THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-000614

James Marlowe and Lori Marlowe, individually, and as Next Friends of K.P., H.M., and B.M., Minors under the age of Eighteen (18) years,

Appellants,

v.

South Carolina Department of Transportation,

Respondent.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

On May 3, 2017, Appellants Lori Marlowe and Jamie Marlowe ("Marlowes") brought this action against Respondent South Carolina Department of Transportation ("SCDOT"), Southern Asphalt, Inc. and United Infrastructure Group, Inc. asserting claims for inverse condemnation, conversion, due process violations, and negligence. On August 22, 2018, Appellants filed an Amended Complaint against the same parties, adding their minor children as named plaintiffs in the action, asserting the same claims.

On March 26, 2019, a consent order was entered dismissing all claims against United Infrastructure Group, Inc.

On November 7, 2019, SCDOT filed its motion for summary judgment solely on the basis that it was immune from liability on all of Appellants' claims pursuant to the South Carolina Tort Claims Act ("TCA"), S.C. Code Ann. §15-78-10, *et seq*, and that there

was no evidence it breached any duty to the Marlowes.

A hearing was held on February 10, 2020. On February 27, 2020, a consent order was entered dismissing all claims against Southern Asphalt, Inc. On March 25, 2020, the trial court issued an Order granting summary judgment in favor of SCDOT. (Order dated March 25, 2020). Thereafter, on April 3, 2020, the Marlowes filed a Rule 59(e), SCRCP, motion to alter or amend – commonly referred to as a motion for reconsideration. Specifically, the Marlowes argued that reconsideration of that ruling was warranted:

1) because the Stormwater Management and Sediment Reduction Act is inapplicable in this case;

2) because the Court made improper factual determinations specifically reserved for the jury, including, who or what – and specifically, whether Respondent, its agents, or employees – caused the flooding to Appellants' property;

3) because the Court improperly weighed the testimony of the Marlowes' expert witness;

4) because the Court failed to address the Marlowes' discretionary immunity arguments;

5) because the Court granted summary judgment on the Marlowes' inverse condemnation claim despite SCDOT failing to even raise the issue in its Notice or Motion for Summary Judgment;

6) because the Court improperly made factual determinations reserved for the jury in determining the facts of this case do not amount to inverse condemnation;

7) because the Court relied on an inapplicable test to determine that the Marlowes' had not sustained an injury necessary to establish inverse condemnation.

Three (3) days later, on April 6, 2020, the trial court denied the Marlowes' motion for reconsideration in a two sentence Form 4 Order. The next day, April 7, 2020, the

Marlowes timely filed their Notice of Appeal.

FACTS

The Marlowe family formerly lived in a single-family home located at 2479 W. Highway 378, Pamplico, South Carolina, in Florence County, which Jamie Marlowe purchased in 2003. (J. Marlowe Dep. p. 15, ¶¶6-19). In late 2013, SCDOT began designing and seeking bids for the 378 Widening Project (the "Project"), which would affect the roadway immediately in front of the Marlowes' property. Construction began in early 2015. (*See* Am. Compl. ¶11).

The Project included installing a new bridge box culvert adjacent to the Marlowes' property, which would be installed under the new and existing 378 roadway. Before construction began, SCDOT engaged in an extensive design phase.

Stanley Roof, an engineer with SCDOT (and one (1) of its 30(b)(6) witnesses), performed an initial study concerning the existing box culvert adjacent to the Marlowes' property in August of 2013. (SCDOT Dep. p. 23-24). In its initial investigation, SCDOT determined that the existing culvert could not be extended and would need to be replaced. (*Id.* p. 24, ¶¶5-9). SCDOT never considered placing the Project's new culvert in any other location than the one ultimately selected. (*Id.*, ¶¶17-20).

During this process, SCDOT determined that "[t]he resident construction engineer for Florence County indicated that he had never seen the roadway overtopped at this location." (*Id.* p. 25, ¶¶17-23). This was an important consideration for SCDOT because it "usually look[s] at past floods for a site and tr[ies] to get as much as information as [it] can for it." (*Id.* p. 26, ¶¶19-23). Despite this important step in its design and evaluation, SCDOT did not speak with the Marlowes, or any other adjacent property owners, to

ascertain whether the roadway in front of their property ever overtopped. (*Id.*, p. 28, ¶¶20-24).

