reason the County cannot avoid application of the TCA hinges on our interpretation of the term "obligation" under Article V, Section 3-1. *See* Article V, Section 3-1 ("Acceptance of a financial guarantee by [the] County shall not be construed as an obligation to any other agency, utility or property owner within affected developments."). We find that disclaiming an "obligation" to property owners when the County accepts a financial guaranty means the County is not

required to pay to the property owners the money made available through the letter of credit or other financial guarantee and the County is allowed to complete the infrastructure and ignore the preferences of the property owners in doing so.

B. The Public Duty Rule and Special Duty Exception

Repko also argues that, under Article V, Section 3-1, the County owed a special duty to him, as a lot purchaser, with respect to the County's management of the financial guaranty that allowed the Developer to sell lots to him. We agree.

"In a negligence cause of action, it is the plaintiff's burden to establish that a duty of care is owed to him by the defendant." *Trask v. Beaufort Cty.*, 392 S.C. 560, 566, 709 S.E.2d 536, 539 (Ct. App. 2011). "Although a statute may impose a duty to act upon a public official, the official may also be immune from a private right of action under the public duty rule." *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006). "This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually." *Id.* (quoting *Steinke*, 336 S.C. at 388, 520 S.E.2d at 149).

> The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach. It is a negative defense which denies the existence of a duty of care owed to the individual. The public duty rule should not be confused with the affirmative defense of immunity. Therefore, the dispositive issue is not whether [the statute] creates a duty, but rather whether the statute was intended to provide an individual a private right of action thereunder.

Id. at 442, 635 S.E.2d at 634 (citations omitted). "Since the public duty rule is not grounded in immunity but rather in duty, . . . it has not been affected by enactment of the TCA." *Arthurs ex rel. Estate of Munn v. Aiken Cty.*, 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001) (citations omitted). "Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue." *Id.*

Our supreme court has carved out a narrow exception to the public duty rule and found a statute imposes a "special duty" on a governmental entity if the following six-part test is met:

> (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 291-92, 688 S.E.2d 125, 129 (2010) (quoting *Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 200, 403 S.E.2d 615, 617 (1991)).

The trial court found Repko failed to satisfy elements two and three of the "special duty test."[4] Concerning element two, the trial court found the Regulations did not impose on any specific public officer of Georgetown County a duty to guard against or not cause a specified harm. Because the Regulations state that both the Planning Department and the Department of Public Works have the duty to oversee any reduction of the financial guarantee, the trial court erred in finding the second element unsatisfied. The Regulations state, "A request to reduce the financial guarantee shall be submitted to the Planning Department . . . . The Planning Department will forward the revised cost estimate to [the] County Department of Public Works for approval." Our appellate courts have found the "specific public officer" element satisfied by statutory language identifying a specific agency or specific employees of that agency. *See Steinke*, 336 S.C. at 390, 520 S.E.2d at 151 (finding the "specific public officer" element met when "[the] Department's director *and his designees*" were "charged with the affirmative duty of administering and enforcing" a statute (emphasis added)); *Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 203, 403 S.E.2d 615, 619 (1991) (finding the element satisfied when a statute imposed a duty to act on "the local child protection agency and its social workers"). The language of the second element

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[4] The trial court did not address elements one, four, five, and six of the special duty test, and the County does not argue these four elements are not met. Therefore, these elements are essentially conceded. Regardless, based on our review of the record and relevant law, we find these four elements were satisfied.

stating that a statute may impose a duty on a specific public officer "directly or indirectly" further supports our finding that the second element is satisfied here.

In addition, the trial court found element three was not satisfied because Article V, Section 3-1 "specifically disclaim[s] any obligation on the part of the County as a result of the acceptance of a financial guarantee." As stated previously, Article V, Section 3-1 is preempted by the TCA. Therefore, the trial court's construction of Article V, Section 3-1 as disclaiming all liability resulting from the County's acceptance of a financial guarantee is unenforceable. Consequently, we find the trial court erred in relying on Article V, Section 3-1 in finding the class of persons the Regulations intended to protect was not identifiable before the fact.

