THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
Case No. 2012-CP-22-00558

David M. Repko,..Appellant,

v.

County of Georgetown,...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Article V, Section 3 of Georgetown County's Development Regulations does not create a private or special duty owed to Plaintiff.

2. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(4) (Rev. 2005)

3. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(5) (Rev. 2005)

4. Georgetown County is immune from liability for Plaintiff's claim pursuant to S.C. Code Ann. § 15-78-60(13) (Rev. 2005), but that issue is now moot because Plaintiff has abandoned any claim for failure to inspect.

5. Georgetown County's immunity from Plaintiff's claim is not subject to an exception for gross negligence.

6. There is no basis for requiring the trial judge to recuse himself from this matter or to grant a new trial.

7. Plaintiff has not suffered any prejudice from any refusal of the trial judge to recuse himself or grant Plaintiff a new trial.

8. Plaintiff's appellate arguments are not properly before this Court for appellate review.

9. As an additional sustaining ground and reason to affirm, the trial court should have granted Georgetown County's directed verdict motion based on the statute of limitations.

STATEMENT OF THE CASE

The Appellant (Plaintiff) sued the Respondent (County) in negligence for alleged violations of the requirements in Article V, Section 3 of County's Development Regulations. This was the only claim made by Plaintiff – he abandoned all other claims at trial. (R. 231). The trial court directed a verdict in favor of County at the close of Plaintiff's case upon the following grounds: (1) Article V, Section 3 of County's Regulations did not create a private duty owed to Plaintiff; and (2) County was immune from liability under subsections (4), (5), and (13) of S.C. Code Ann. § 15-78-60 (Rev. 2005) in the Tort Claims Act. (R. 4-8, 8-11).

Plaintiff filed a motion to reconsider, which sought a new trial upon reconsideration of the foregoing rulings. (R. 381-382). At the hearing on the motion to reconsider, Plaintiff raised two issues for the first time: (1) the immunity granted by § 15-78-60(4), (5), and (13) was subject to an exception for "gross negligence"; and (2) the trial judge should have recused himself.[1]

The trial court denied Plaintiff's post-trial motions in a single-sentence order that stated: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "gross negligence" and "recusal" issues until the hearing on his motion to reconsider, this was the first order on those issues. The order did not mention nor rule on these issues specifically. (Id.). Plaintiff did not file a motion seeking a ruling on these issues before appealing.

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[1] Plaintiff did not raise these issues at trial. (See R. 224-251, *passim*). He did not raise these issues in his motion to reconsider. (R. 381-382, *passim*). He raised the "gross negligence" issue for the first time at the hearing on the motion to reconsider (R. 265-267) and in a memorandum that he handed up at the hearing. (See R. 255, 405-408). Plaintiff orally raised the recusal issue for the first time at the motions hearing. (R. 268-270).

ARGUMENT

The fundamental question presented in this appeal is whether Article V, Section 3 of County's Regulations created a special or private duty owed to Plaintiff. The trial court correctly held that it did not because, *inter alia*, Section 3-1 of those Regulations expressly disclaimed any legislative intent to create any private duty. (R. 4). Section 3-1 provides:

> Acceptance of a financial guarantee [Letter of Credit] by Georgetown County *shall not be construed as an obligation to any* other agency, utility or *property owner within the affected developments*.

(County Reg. at Art. V, § 3.1) (emphasis added). On appeal, Plaintiff makes three basic arguments. First, he argues that the trial court misconstrued § 3-1, because it does not disclaim a "private duty." (Init. App. Br. 15-17). This argument is not preserved for appeal, and it is manifestly without merit. Second, Plaintiff mixes the concepts of duty, liability, and immunity to construct an erroneous argument that the Tort Claims Act "preempts" § 3-1 and renders it void. (Init. App. Br. 17-21). This argument is not preserved for appeal, and it is manifestly without merit. Third, Plaintiff argues that application of the six-part "special duty test" created by the courts to construe statutes mandates a conclusion that the Regulations created a private duty to him. (Init. App. Br. 21-26). This argument is not preserved for appeal, and it is manifestly without merit.

The trial court also ruled correctly that, assuming the Regulations created any duty owed to Plaintiff, County was immune from liability under three subsections of the Tort Claims Act. (R. 8-11). On appeal, Plaintiff presents myriad arguments on each of the three subsections. (Init. App. Br. 26-33). These arguments are not preserved for appeal, and they are manifestly without merit.

The trial court granted a directed verdict to County on several independent grounds. Under the two-issue rule, the trial court must be affirmed if any one of these grounds is correct, regardless of any presumed error in any of the other grounds. *Dropkin v. Beachwalk Villas Condo. Ass'n, Inc.*, 644 S.E.2d 808, 811 (S.C. App. 2007); *Weeks v. McMillan*, 353 S.E.2d 289, 292 (S.C. App. 1987).

In his final argument, Plaintiff argues he is entitled to a new trial, because the trial judge should have recused himself from this matter. (Init. App. Br. 33-41). This argument is frivolous, and it is not preserved for appeal.

I. The trial court correctly held that Article V, Section 3 of Georgetown County's Development Regulations did not create a private duty owed to Plaintiff, and Plaintiff's contrary arguments are not preserved for appeal and have no merit.

The trial court held that the Regulations did not create any special duty owed to Plaintiff for three independent reasons:

1. The plain language of § 3-1 demonstrated a clear legislative intent to not create a special or private duty. (R. 4).
2. The Regulations should not be read as imposing a special duty on the County, because doing so would make the County an insurer of developments, and would likely discourage efforts to regulate developments. (R. 5-7).
3. Assuming the "special duty" test was applicable, Plaintiff failed to satisfy two elements of this test. (R. 7-8).

As demonstrated below, the trial court's rulings were correct, and Plaintiff's contrary arguments are not properly before this Court for review. Affirmance on any one of these grounds moots all other issues. *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 598 (S.C. 1999) (when ruling on one issue is dispositive of the appeal, the appellate court need not address any other issues).

A. Section 3-1 of County's Regulations plainly states a legislative intent that the Regulations in Article V, Section 3 do not create any special or private duty to any person and, therefore, Plaintiff's claim is barred by the public duty rule.