In June of 2017, after complaints primarily from the Marlowes regarding flooding on their property, SCDOT performed an investigation and completed an addendum to its original design. (*Id.* p. 30-31). At that point, the new culvert had not been completely installed. (*Id.*, p. 31, ¶¶8-18).

However, this time, SCDOT determined that for a 25-year rain event, the existing roadway in front of the Marlowes' property would experience overtopping (*Id.* p. 32, ¶20 – p. 33, ¶8), – that is, where flood waters from adjacent property flows over the top of the roadway to an outlet, which is usually a stream, river, pond, or lake. SCDOT's standard for culverts is withstanding a 100-year rain event. (*Id.* p. 28, ¶¶4-8). Incredibly, SCDOT claimed this new information was discovered because it "didn't have that information at the time" – in 2013. (*Id.* p.33, ¶¶9-13). The only reason this information was unavailable to SCDOT was because of its failure perform any analysis on the subject.

Again, SCDOT did not speak with the Marlowes during its investigation, or any adjacent property owners. (*Id.* p. 35, ¶¶1-4; p. 53, ¶¶2-19). During the investigation, though, SCDOT's analysis determined that the existing culvert (present prior to the Project's construction) "would overtop for discharges associated with the 25-year return interval and greater." (*See* Exhibit 1 to Appellants' Memorandum in Opposition to Respondent's Motion for Summary Judgment). In its addendum, SCDOT included its determination that the Marlowes' "structure" – or house – "could be impacted by a flood associated with the 25-year return interval, and potentially the 10-year interval." (*Id.*) (DOT Dep. p. 36, ¶¶1-5). The most disturbing aspect of this information's inclusion in the

addendum is the information was readily available to SCDOT in 2013. (SCDOT Dep. p. 59, ¶¶21-23) ("Q: And, so, you had the same information in 2013, correct? A: Correct."). At this point, though, the new culvert was still not completely installed. (SCDOT Dep. p. 37, ¶¶6-13).

A critical piece of SCDOT's new addendum was missing: any consideration of the higher elevation of the Project's new roadway being built simultaneously next to the existing roadway. (*Id.* p. 39, ¶¶14-18). Therefore, the 2017 addendum, which included an analysis of the existing roadway's height compared to the height of the Marlowes' house, did not even include an accurate figure for the height of the roadway in relation to the Marlowes' home. (*Id.* p. 40, ¶¶5-8). In 2017, as it concerned the roadway's overtopping, SCDOT again failed to consider whether the new roadway could potentially block the existing roadway's overtopping. (*Id.* p. 41, ¶¶2-5). More importantly, though, SCDOT never considered this possibility or performed any analysis in 2013 when it drafted its initial design report. (*Id.*, ¶¶8-11).[1]

In October of 2015, South Carolina experienced historic rainfall levels, with one-day rainfall levels at the two (2) closest NOAA weather stations to the Marlowes' property experiencing greater than 10-year but less than 25-year rainfall levels. (Feb. 22, 2019 Report of Jason Gregorie, at 20) (*See* Exhibit 2 to Appellants' Memorandum in Opposition to Respondent's Motion for Summary Judgment). Those stations experienced 4-day rainfall levels between 200-500 years. (*Id.*). This event, in conjunction with SCDOT's

1 SCDOT also testified that it never performed (prior to construction beginning, in 2015, or in 2016) any analysis concerning whether the new roadway's construction next to the existing roadway could create a "choke point." (SCDOT Dep. p. 49, ¶¶17-21; p. 49, ¶22 – p. 50, ¶5).

construction of the Project, caused catastrophic flooding to the Marlowes' home, with approximately 18 inches of water in their house. (L. Marlowe Dep. p. 26, ¶¶12-19). After that, the Marlowes essentially reconstructed their home with the assistance of FEMA and taking out personal loans. (*Id.* p. 25-26). Then, in 2016, Hurricane Matthew passed through the region, again bringing historic levels of rainfall to the Marlowes' property, with 1-day rainfall levels corresponding to greater than 10-year but less than 25-year levels. (Ex. 2, p. 20). Those stations experienced 4-day rainfall levels greater than 100-years but less than 200-years. (*Id.*). The Marlowes' home was again destroyed, with water levels between 15 and 16 inches, and since then, the Marlowes have been unable to live at their home. (L. Marlowe Dep. p. 26, ¶¶16-25).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial [392 S.C. 122] court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *accord Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); *see also Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)); acc*ord Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Hall v. Fedor*, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing *Young v. South Carolina Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795

(1999)).