We also find the third element was satisfied because the class of persons the statute intended to protect was identifiable before the fact. When considering the Regulations as a whole, the purpose was to protect the property owners in Phase 2-D-1. The property owners in the subdivision were the only group that would benefit from the requirement that infrastructure be completed or financial guarantees be in place before the Developer was allowed to sell lots in a subdivision. Furthermore, the property owners were identifiable as a class before the County agreed to reduce the financial guarantee. Therefore, we find the class of persons the statute intended to protect was identifiable before the fact.

Based on the foregoing, we find Repko satisfied the six-element special duty test.

C. *Brady Development Co. v. Town of Hilton Head Island*

Repko next argues the trial court erred in relying on *Brady Development Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), to find the County did not owe him a special duty. We agree.

In *Brady*, the developers of a 244-lot subdivision applied for approval of their final development plan in accordance with the Hilton Head Development Standards Ordinance. *Id.* at 74, 439 S.E.2d at 267. The preamble of the Development Standards Ordinance stated, "The town council finds that the health, safety and welfare of the public is in actual danger . . . if development is allowed to continue without limitation." *Id.* at 77, 439 S.E.2d at 268 (alteration in original). To obtain a permit to sell lots before the completion of required infrastructure, the Development Standards Ordinance required the developer to post a letter of credit to guarantee the completion of the development. *Id.* at 74-75, 439 S.E.2d at 267. The Town allowed the developer to "draw down" on the letter of credit as the improvements were completed. *Id.* at 75, 439 S.E.2d at 267. The Department of

Health and Environmental Control and the Town Engineer eventually approved the completed water and sewer infrastructure; however, the Public Service District refused to approve the systems for operation because the developer went bankrupt without paying the construction fee. *Id.* A contractor for Brady, a property owner in the development, was later required to stop construction on Brady's house because water and sewer infrastructure had not been approved. *Id.* The house was vandalized and eventually burned. *Id.*

Brady sued the Town, claiming it had negligently administered its Development Standards Ordinance. *Id.* The Town moved for a directed verdict, arguing the Development Standards Ordinance did not create a special duty owed to Brady as an individual lot owner. *Id.* The trial court denied the Town's motion, finding the Town owed a special duty to Brady under the ordinance. *Id.* The jury returned a verdict for Brady, and the Town appealed. *Id.* at 76, 439 S.E.2d at 267. In reversing the trial court, our supreme court relied on the public duty rule in holding the trial court erred in ruling the ordinance created a special duty. *Id.* at 76-78, 439 S.E.2d at 268. Specifically, the supreme court stated,

> We hold that the Development Standards Ordinance does not create a special duty to Brady. The essential purpose of the ordinance is to protect the public from the dangers of overdevelopment on the Island of Hilton Head. Brady argues that the essential purpose of the ordinance is to protect those who buy lots, building sites[,] and buildings because the ordinance requires improvements and services agreements to be in existence or a surety guaranteeing these services for a development permit to be granted. To recognize such a duty would make the Town substantially an insurer of all developments it undertook to inspect and control through its Development Standards Ordinance and would likely discourage all efforts at such control.

Id. at 77, 439 S.E.2d at 268.

Here, the court found no duty existed under *Brady* because "[t]o recognize such a duty would make the [County] substantially an insurer of all developments it undertook to inspect and control through its Development [Regulations] and would likely discourage all efforts at such control." This finding was error because this case is distinguishable from *Brady*.

Unlike the Regulations, the *Brady* ordinance was enacted to protect the public at large rather than to protect a specific group of people. Specifically, the purpose of the Regulations is not to "protect the public from the dangers of overdevelopment," as was the purpose of the *Brady* ordinance. *See id.* at 77, 439 S.E.2d at 268 (noting the preamble of the Development Standards Ordinance stated "[t]he town council finds that the health, safety and welfare of the public is in actual danger . . . if development is allowed to continue without limitation" (alteration in original)). The Regulations contain no express language declaring their purpose; however, reviewing the Regulations as a whole, the purpose of the Regulations is to protect property owners in the subdivision in the event the developer does not complete the required infrastructure.

