THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

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

v.

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

And

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

v.

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

RESPONDENTS' FINAL BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF THE CASE

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. p. 16).

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

The fact that damages occurred in one of several ways does not defeat a verdict if the evidence tends to support the reasonable probability of the theory of damages relied

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

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

RES IPSA LOQUITUR

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

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

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

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

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

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

The Shed

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

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

(R. p. 14).

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

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

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

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PROOF OF SERVICE AND
211(b) CERTIFICATION

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

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

May 12, 2014

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

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

CONCLUSION

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

Respectfully submitted,

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