ARGUMENT

I. THE TRIAL COURT'S RELIANCE ON THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION ACT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS A CLEAR ERROR OF LAW AND AMOUNTED TO AN ABUSE OF DISCRETION.

The trial court's reliance on SCDOT's citation to the Stormwater Management and Sediment Reduction Act ("Stormwater Act")[2] in support of the ruling granting summary judgment was a clear error of law and amounted to an erroneous abuse of discretion. The Marlowes did not allege any deficiency in regard to SCDOT's application or procurement of a permit under the Stormwater Act. The Stormwater Act is inapplicable to the facts and issues in this case, and the trial court's reliance on it in granting SCDOT's motion for summary judgment was a clear error of law that amounted to an abuse of discretion.

The Legislature's intent is plainly and unequivocally expressed in the applicable statute. The General Assembly enacted the Stormwater Act to specifically address stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167.

In fact, the Supreme Court has previously stated that the "legislature enacted the Stormwater Act to specifically deal with stormwater management and sediment reduction." *Responsible Economic Development v. SC DHEC*, 641 S.E.2d 425, 371 S.C. 547 (2007). The *Responsible Economic Development* Court wrote that the purpose of the

[2] S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2005).

Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." *Id.* (citing Act No. 51, 1991 Acts 167).

The Stormwater Act requires a person who intends to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The stormwater regulations provide that unless exempted, “a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan.” S.C. Code Ann. Regs. 72–305(A). In other words, all non-exempt development construction sites must have a permitted plan for handling stormwater, the requirements of which depend on the size and complexity of the project. *See id.* 72–305(B). Further, as the Court’s Order notes, the Stormwater Act states that “[n]othing… in this chapter…may be construed: (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity.” (*See* Order dated March 25, 2020, at 3-4 (citing S.C. Code Ann. § 48-14-160(2)).

Put simply, the Stormwater Act does not in any way even remotely apply to the facts of this case, and there is no South Carolina authority determining a party was not liable to another for creating or worsening property flooding because of reliance on the Stormwater Act. In fact, there is no South Carolina case or other authority in support of the proposition that the SCDOT may make an end run around liability for its actions or

inactions by relying on a permitting statute. To the contrary, South Carolina law states that where the language of a statute is plain and express (as it is here), the court has no right to impose another meaning. The trial court's order, like SCDOT's memorandum in support of its motion for summary judgment, glaringly fails to cite to or rely on any South Carolina appellate case (or federal court analysis) interpreting the Stormwater Act to relieve a party from similar actions and inactions as the facts alleged here. However, as the Order – and statute – notes, the Stormwater Act expressly states that it does not relieve SCDOT from liability for actions or inactions in the land disturbing activities. (*Id.*).

Because the General Assembly's intent is plain and explicit, because there is no precedent or authority supporting the trial court's conclusion in similar cases, and because proximate causation is a jury question, the trial court's reliance on the Stormwater Act was not a valid basis for granting summary judgment in SCDOT's favor. For that reason, the trial court's determination was controlled by an error of law and constituted an abuse of discretion. *Parker v. Williams & Madjanik, Inc.*, 239 S.E.2d 487, 269 S.C. 662 (1977); *see also McClurg v. Deaton*, 380 S.C. 563, 570, 671 S.E.2d 87, 91 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support."). Thus, the trial court's Order should be reversed.

II. THE TRIAL COURT ERRED IN MAKING FACTUAL DETERMINATIONS WHICH WERE SOLELY FOR THE JURY'S CONSIDERATION.

A. Whether the flooding to the Marlowes' property was caused by an "act of God" was a question for the jury.

In its order, the trial court found that the flooding to the Marlowes' residence was caused by "acts of God," not any negligence on the part of SCDOT.[3] Causation, and specifically whether a party's injuries were caused by an "act of God", is a question of fact for the jury. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938).[4]

"Ordinarily, proximate cause is a question for the jury[.]" *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 613-14, 579 S.E.2d 136, 145 (Ct. App. 2003) (citations omitted), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

South Carolina law imposes no liability for injuries or damages sustained as the result of an act of God. Nor is one liable for damages caused by the act of God, if such act be the direct or proximate cause of the injury. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938). However, "act of God" is a valid defense only when it is the **sole** cause of the injury. *Id.* (emphasis added).