South Carolina adopted the "public duty rule" in 1940, and it remains the law of South Carolina today. *Edwards v. Lexington County Sheriff's Dept.*, 688 S.E.2d 125, 129 (S.C. 2010). Under this rule, statutes that create or define a public officer's duties do not create a private duty owed to individuals. *Id.* South Carolina recognizes a limited exception to this rule, that exception being whether the legislative body intended to create a private right of action for an alleged violation of the duty imposed by the statute, *i.e.*, a "special" or "private" duty. That intent is determined by applying a six-factor test under the public duty rule if, and only if, the statute does not express a legislative intent on the creation of a special duty:

> 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.

Vaughan v. Town of Lyman, 635 S.E.2d 631, 634 (S.C. 2006) (emphasis added), *quoted with approval and applied in Edwards v. Lexington County Sheriff's Dept.*, 688 S.E.2d 125, 129 (S.C. 2010). There can be no special or private duty if the legislative body "has spoken directly to its intent to foreclose" any special or private duty. *Edwards*, 688 S.E.2d at 129.

Here, § 3-1 of the Regulations specifically and plainly states that "[a]cceptance of a financial guarantee [Letter of Credit] *shall not be construed as an obligation* to *any . . . property owner* within affected developments." (County Reg. at Art. V, § 3.1) (emphasis

added). It is thus clear that the legislative body did not intend to create any special or private duty to any property owner. Thus, the six-factor "special duty test" is irrelevant. *Edwards*, 688 S.E.2d at 129; *Vaughan*, 635 S.E.2d at 634. Accordingly, the trial court correctly held that the Regulations did not create any duty to Plaintiff. (R. 4). Affirmance on this ground moots all other issues in this appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

On appeal, Plaintiff refers to § 3-1 as a "sovereign immunity provision." (Init. App. Br. 15). Section 3-1, however, goes to the existence of a duty – it has nothing to do with immunity. Plaintiff has confused the question of duty with the defense of immunity.

Plaintiff also argues that the trial court misconstrued § 3-1 for three reasons and therefore mistakenly found there was no duty owed to Plaintiff:

1. Section 3-1 does not disclaim any "private duty" because it does not use the words "private" or "duty." Rather, § 3-1 uses the term "obligation" without indicating whether it includes the tort concept of duty or merely negates any contractual obligation claim such as a property owner claiming to be a third-party beneficiary of the financial guarantee.

2. Section 3-1 addresses only the "acceptance" of a financial guarantee but does not address whether there is a private claim for mishandling the financial guarantee after it is accepted.

3. The county attorney testified that County owed a duty to property owners under the Regulations to effectively manage the financial guarantee after its acceptance, which negates the notion the § 3-1 precludes any private duty, and this testimony should be accorded deference as a decision by those charged with interpreting and applying ordinances.

(Init. App. Br. 15-17). Plaintiff did not make any of these arguments at trial (R. 224-251, *passim*) and, therefore, he cannot make them on appeal. *In re Michael H.*, 602 S.E.2d 729,

732 (S.C. 2004) (issue not raised at trial cannot be raised on appeal).[2] In any event, Plaintiff's arguments are manifestly without merit.

As to the absence of "private" and "duty" from § 3-1, the cardinal rule of statutory construction, to which all other rules are subservient, is to determine and give effect to the intent of the legislative body. *State v. County of Florence*, 749 S.E.2d 516, 518 (S.C. 2013). In determining this intent, the words used by the legislative body must be given their plain and ordinary meaning. *Id.* at 518. Here, the concept of "private," *i.e.*, a private person like Plaintiff, is fully set forth in and captured by the phrase "any ... property owner within affected developments." As to "duty," § 3-1 expressly disclaims any "obligation," which is a broad and expansive term that captures and includes the concept of duty. BLACK'S LAW DICTIONARY (10th Ed. 2014) at 1242 ("Obligation" has "many wide and varied meanings," including a duty "imposed by law."); *accord* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Ed. 2000) at 1212 ("obligation" includes "a social, legal, or moral requirement, such as a duty"). This has been the meaning of "obligation" in South Carolina law for 150 years. *Wood v. Wood*, 19 S.C.L. (14 Rich.) 148, 153 (S.C. App. 1867) (obligation "is a word of large extent" that "sometimes means only duty, and always includes this meaning"), *quoting* Lord Coke. Thus, Plaintiff's argument on the failure to mention "private" or "duty" is without merit.

As to Plaintiff's "acceptance v. mishandling" argument, the acceptance of a financial guarantee is a condition precedent to and trigger for any "handling" of the guarantee. By disclaiming any obligation from the acceptance of a financial guarantee, the

[2] Plaintiff also did not make these arguments to the trial court in his Rule 59 motion, his memorandum in support of that motion, or at the hearing on that motion. (See R. 381-396, 397-408, 255-279, all *passim*). Thus, Plaintiff is making these arguments for the first time on appeal, and it is axiomatic that an argument cannot be made for the first time on appeal. *In re Michael H.*, 602 S.E.2d at 732.

legislative body manifestly captured and disclaimed any obligation related to any subsequent "handling" of the guarantee. Moreover, it would make no sense and be absurd for a legislative body to disclaim any obligation arising from the "acceptance" of a financial guarantee but *intend to assume* an obligation for the subsequent "handling" of that same guarantee – and a fundamental rule of statutory construction is to avoid absurd results. *State v. County of Florence*, 749 S.E.2d at 518 (court will not interpret a statute in a manner that produces an absurd result). The only logical reading of § 3-1 is that the legislative body intended that it would have no obligation or duty to any property owner for anything arising from or related to the acceptance of a financial guarantee, including but not limited to any subsequent "handling" of that same guarantee.

Finally, as to the testimony of the county attorney, Plaintiff correctly notes the general rule that courts give deference to bodies charged with the administration of ordinances. (Init. App. Br. 16). That deference, however, is not absolute as noted in the authority cited by Plaintiff:

> Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "*a broader and more independent review is permitted when the issue concerns the construction of an ordinance*." The determination of legislative intent is a matter of law.

Mikell v. County of Charleston, 687 S.E.2d 326, 329 (S.C. 2009) (citations omitted) (all emphasis added). Thus, "[w]hen reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law." *Id.* at 330. Moreover, the plain language of the ordinance controls over any construction by persons involved in its administration. *Brown v. South Carolina Dept. of Health and Envtl. Control*, 560 S.E.2d 410, 415 (S.C. 2002) ("While the Court typically defers to the Board's construction of its

own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation.").