At oral argument, the County's attorney asserted the Regulations did not need a preamble like the one in *Brady* because Article V, Section 3-1 stated the County's acceptance of a financial guarantee "shall not be construed as an obligation to any . . . property owner within affected developments." However, our interpretation of the term "obligation" in Article V, Section 3-1, as discussed above, does not obviate the need for language like that found in the ordinance preamble in *Brady*. Accordingly, we find the trial court erred in relying on *Brady* to find the County did not owe a special duty to Repko.

II. Tort Claims Act

Repko asserts because the County pled subsection 15-78-60(12) as an affirmative defense in its answer, "South Carolina law mandates that a similar gross negligence exception be read into subsections 15-78-60(4), (5), and (13)." We agree.

Under subsection 15-78-60(12),

> [t]he governmental entity is not liable for a loss resulting from . . . *licensing powers or functions including*, but not limited to, *the* issuance, denial, suspension, *renewal*, or revocation *of* or failure or refusal to issue, deny, suspend, renew, or revoke *any permit*, license, certificate, *approval*, registration, order, or similar authority *except when the power or function is exercised in a grossly negligent manner*[.]

(emphases added). "Generally, this exception is applied where a governmental agency actually engages in licensing functions." *Plyler v. Burns*, 373 S.C. 637, 652, 647 S.E.2d 188, 196 (2007). The supreme court has held that "when an

exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. Otherwise, portions of the Act would be a nullity, which the Legislature could not have intended." *Steinke*, 336 S.C. at 398, 520 S.E.2d at 155.

Subsection 15-78-60(12) grants immunity for losses resulting from the "renewal" of a permit. The County approved reductions of the letter of credit and, in doing so, allowed the renewal of the permit to sell lots even though the letter of credit had been improperly reduced. Based on this evidence, a jury could have found subsection 15-78-60(12) applied. When subsection 15-78-60(12) applies, the gross negligence standard can be extended to apply to any other applicable immunity subsection. *Plyler*, 373 S.C. at 651, 647 S.E.2d at 196 ("When a governmental entity asserts an exception to the waiver of immunity and any other applicable exception contains a gross negligence standard, the Court must read the gross negligence standard into all of the exceptions under which the entity seeks immunity.").

Repko also argues the trial court erred in finding subsections 15-78-60(4), (5), and (13) of the TCA provided the County with immunity to his negligence claim.[5] Because the trial court erred in failing to read the gross negligence standard into the exceptions in subsections (4), (5), and (13), an error of law controlled the directed verdict in the County's favor. *See Jones*, 379 S.C. at 288-89, 665 S.E.2d at 644 ("The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law."). On remand, the trial court should reexamine the applicability of subsections (4), (5), and (13) under a gross negligence standard.

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[5] Subsection 15-78-60(4) provides a governmental entity is not liable for a loss resulting from the "adoption, enforcement, or compliance with any law or any failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." Subsection 15-78-60(5) states a governmental entity is not liable for a loss resulting from "the exercise of discretion or judgment by the 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." Subsection 15-78-60(13) provides a governmental entity is not liable for a loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety."

III. Recusal

Repko argues the trial judge, Judge Culbertson, erred in not recusing himself because he had previously been hired by Harmony Holdings to handle real estate transactions. Because this issue was raised for the first time at the hearing on the motion to reconsider, it is unpreserved. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").[6]

CONCLUSION

For the foregoing reasons, the trial court's decision is

REVERSED AND REMANDED.[7]

FEW, C.J., concurs. KONDUROS, J., concurs in result only.

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[6] We note that Judge Culbertson stated at the motion to reconsider hearing that he handled several closings for people who purchased lots at the Harmony development but that was the extent of his involvement with the Harmony development. The record contains no evidence that he was involved in any transaction in this case.

[7] As an additional sustaining ground, the County asserts the trial court erred in denying its directed verdict motion on the grounds that the statute of limitations barred this action. Viewing the evidence in the light most favorable to Repko, a question of fact existed as to when Repko should have discovered he had a claim against the County. Therefore, the trial court did not err in denying the County's directed verdict motion on this ground. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.").