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[3] Specifically, the Court concluded that "[t]he flooding in October 2015 and October 2016 were Acts of God and not caused by the SCDOT. In October 2015, the Grand Strand and Pee Dee suffered from the '1000 Year Flood.' Then in October 2016, Hurricane Matthew struck South Carolina causing massive flooding throughout the Grand Strand and Pee Dee. Many residents suffered flooding in their homes, including many who had never experienced flooding previously." (Order, at 5).

[4] This analysis applies equally to the Court's Stormwater Act determination, *supra*: "whether the violation of a statute is the proximate cause of an injury is ordinarily a jury issue and thus inappropriate for disposition by summary judgment." *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1983).

In *Montgomery*, the Supreme Court held that it was a question of fact for the jury to determine if the “act of God” was the proximate cause of respondent's injury, or if respondent had shown by the preponderance of the evidence that the act of omission on the part of appellants in failing to warn her of the blocked condition of the highway in time to prevent the injury, combining and concurring with the act of God, was the proximate cause of the injuries suffered by respondent. *Id.* Leaving out the question of contributory negligence on the part of a plaintiff, when a defendant pleads the act of God, he must prove that the act of God is the sole proximate cause of the injury, and to do so, such defendant must of necessity prove that he is without negligence which contributed as a. proximate cause. *Id.* In other words, this defense creates a separate issue in which the rule is different, in that a defendant has to prove himself without negligence in order to show that the act of God is the sole proximate cause. *Id.*

Other jurisdictions have similarly concluded that whether a flooding event constitutes an “Act of God” is a question of fact for the jury to consider. *See Lee v. Mobil Oil Corp.*, 203 Kan. 72, 452 P.2d 857 (Kan. 1969) (“Whether a particular flood is of such extraordinary and unprecedented nature as to constitute an 'act of God' is a question of fact for the jury.”); *Maddock v. Andersen*, 2013 ND 80, 830 N.W.2d 627 (N.D. 2013)(“Whether an act-of-God defense has been established is a question of fact.”); *Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud*, 532 N.W.2d 192, 209 Mich. App. 452 (Mich. App. 1995) (“An act of God is a valid defense to a trespass claim and presents a question of fact for a factfinder.”); *Brown v. Sandals Resorts Intern.*, 284 F.3d 949 (8th Cir. 2002) (citing *Northwestern Bell Telephone Co. v. Henry Carlson Co.*, 83 S.D. 664, 165 N.W.2d 346, 349 (S.D.1969) (holding that whether damage was

proximately caused by act of God is question of fact for jury to resolve, and that trial judge erred in taking issue away from jury); *Omega Apparel Inc. v. ABF Freight Sys., Inc.* (M.D. Tenn. 2012) (denying a defendant's motion for summary judgment where the Court stated that even though a jury would be "hard-pressed" to find flooding was not an "act of God," the defendant was not absolved of liability unless it could show that its negligence played no role in the loss.).

In this case, there was testimony – both by SCDOT, its witnesses, and the Marlowes' expert witness – that SCDOT's actions and/or inactions contributed to the flooding on the Marlowes' property. Thus, whether the flooding was caused by an "act of God," and whether the "act of God" was the sole cause of the Marlowes' injuries was a question of fact for the jury to determine. *Montgomery*, 186 S.C. at 167. At the very least, the issue is in dispute "so as to make a genuine question for determination by the trier of the facts." *Lunsford v. McDaniel*, 272 S.C. 525, 252 S.E.2d 917 (1979). Therefore, summary judgment was inappropriate, and the trial court's order should be reversed and the case remanded for a trial on the merits. *See Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (2014) (rendering summary judgment inappropriate where a question of fact exists); *see also* Thomas *v. Dootson,* 659 S.E.2d 253, 377 S.C. 293 (Ct. App. 2008) (finding a directed verdict inappropriate where a jury question was presented).

B. Whether the flooding to the Marlowes' property was caused by a natural condition was a question for the jury.

In its order granting summary judgment, the trial court further concluded that, pursuant to the Tort Claims Act, SCDOT was not liable for the flooding on the Marlowes' property "as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees." (Order, at 5). As discussed above, the factual determination

by the trial court as to the proximate cause of the Marlowes' injuries was inappropriate at the summary judgment stage where there was conflicting evidence concerning causation. Specifically, the question of whether the flooding on the Marlowes' property was caused by a natural condition or, rather, caused by SCDOT, its agents, or employees, was a factual question for the jury's determination.