Here, the county attorney believed there was a duty to property owners, but his belief is irrelevant, because the plain language of the § 3-1 disclaims any such duty. *Brown*, 560 S.E.2d at 415. Moreover, his testimony generally related to his beliefs about what the County should do under the ordinance after it called a letter of credit and received the cash, and after it had learned of questionable – perhaps fraudulent – activity by the developer. (R. 69-71, 85-86, 91-92). Plaintiff does not complain about County's actions after it received the cash from the letter of credit – rather, he complains about the reductions in the letter of credit before County received any cash from it.

In summary, Plaintiff's arguments about the meaning of § 3-1 are not preserved for appellate review and, in any event, his arguments have no merit. The plain meaning of § 3-1 is that the County owed no private or special duty to Plaintiff. Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

B. The Tort Claims Act does not negate the disclaimer of duty in § 3-1.

Plaintiff argues that any disclaimer of duty in § 3-1 is unenforceable, because: (1) the General Assembly has preempted the field of sovereign immunity with the Tort Claims Act; (2) the "Sovereign Immunity provision" in § 3-1 conflicts with the Tort Claims Act; and (3) therefore, the "Sovereign Immunity provision" in § 3-1 is unenforceable. (Init. App. Br. 17-21). Plaintiff's argument is based on a false premise. Section 3-1 is not a sovereign immunity provision – it goes to the existence of a duty, not an immunity from the breach of a duty. The trial court's ruling was based on the public

duty rule, not any notion of sovereign immunity. Thus, Plaintiff has fallen prey to the confusion that the Supreme Court warned against in *Vaughn*: "The public duty rule *should not be confused with the affirmative defense of immunity*." *Vaughan*, 635 S.E.2d at 634 (emphasis added). In short, Plaintiff's pre-emption argument is without merit and irrelevant. The issue presented here is one of duty, not immunity. Moreover, Plaintiff misperceives the impact and purpose of the Tort Claims Act. It does not create or impose any duty – it simply limits liability for the breach of an existing duty, and § 3-1 precludes the existence of any special or private duty in this case. [3]

C. Section 3-1 does not create a "special duty" owed to Plaintiff.

Plaintiff argues that § 3-1 created a "special duty" to him under the six-part special duty test for identifying exceptions to the public duty rule. (Init. App. Br. 21-26). Plaintiff ignores the essential purpose of this "special duty test," which is to determine whether the legislative body intended to create a private duty. As shown earlier, § 3-1 plainly expresses a legislative intent to not create a private duty and, therefore, the six-part special duty test is irrelevant. In any event, the trial court also made two additional independent rulings that application of the "special duty test" did not yield any private or special duty owed to Plaintiff.

[3] It is questionable whether Plaintiff's pre-emption argument is preserved for appeal. At trial, Plaintiff argued that the Tort Claims Act made governmental entities liable for their negligence just as any other person or entity, and this liability could not be avoided by waiving it in a statute. (R. 238-241). Plaintiff never mentioned pre-emption and never argued specifically that § 3-1 was a "sovereign immunity provision" that was "'pre-empted" by the Tort Claims Act. (Id.). An argument not raised at trial is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732.

1. Imposing liability on County in this case would make it an insurer of developments and discourage regulation of developments.

The trial court held that finding a private duty was precluded by the Supreme Court's ruling in *Brady Dev. Co., Inc. v. Town of Hilton Head*, 439 S.E.2d 266 (S.C. 1993), to-wit: recognizing a private duty would make County an insurer of developments in the county and discourage regulation of developments. (R. 7). On appeal, Plaintiff argues that the "public policy concerns" in *Brady* are not present here. (Init. App. Br. 25-26). Plaintiff never made this argument to the trial court[4] and, therefore, this argument cannot be made on appeal. *In re Michael H.*, 602 S.E.2d at 732. Affirmance on this ground moots all other issues on appeal. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292. In any event, the trial court ruled correctly. This case, like *Brady*, involves the public policy concern of not making County an insurer of developments. That is precisely what Plaintiff seeks to do here, and the trial court properly rejected it. Affirmance on this ground also moots all other issues on appeal, including all recusal issues. *Id.*

2. Plaintiff fails to satisfy two elements of the "special duty test" for imposing liability on County in this case.

The trial court ruled that Plaintiff failed to satisfy two elements of the "special duty test." (R. 7-8). That test has the following six elements:

(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] Plaintiff did not make this argument at trial. (See R. 224-251, *passim*). He did not make this argument in his motion to reconsider. (See R. 381-382, *passim*). He did not make this argument in his memorandum in support of his motion to reconsider. (See R. 397-408, *passim*). He did not make this argument at the hearing on his motion to reconsider. (See R. 255-279, *passim*).

> (4) the plaintiff is a person within the protected class;
> (5) the public officer knew 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.

Steinke v. South Carolina Dep't of Labor, Licensing, and Reg., 520 S.E.2d 142, 150 (S.C. 1999). (emphasis added). The trial court found that the second element had not been met, because Article V, § 3 of County's regulations did not impose any duty on "any *specific* public officer of Georgetown County." (R. 7-8) (emphasis added). On appeal, Plaintiff first argues that this ruling was "based solely on the unenforceable Sovereign Immunity provision," *i.e.*, § 3-1 of the regulations. (Init. App. Br. 23). This is simply wrong – the trial court specifically ruled: "Specifically, the Georgetown County Development Regulations at issue here neither directly nor indirectly imposed on any *specific* public officer of Georgetown County a duty to guard against or not cause a specified harm." (R. 7-8) (emphasis added). Moreover, as shown earlier, § 3-1 is not a "sovereign immunity provision"

Plaintiff next argues that the regulation imposes a duty on employees of County's Planning Department and Department of Public Works. (Init. App. Br. 23). This does not and cannot satisfy the requirement of imposing a duty on a "*specific* public officer." Moreover, as Plaintiff concedes on appeal, responsibility under the ordinance is divided amongst several departments and employees: the decision to accept a financial guarantee "is imposed on employee<u>s</u> of the County's Planning Department" and the ordinance then tasks "the Planning Department ***and*** the Department of Public Works with the duty overseeing any reduction in these funds." (Init. App. Br. 23) (all emphasis added). Thus, there is no "*specific* public officer" charged with a duty to guard against or not cause harm.

Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; W*eeks*, 353 S.E.2d at 292.

The trial court also found that the third element of the "special duty test" had not been met, because the class of persons that the statute "intends" to protect is not identifiable before the fact. (R. 8). On appeal, Plaintiff argues that "[t]he ordinance *intends* to protect" persons who purchase a lot in a development covered by a financial guarantee. (Init. App. Br. 23) (emphasis added). The ordinance clearly had no such "intent" – it specifically disavowed any obligation to any "property owner within affected developments." (Cnty. Reg. § 3-1). Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; W*eeks*, 353 S.E.2d at 292.

II. County is immune from liability under the Tort Claims Act, and Plaintiff's contrary arguments are not preserved for appeal and have no merit.

The trial court held that County was immune from liability under three subsections (4), (5), and (13) of § 15-78-60 in the Tort Claims Act. (R. 8-11). As demonstrated below, Plaintiff's contrary arguments are not preserved for appeal and have no merit.

A. County is immune from liability pursuant to § 15-78-60(4), and Plaintiff's contrary arguments are without merit and not preserved for appeal.

The trial court held that § 15-78-60(4) [5] granted immunity to County under the following analysis and ruling:

> The gravamen of the Plaintiff's Complaint *and his trial evidence* was that [County] failed to comply with or enforce its own regulation regarding the acceptance and reduction of a financial guarantee. Simply put, Plaintiff

[5] Section 15-78-60(4) provides that 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."

> contended that [County] adopted the Development Regulation relating to financial guarantees and the *failed to enforce it against itself*. . .. Plaintiff's allegations of failure to enforce the Development Regulations fall squarely within exception § 15-78-60(4) . . ..

(R. 9-10) (emphasis added). Plaintiff never challenges this ruling on appeal. It is therefore the law of this case. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998). Moreover, the trial court was manifestly correct – subsection (4) grants immunity from any claim based on a failure to enforce a regulation, and Plaintiff's entire claim rests upon County's alleged failure to abide by the Regulations. (See R. 247, where Plaintiff asserts that County was "negligent as to how they handled the funds, which is the *whole basis of our negligence claim* in this case.") (emphasis added).

At trial, Plaintiff's only argument against immunity under subsection (4) was made in response to the trial court's question regarding the "failure to enforce any law including an ordinance." (R. 245). Plaintiff's entire argument is set forth below:

> At that point, Your Honor, they're not, they're not failing to enforce this ordinance. They actually in their enforcement mechanism they're required to make sure that they administer the reductions in the letter of credit properly. They're not looking to enforce an ordinance. They have an administrative function at that point to ensure that these monies are not improperly reduced or spent and that's what's happened in this case. This isn't – this doesn't go to adoption or enforcement of a law or statute. It goes directly to the handling of their own functions within the, within the County offices.

(R. 245). In short, Plaintiff argued only that subsection (4) did not apply, because it did not include County's failure to follow the ordinance, *i.e.*, County's failure to enforce the ordinance against itself. Plaintiff never pursues this argument on appeal. (Init. App. Br. 27-29, *passim*). Thus, Plaintiff has abandoned this argument.

Plaintiff's only argument on appeal is that the immunity granted by subsection (4) is subject to an exception for "gross negligence." (Init. App. Br. 27-29). Plaintiff did not

make this argument at trial. (See R. 224-251, *passim*). Therefore, he cannot make this argument on appeal. *In re Michael H.*, 602 S.E.2d at 732 (issue not raised at trial is not preserved for appeal). Plaintiff also did not make this argument in his Rule 59 motion. (See R. 381-382, *passim*).

Seventy-nine (79) days after the trial court's order, and seventy-one (71) days after Plaintiff filed his motion to reconsider, the trial court held a hearing on Plaintiff's motion. At this hearing, Plaintiff handed up a memorandum and argued for the first time that the immunity granted by subsection (4) was subject to an exception for "gross negligence." (R. 255, 265-267, 397-408). It is axiomatic that an issue cannot be raised for the first time in a motion to reconsider. *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). It is therefore equally axiomatic that an issue cannot be raised for the first time at oral argument on a motion to reconsider. Thus, this issue is not preserved for appeal.

The trial court summarily denied Plaintiff's motion to reconsider as follows: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "gross negligence" issue until the motions hearing, this order was the trial court's first opportunity to address the issue. This order did not mention or rule specifically on the "gross negligence" issue. Plaintiff did not file a motion to obtain a ruling. Thus, his appellate arguments are not preserved for appeal. *Johnson v. Lloyd*, 757 S.E.2d 705, 706 (S.C. 2014).

In short, Plaintiff's only argument against immunity under subsection (4) is not preserved for appellate review and, therefore, this Court should affirm the trial court's ruling. This affirmance would moot all other issues, because the trial court's ruling under § 15-78-60(4) was an independent ground for directing a verdict against Plaintiff. *Dropkin*

v. Beachwalk Villas Condo. Ass'n, Inc., 644 S.E.2d 808, 811 (S.C. App. 2007); see also *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 598 (S.C. 1999) (when ruling on one issue is dispositive of the appeal, the appellate court need not address any other issues).

Plaintiff's "gross negligence" argument is also not properly before this Court for other reasons. It rests upon the Supreme Court's ruling in *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 520 S.E.2d 142 (S.C. 1999) that when an exception to liability containing a gross negligence standard applies to a case, the gross negligence standard is read into any other applicable exceptions. Plaintiff argues that the immunity granted by § 15-78-60(12) was raised by the County and, since it contains a "gross negligence" standard, that standard also applies to the subsection (4) immunity found by the trial court in this case. As noted earlier, this argument is not preserved for appeal, because Plaintiff did not make this argument at trial. It also not properly before this Court for two other reasons. First, Plaintiff successfully argued at trial that subsection (12) did not apply here. (R. 246). He cannot change positions on appeal. *State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (cannot make one argument at trial and a different argument on appeal). Second, the trial court ruled that subsection (12) did not apply to this case. (R. 11; see also R. 249, where trial court rules that subsection (12) is not "applicable"). Neither party has appealed this ruling, so it is the law of the case. *First Union*, 511 S.E.2d at 378. Thus, Plaintiff's "gross negligence" arguments fails, because the premise of the argument – the applicability of subsection (12) – is barred by the law of the case doctrine and Plaintiff cannot argue on appeal that subsection (12) applies. In any event, Plaintiff's argument has no merit.