While the two (2) weather events which occurred when the Marlowes' property flooded were extreme, and even historic, there was evidence in the record that suggested – and created a genuine issue of material fact –the flooding of the property was not just a "natural condition" but was, in fact, caused by the negligence of a government employee or employees. Taking the evidence in the light most favorable to the Marlowes, as the trial court was required to do, there was evidence that SCDOT knew, or should have known, (1) that the Marlowes' home would likely be affected by a 10-year rain event due to the existing box culvert; and (2) SCDOT took no steps, or even considered taking any steps, to remove that culvert or install a new one until 2017, well after the two (2) rain events. The evidence also showed that were those events isolated to only one-day events, the rainfall would have exceeded permitted levels, which were below SCDOT's self-created standard of 100-year rain events. For these reasons, reversal of the trial court's order is warranted, and the issues should be submitted to a jury in light of the conflicting evidence in this case which presented a factual dispute. *See Springob*, 407 S.C. 490; *Thomas,* 377 S.C. 293.

C. Whether the flooding to the Marlowes' property was caused by SCDOT, its agents, or employees was a question for the jury.

Similarly, the trial court's ruling that "[p]ursuant to the Tort Claims Act, [Respondent] is not liable for the flooding on [Marlowes'] property as the rain event and

Hurricane were natural conditions, not caused by [SCDOT] or its agents or employees" was a factual determination reserved for the jury in light of the conflicting evidence presented, which created a genuine issue of material fact. Evidence was submitted that suggested (1) SCDOT had knowledge of a defect or hazard in the culvert adjacent to the Marlowes' property; (2) SCDOT failed on multiple occasions to remedy that defect or hazard, and (3) that the inadequate culvert was the cause of the flooding on the Marlowes' property. Thus, summary judgment was inappropriate, and the trial court's conclusion that these conditions were natural was a factual determination reserved for the jury considering the conflicting evidence submitted.

First, SCDOT knew or should have known in 2013 during its design of the Project, again in 2015 when it began construction on the Project, after the 2015 rain event, and after the 2016 rain event, that the existing box culvert adjacent to the Marlowes' property was substandard under its own design requirements and made no efforts to correct or replace the culvert. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008).

In *Giannini*, the plaintiffs claimed that DOT failed to take proper measures after notice of an existing hazard. 664 S.E.2d at 453. In that case, the portion of the roadway where the plaintiff's car accident occurred had experienced several crossover accidents within two miles of their accident in which two people had been killed, and the accidents had been publicized by local media. *Id.* The Supreme Court of South Carolina determined that the plaintiff's claim was not a claim of defective construction but, rather, one of failure to take corrective action after notice of a defect. *Id.*

The *Giannini* Court determined that the case was analogous to *Wooten v. SCDOT*, 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997), *aff'd,* 333 S.C. 464, 511 S.E.2d 355 (1999).

Id. In Wooten, the Supreme Court affirmed the Court of Appeals' ruling that although SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition. 333 S.C. at 467-468, 511 S.E.2d at 357. In *Wooten*, the plaintiffs claimed SCDOT was negligent in failing to provide traffic lights at an intersection which would allow a pedestrian ample time to cross the street. *Id.* The Court of Appeals held that although DOT initially had design immunity, such immunity was not "perpetual." *Id.* The Court of Appeals held that once DOT had notice the intersection was hazardous, it was no longer immune from liability. 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997). On appeal, the Supreme Court affirmed as modified, adopting the trial court's ruling that the immunity provision regarding signs and signals was the more specific one applicable to the case, such that a jury issue was presented as to whether SCDOT was liable. 333 S.C. at 468-469, 511 S.E.2d at 357-358 (1999). Accordingly, the *Giannini* Court found that the trial court properly denied SCDOT's motions for directed verdict and JNOV on the issue of whether it breached a duty to the plaintiffs in failing to install median barriers after notice of cross over accidents along that stretch of roadway. 664 S.E.2d at 454.