In *Steinke*, the Supreme Court held that "when an *applicable* exception contains the gross negligence standard, then any other *relevant* exception must be read in light of that standard." 520 S.E.2d at 158 (emphasis added). The rationale for this ruling is simple and straightforward. If the conduct protected by a subsection with a gross negligence exception is the same conduct protected by another subsection without a gross negligence exception, then it would make no sense to allow the governmental entity to escape "gross negligence" liability for that conduct. *Id.* at 154 (gross negligence standard applies to all exceptions from liability "when it is contained in one *applicable* exception") (emphasis added). Here, Plaintiff's entire claim rests solely upon how County handled the letter of credit (See R. 247, where Plaintiff asserts that County was "negligent as to how they handled the funds, which is the *whole basis of our negligence claim* in this case.") (emphasis added). Subsection (12) clearly does not apply to this claim, because this case does not involve any "licensing" decision by County.[6] Since subsection (12) does not apply to Plaintiff's claim, the "gross negligence" standard in subsection (12) does not apply to any other exceptions, *i.e.*, it does not apply to the exceptions in subsections (4), (5), and (13).[7] Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; W*eeks*, 353 S.E.2d at 292.

[6] Section 15-78-60(12) provides that 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."

[7] Plaintiff never argues that subsection (12) applies to his claim. (Init. App. Br. 27-29, *passim*). Rather, he argues only that County asserted subsection (12) as a defense and this assertion itself made the "gross negligence" standard applicable to the other exceptions. (See Init. App. Br. at 27, stating that gross negligence applied "[b]ecause subsection (12 was *raised* by the [County]"; and at 28, stating that "[b]ecause the [County] *raised* subsection (12) as a defense . . ." (Emphasis added). The question, however, is whether subsection (12) *applies* to this case, not whether it was *raised*. Plaintiff never argues that subsection (12) applies, and it clearly does not apply. Thus, the gross negligence standard in subsection (12) does not apply to subsections (4), (5), or (13) in this case.

B. County is immune from liability pursuant to § 15-78-60(5), and Plaintiff's contrary arguments are without merit and not preserved for appeal.

The trial court held that § 15-78-60(5) granted immunity to County, because the decision to accept and reduce a financial guarantee was a discretionary act. (R. 10).[8] On appeal, Plaintiff concedes the correctness of this ruling: "the Court *correctly* noted that the County's decisions to accept financial guarantees and *to subsequently authorize reductions* in the letter of credit *were all discretionary acts*." (Init. App. Br. 30) (emphasis added).

Plaintiff nevertheless argues that: (1) County failed to show it had weighed competing alternatives under accepted professional standards; and (2) County did not rely on proper documentation or otherwise adhere to the regulations. (Init. App. Br. 30-31). Plaintiff did not make these arguments to the trial court (R. 246) and, therefore, these arguments cannot be made on appeal. *In re Michael H.*, 602 S.E.2d at 732.

Plaintiff also argues that the gross negligence standard from subsection (12) applies to subsection (5). (Init. App. Br. 31-32). As shown earlier, this argument is not preserved for appeal and has no merit. (See Arg. II(A), *supra*).

Finally, Plaintiff argues in a single sentence that "subsection (5) does not entitle the County to immunity because the requirement that the County always retain 125% of the outstanding completion costs is mandatory and is not subject to discretion." (Init. App. Br. 30). This single-sentence argument is too conclusory to present any issue on appeal and is therefore an abandonment of this issue. *Bean v. South Carolina Cent. R. Co., Inc.*, 709

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[8] Section 15-78-60(5) provides that 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."

S.E.2d 99, 113 (S.C. App. 2011). Affirmance on the foregoing grounds moots all other issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

In any event, the trial court ruled correctly. County had discretion to reduce the letter of credit – Plaintiff concedes this. There is evidence from which one could infer the letter of credit was reduced below 125% of the costs to complete the infrastructure, but this was simply a mistake by County, *i.e.*, negligence, and subsection (5) provides immunity for such negligence. Thus, the trial court correctly found that subsection (5) provided immunity to County. Affirmance on this ground moots all other issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

C. The question of immunity pursuant to § 15-78-60(13) is now moot, because Plaintiff concedes on appeal that he is not pursuing any "duty to inspect theory" or any violation of that duty.

The trial court held that § 15-78-60(13) granted immunity to County, because Plaintiff elicited testimony that County had not inspected the property before reducing the letter of credit, and subsection (13) granted immunity for any failure to inspect. (R. 11). Plaintiff concedes on appeal that he is not seeking recovery under any "failure to inspect" theory. (Init. App. Br. 32-33). Thus, this issue is now moot.

III. Plaintiff's "recusal" issue is frivolous, and it is not preserved for appeal.

Plaintiff orally raised the recusal issue for the first time at the hearing on his motion to reconsider and for new trial. (R. 268-270). It is axiomatic that an issue cannot be raised for the first time in a motion to reconsider. *Patterson v. Reid*, 456 S.E.2d 436, 437 (S.C. App. 1995). It is therefore equally axiomatic that an issue cannot be raised for the first

time at oral argument on a motion to reconsider. Thus, Plaintiff's recusal arguments are not preserved for appellate review.

The trial court summarily denied the motion as follows: "Plaintiff's motion to reconsider and for new trial is denied." (R. 15-16). Since Plaintiff did not raise the "recusal" issue until the motions hearing, this order was the trial court's first opportunity to address the issue. This order did not mention or rule specifically on the "recusal" issue. Plaintiff did not file a motion to obtain a ruling. Thus, his appellate arguments are not preserved for appeal. *Johnson*, 757 S.E.2d at 706. As shown below, Plaintiff's recusal issue is also not preserved for other reasons. More importantly, Plaintiff's recusal issue is frivolous.

Since Plaintiff accuses the trial judge of impropriety, it is worthwhile to quote the entire transcript on this matter:

> MR. MOODY [plaintiff's attorney]: ... Finally, Your Honor, one last argument not in my Brief that I have to raise for the Court. Your Honor, *since the trial in this case*, and this is on my request for a new trial as well, since the trial of this case my client is [sic] come into information that Your Honor actually did work out at Harmony *to the extent of which I do not know* - - I believe that *perhaps there were some real estate transactions that you may or may not have handled for the developer* to the extent that *that may or may not have weighed on your decision*, making my clients believe that it probably should've been proper for you to, sua sponte, recuse yourself from the hearing of this case at the trial. So, I race [sic] that for the record.
>
> THE COURT: Did I represent your clients in their closing?
>
> MR. MOODY: I don't believe that you did sir, no sir.
>
> THE COURT: Did I represent any party in this action?
>
> MR. MOODY: *You did not represent my client and I don't know that you have ever represented Georgetown County. Those were the only parties in this action.*

> THE COURT: In this action, okay. But I'll admit I did some closings out there. I did a bunch of closings out there *for people that purchased lots out there* but that was basically the extent of my involvement out there. Is there - - the fact that I just did closings out there, is that what they're saying is the conflict?
>
> MR. MOODY: Your Honor, I think my clients *don't know the extent to which you were involved. So, to the extent that that raises that issue, my clients would raise the issue for the record.*

(R. 268-270) (emphasis added). The above-quoted colloquy is the only evidence and only argument on the recusal issue.

A. Plaintiff's entire recusal argument hinges on an inference drawn from a "fact" that has no evidentiary support.

The fallacy in Plaintiff's argument begins with the first sentence of his argument, where he asserts the trial judge "had previously been *hired by the development* in question, Harmony Holdings, to handle real estate transactions." (Init. App. Br. 33) (emphasis added). This "fact" is the linchpin for Plaintiff's entire recusal argument – he relies on it throughout his arguments to infer that the judge was biased against him or in favor of County. (See Init. App. Br. 36 – 41, *passim*). This "fact" has no evidentiary support and, therefore, Plaintiff's appeal should be denied.

To show this "fact," Plaintiff cites page 17, lines 3-11 of the hearing transcript on Plaintiff's motion to reconsider. (Init. App. Br. 33). Those lines, however, are statements by Plaintiff's attorney. (R. 269 at lines 3-11). It is axiomatic that counsel's statements are not evidence of anything. *E.g.*, *Gilmore v. Ivey*, 348 S.E.2d 180, 183 (S.C. App. 1986).

The only "evidence" of the trial judge's involvement with anything comes from the following statement by the judge: "But I'll admit I did some closings *out there*. I did a bunch of closings *out there* <u>for people that purchased lots</u> *out there* but that was basically

the extent of any involvement *out there*." (R. 269, ll. 22-25) (all emphasis added).[9] Plaintiff cites this statement for the following argument: "Judge Culbertson made it clear that he was hired and worked directly with Harmony Holdings involved in these transactions." (Init. App. Br. 37). The trial judge said nothing like this. (See earlier-quoted colloquy, *supra*). The only reasonable inference to be drawn from the judge's statement is that he represented the buyers.

In summary, no evidence supports the linchpin "fact" for Plaintiff's entire recusal argument. Thus, Plaintiff has failed to show any error in denying the motion to recuse. Affirmance on this ground moots all other recusal issues. *Futch*, 518 S.E.2d at 598.[10]

B. Assuming the trial judge represented the developer in some past residential real estate closings, there was no error in denying the motion to recuse.

Judge Culbertson was elected to the bench in May 2007.[11] Thus, any presumed representation of the developer ended more than six years before the trial of this case in September 2013. This presumed representation involved nothing more than closing residential real estate sales – there is no evidence and no argument that the trial judge had any other "relationship" with the developer, who is not a party to this action in any event. It is undisputed that the judge was not involved in the closing on Plaintiff's property, and there is no evidence that the judge ever represented County. There is no evidence that the judge was aware of or involved in the "financial guarantee" transactions in this case or any

[9] The phrase "out there" refers to the entire development, and it is unknown whether the judge closed any sales that were in the same phase as Plaintiff's property. It is undisputed that the judge did not represent anyone in the closing for Plaintiff's property.

[10] This remains true even if one were to accept Plaintiff's argument that this Court should change South Carolina's law on recusal to the federal "objective appearance of impropriety standard." The "appearance" upon which Plaintiff relies hinges on the linchpin "fact" that has no evidentiary support, *i.e.*, Plaintiff draws an inference from a "fact" that has no evidentiary support.

[11] See S.C. Judicial website at www.sccourts.org/circuitCourt/displaycirjudge.cfm?judgeid=2148.

other matter related to any "financial guarantee." No reasonable person would believe that any bias was born of these facts, and Plaintiff never explains how or why any reasonable person would believe otherwise.

C. Plaintiff cannot be prejudiced by the denial of his recusal motion, because the appeal from the trial court's final judgment raises only questions of law that are subject to *de novo* review by this Court.

This appeal does not involve any issue that resided in the trial court's discretion, nor does it involve any issue in which the trial court resolved factual questions under conflicting evidence. Rather, every issue on appeal involves a question of law that is subject to *de novo* review without any deference to the trial court's reasoning or ruling. Thus, Plaintiff was not and cannot be prejudiced by the denial of the recusal motion.

Throughout his argument, Plaintiff repeatedly and mistakenly argues that the trial court's "factual findings" are not supported by the record, and this is evidence of bias against him or in favor of County. (Init. App. Br. 34-41, *passim*). There are no "factual findings" in this case, because a directed verdict motion presents questions of law, not fact. *Estate of Haley ex rel. Haley v. Brown*, 634 S.E.2d 62, 68-69 (S.C. App. 2006); *McEntire v. Mooregard Exterminating Servs., Inc.*, 578 S.E.2d 746, 748 (S.C. App. 2003). Moreover, a trial court's directed verdict rulings, like all rulings on questions of law, are subject to a *de novo* review by the appellate court. *Id.; see also Town of Summerville v. City of N. Charleston*, 662 S.E.2d 40, 41 (S.C. App. 2008) (also holding that construction of a statute is question of law subject to *de novo* review on appeal). Thus, if the trial court erred in any of its rulings, this Court can reverse under a *de novo* review without any deference to the trial court's reasoning. Accordingly, there can be no prejudice to Plaintiff from the denial of his recusal motion.

D. Canons 2 and 3 of the Code of Judicial Conduct, Rule 501, SCACR, did not require recusal of the trial judge.

Plaintiff makes two arguments that the trial judge should have recused himself under Canons 2 and 3. First, he argues the trial judge's "impartiality might reasonably be questioned because his findings of fact are not supported by the record." (Init. App. Br. 34). There simply are no findings of fact at issue here.

Second, Plaintiff argues this Court should change existing law, apply the federal "objective appearance of impropriety" test, undertake a *de novo* review of the trial judge's denial of the recusal motion, and find that the judge should have recused himself. (Init. App. Br. 34-38). These arguments have no merit and are not preserved for appeal.

1. <u>Plaintiff's recusal argument must be rejected under South Carolina's settled law on recusal</u>.

Plaintiff acknowledges that South Carolina's current law requires him to show some evidence of actual prejudice by the judge. (Init. App. Br. 34). In an apparent attempt to satisfy this burden, Plaintiff implies that the trial judge's factual findings lack support in the record. (Id.). Plaintiff, however, never identifies any factual finding by the trial court, much less any factual finding not supported by the record. (Id.).[12] Again, there simply are no factual findings at issue in this case – it presents question of law only. Plaintiff also never identifies any evidence showing actual bias. (Id.). Thus, Plaintiff has failed to meet his burden under current South Carolina law and, therefore, his appeal must be denied. Affirmance on this ground moots all other recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; *Weeks*, 353 S.E.2d at 292.

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[12] In later arguing for changing South Carolina's law on recusal motions, Plaintiff asserts: "In the present case, the record is clear with evidence that [the judge's] findings are not supported by the record . . .." (Init. App. Br. 37). Here again, however, Plaintiff never identifies any factual finding not supported by the record, and there simply are not factual findings in this case.

2. <u>Plaintiff's argument for a change in the law regarding recusals is not preserved for appeal and ruling on it is unnecessary under the circumstances of this case</u>.

Plaintiff argues that this Court should change South Carolina's law on recusal, shifting from a standard that requires some evidence of bias to the federal "objective standard." Plaintiff then argues this Court should reverse the trial court under this new standard. (Init. App. Br. 34-38).

Plaintiff's argument is not preserved for appeal. He never argued to the trial court that existing South Carolina law on recusal should be discarded in favor of the federal "objective standard." (R. 268-270, *passim*). Thus, he cannot make this argument for the first time on appeal. *In re Michael H.*, 602 S.E.2d at 732.

Moreover, there is no need for this Court to consider changing South Carolina's law. As noted earlier, all issues on appeal present questions of law that are subject to *de novo* review by this Court without any deference to the trial court's reasoning or ruling. Accordingly, Plaintiff cannot demonstrate any prejudice from the denial of the recusal motion, including the failure to apply "new law" to the recusal question. Thus, there is no reason for this Court to consider the requested change in South Carolina law. See *Patel v. Patel*, 599 S.E.2d 114, 119 (S.C. 2004) (court not reaching issue of adopting federal standard because it would not affect the outcome of the appeal).

3. <u>Plaintiff's argument for a change in the law suffers from numerous flaws in logic and in fact</u>.

Plaintiff uses a classic "writer's trick" in presenting his argument for changing South Carolina's recusal law. He first correctly states the advocated federal standard of whether a trial judge's impartiality might reasonably be questioned under all of the circumstances in the case. (Init. App. Br. 35). By the end of his argument, however,

Plaintiff changes the test to whether there is "at least a *suspicion* of bias." (Init. App. Br. 38) (emphasis added). The federal test is not "suspicion." Rather, the test is whether an average judge in the same position is likely to remain neutral or whether there is a serious risk of actual bias given human weaknesses and psychological tendencies. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2262-2264 (U.S. 2009).

Here, the only known circumstance is that, at some point in his legal career, the trial judge was a small town lawyer that closed some residential real estate sales in the development. All of this happened at least six years before the trial of this case. Without more, any reasonable person who knows the nature of residential real estate closings could not reasonably conclude that the judge would be biased against Plaintiff on in favor of County. It is uncontested that the judge was not involved in the closing of Plaintiff's property. There is no evidence that the trial judge had any involvement in anything related to the financial guarantee at issue here or financial guarantees generally. There is no evidence that the judge ever represented either party in the present case. In short, there is no reasonable basis for concluding the judge would be biased in any manner in this case.

During the course of his argument, Plaintiff makes several factual assertions that have no basis in the record. First, Plaintiff asserts: "Under an objective view, Judge Culberston's disclosure that he *knew some of the parties professionally* and had *worked for them* is sufficient to raise question [sic] as to his impartiality in this case." (Init. App. Br. 36) (emphasis added). There is no evidence that the judge knew or worked for any party to this action.

Second, Plaintiff again asserts that "the record is clear with evidence that Judge Culbertson's findings are not supported by the record, such that his impartiality 'might

reasonably be questioned,' and thereby rendering his disqualification mandatory." (Init. App. Br. 37). Again, there simply are no factual findings in this case. Again, Plaintiff never identifies any findings, much less any findings not supported by the record.

Third, Plaintiff asserts that "[t]he evidence includes not only evidence of bias against Appellants (sic) [Plaintiff], but also evidence of partiality in favor of counsel for the Respondents (sic) [County]." (Init. App. Br. 37). Again, there is no evidence of bias against Plaintiff, and Plaintiff cites none. Plaintiff never identifies any evidence of partiality by the judge in favor of County's attorney, and there is none. Moreover, Plaintiff never raised this issue to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Finally, and for the record, County's attorneys categorically deny this completely false accusation. [13]

Fourth, Plaintiff asserts that the trial judge's "personal and professional interactions could have resulted in his being called as a witness in the trial of this case." (Init. App. Br. 37). Plaintiff never identifies how the judge would have any relevant information, or what that information might be, such that he could be called as a witness. Moreover, Plaintiff never raised this issue to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732.

In short, Plaintiff strings together several assertions that have no evidentiary support to advocate changing South Carolina law under an argument that is not preserved for appeal.

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[13] Plaintiff later states: "Importantly, Canon 3(E)(1) does not distinguish between 'a party or a party's lawyer' where bias is alleged." (Init. App. Br. 39). This appears to be a reference back to Plaintiff's false assertion of the judge having "partiality in favor of counsel for the Respondents (sic)." Plaintiff's appellate counsel (who were not trial counsel) make this false accusation for the first time on appeal – they have several cases pending against County on the same "financial guarantee" issue.

In closing his argument, Plaintiff argues that Judge Culbertson "should have at least timely and fully disclosed the relationships and circumstances on the record." (Init. App. Br. 38). This appears to be an argument that the trial judge, prior to trial, should have revealed his alleged representation of the developer in real estate closings. (See also Init. App. Br. 36). Plaintiff never made this argument to the trial court (R. 268-270), so it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Moreover, this argument (like all of Plaintiff's recusal arguments) is based on an inference of bias drawn from a "fact" that has no evidentiary support. And again, Plaintiff never explains how or why any presumed representation of the developer in residential real estate closings over six years before trial would cause the judge to be biased against Plaintiff or in favor of County.

E. Plaintiff's "due process" argument on recusal is not preserved for appeal and has no merit.

Plaintiff argues that the due process clauses of the state and federal constitutions required the judge to recuse himself, and Plaintiff also seems to argue that the U.S. Supreme Court has overruled South Carolina's recusal law under the federal due process clause. (Init. App. Br. 38-41). Plaintiff did not make these arguments to the trial court (R. 268-270) and, therefore, these arguments are not preserved for appeal. *DuRant v. South Carolina Dep't of Health & Envtl. Control*, 604 S.E.2d 704, 709 (S.C. App. 2004) (constitutional issues not raised at trial are not preserved for appeal).

Here, as in his prior argument, Plaintiff makes the same factual assertions that, as demonstrated earlier, have no basis in the record. He also makes some new yet still unfounded and frivolous assertions.

First, Plaintiff complains that the trial judge presided over claims "against the County in which he now sits as a judge." (Init. App. Br. 40). Plaintiff would have this

Court rule that no resident judge in Georgetown County can preside over any claim against Georgetown County. Plaintiff did not make this "argument" to the trial court (R. 268-270) and, therefore, it is not preserved for appeal. *In re Michael H.*, 602 S.E.2d at 732. Moreover, this argument is frivolous on its face.

Second, Plaintiff asserts that the judge presided over claims "concerning transactions that he conducted and with which he was directly involved." (Init. App. Br. 40). It is undisputed that the judge was not involved in the Plaintiff's closing. There is no evidence that the trial judge had any knowledge of or involvement with the "financial guarantee" transactions at issue here. This assertion is simply frivolous.

In short, Plaintiff's "due process" arguments are not preserved for appeal and are manifestly without merit.

IV. As an additional sustaining ground and reason to affirm, the trial court erred in denying County's directed verdict motion on the statute of limitations.

The Tort Claims Act required Plaintiff to bring this action "within two years after the date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110 (Rev. 2005). The date on which discovery should have been made and, therefore, the date on which the statute of limitations begins to run, is an objective test. *Hackworth v. Greenville County*, 637 S.E.2d 320, 322 (S.C. App. 2006). The question is not when a plaintiff actually knows he has a claim – rather, the question is whether the particular circumstances would alert a reasonable person some claim against another party might exist and he should make inquiry about the matter. *Id.*

Plaintiff commenced this action on April 20, 2012, so the question is whether the circumstances existing on or before April 19, 2010, put Plaintiff on inquiry notice to

determine whether he might have a claim against someone. As demonstrated below, Plaintiff should have made inquiry no later than November 3, 2008, and this inquiry would have revealed the matters about which Plaintiff sues in this case. The undisputed circumstances in this case are summarized below:

1. Plaintiff is a financial planner with 22 years of experience, and he had past experience in purchasing real estate as an investment. (R. 182, 205-206).

2. Plaintiff learned about the property from his best friend, who had moved to Georgetown and become a salesman for the developer. (R. 183-185, 206-207).

3. Plaintiff bought the property sight unseen on the recommendation of his friend – his friend closed the sale for him under a power of attorney. (R. 210-211).

4. Plaintiff purchased the property in October 2006, knowing that no infrastructure was in place. (R. 186-187).

5. He was not concerned about the absence of infrastructure, because he knew about the financial guarantee filed with County. (R. 191). He apparently learned about it from the salespeople in the developer's sales office. (R. 207).

6. Plaintiff never contacted County at any time to confirm the existence, amount, or validity of the financial guarantee. (R. 211-212, 214-215). He nevertheless relied on the existence of the financial guarantee in buying the property – he would not have bought the property if the financial guarantee had not been in place. (R. 192).

7. By December 2007, Plaintiff believed the property had little or no value, because the infrastructure was not yet in place. (R. 212-213).

8. As early as December 2007 (R. 213) but no later than September 2008, Plaintiff knew that the developer was in bankruptcy when he signed a ballot from the bankruptcy court as a creditor of the developer. (R. 215-216). He stopped paying HOA dues because of the bankruptcy (R. 196), but he did not contact County about the financial guarantee. (R. 214-215).

9. By November 3, 2008, nineteen months after buying the property, Plaintiff knew the infrastructure had not been put in place, knew the developer was in bankruptcy, and believed the property had no value due to the absence of infrastructure. (R. 213-216; 370-371). He therefore knew or had reason to know of his "loss" on this date.

Under these circumstances, Plaintiff knew of his "loss" no later than November 3, 2008. S.C. Code Ann. § 15-78-110 (plaintiff must commence action "within two years after the date the loss was or should have been discovered"). Under these circumstances, any reasonable person would have made inquiry about the existence, status, and continued validity of the financial guarantee no later than November 2008, particularly any person who had relied completely and absolutely on the existence of the financial guarantee in buying the property without first contacting County to confirm its existence. Had Plaintiff done so, he would have discovered the matters of which he now complains. Thus, the statute of limitations began to run on or before November 3, 2008, and long before April 19, 2010. Plaintiff did not commence this action until April 20, 2012 and, therefore, his claim is barred by the two-year statute of limitations. Affirmance on this ground moots all issues on appeal, including all recusal issues. *Futch*, 518 S.E.2d at 598; *Dropkin*, 644 S.E.2d at 811; W*eeks*, 353 S.E.2d at 292.

CONCLUSION

The sole purpose of the "special duty test" is to determine whether the legislature intended that a statute create a private duty enforceable by individuals. That test is irrelevant here, because the statute expressly states that it does not create any special or private duty enforceable by Plaintiff. Thus, Plaintiff has no claim against County. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

It is uncontested that the immunity afforded by § 15-78-60(4) applies here. Plaintiff's only argument against this immunity is that it is subject to a "gross negligence" exception. That argument has no merit, because subsection (4) does not have a "gross negligence" exception, and no subsection with the exception applies to this case. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

Plaintiff was on inquiry notice no later than November 3, 2008, and reasonable inquiry at that time would have led him to discover the matters of which he now complains. Plaintiff commenced this action in April 2012 and, therefore, this action is barred by the two-year statute of limitations. Affirmance on this ground moots all other issues on appeal, including all recusal issues.

For these reasons, and for all of the reasons set forth herein, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,

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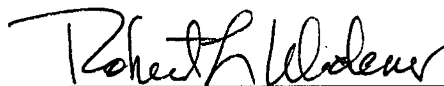
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-000156
Case No. 2012-CP-22-00558

David M. Repko, ...Appellant,

v.

County of Georgetown,..Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Final Brief of Respondent on the 3rd day of September, 2014, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to the parties listed below at the following addresses:

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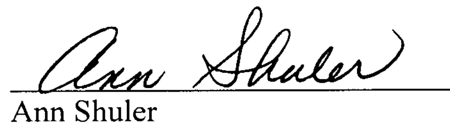
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