Here, SCDOT provided no evidence – through documentation or testimony – establishing when the Project's new culvert was finally installed, but the record establishes it was not fully installed by at least 2017. (DOT Dep. p. 37, ¶¶6-13; p. 50, ¶¶9-15). However, SCDOT testified, that in 2017, it had information necessary in 2013 to determine that the existing culvert prior to the initiation of the Project could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on the Marlowes' property. (*Id.* p. 36, ¶¶1-5). SCDOT admitted the existing culvert was

undersized according to its own standard. (*Id.* p. 11, ¶¶17-20) ("The existing culvert was undersized.") Despite this knowledge, SCDOT admitted there was never any consideration given to install a new culvert, much less the one that was supposed to be installed during Stage I of the Project. (*Id.* p. 41, ¶24 – 42, ¶5; p. 12, ¶¶6-21).

Furthermore, not only was SCDOT aware that the existing culvert was undersized when it began designing and construction on the Project, it knew or should have known that the existing roadway served as an outlet for water, even at 25-year rainfall levels. (*Id.* p. 27, ¶¶15-19). SCDOT knew this was unsafe. (*Id.* p. 28, ¶¶4-6) ("Q: And the standard should be a hundred-year rain event; is that correct? A: Right."). Despite its own models indicating overflow, SCDOT admitted that it took no steps to speak to the Marlowes or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (*Id.* p. 35, ¶¶1-4; p. 53, ¶¶2-11). SCDOT admitted it did not even consider contacting the Marlowes or adjacent property owners. (*Id.*, p. 53, ¶¶17-19).

As the Marlowes' expert witness's report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to the Marlowes' property both showed rainfall events greater than 10-year but less than 25-years. (*See* Ex. 2 to Plaintiffs' Mem. Opp. S.J., 20).[5] Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, the evidenced established that SCDOT knew the existing culvert adjacent to the Marlowes' property would likely affect their home.

Taking this evidence in the light most favorable to the Marlowes, by SCDOT's own admission, it had information in 2013 and prior to the construction of the Project that the

[5] SCDOT produced no contradicting evidence, from expert testimony or otherwise, concerning these rainfall figures. For that reason alone, summary judgment was inappropriate on this issue.

existing culvert was a hazard. According to *Giannini*, that knowledge and notice no longer provided SCDOT immunity, and the trial court's determination amounted to a determination of fact in light of a genuine issue of material fact. For this reason, the trial court's order should be reversed and the Marlowes' claim for negligence should be submitted to a jury. *Wooten*, 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997).

III. THE TRIAL COURT ERRED IN PLACING ITSELF IN THE ROLE OF THE JURY BY IMPROPERLY WEIGHING THE TESTIMONY OF THE MARLOWES' EXPERT WITNESS.

The trial court concluded that the Marlowes' expert witness, Jason Gregorie, testified there was no defect in the design or construction of the project, and that if there was no defect in the construction or design, then there was no basis for liability on the part of SCDOT. (*See* Order dated March 25, 2020, at 5). The trial court further noted that "Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project, [the Marlowes'] residence ***may*** have still flooded." (*Id.*) (emphasis added). Specifically, the trial court stated:

> Furthermore, the Plaintiffs' expert failed to opine whether any such alleged defect caused the flooding to a reasonable degree of engineering certainty. Any alleged defect and any damage resulting therefrom would not be in the purview of common knowledge, and thus, an expert is necessary to testify regarding the alleged defect and any potential causation. The expert's opinions must be to a reasonable degree of engineering certainty. Plaintiff's expert has failed to give opinions to that degree.

(*Id.*). As discussed above, the trial court's ruling, disregards the *Giannini* Court's decision. In fact, the *Giannini* Court's decision establishes that the trial court's factual determinations regarding Jason Gregorie were misplaced. 664 S.E.2d at 454.

In *Giannini*, the plaintiffs presented the deposition testimony of a highway transportation engineer. *Id.* The plaintiffs' expert testified that it was feasible to install three-cable median barriers prior to the car accident, and that such a barrier would have entrapped or redirected the tires of a car hitting it. *Id.* When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified,

> "I think it is highly likely that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And although there may have been some subsequent crash, it would not have been the crash that occurred. The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

The *Giannini* Court found that this evidence was sufficient to submit the issue to the jury, and any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury. *Id.* at 454-55 (citing *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility)).

In fact, the South Carolina Supreme Court has specifically addressed the trial court's ruling concerning Gregorie's testimony that Appellants' property may have flooded absent SCDOT's actions or inactions. *King v. North River Ins. Co.*, 278 S.C. 411, 297 S.E.2d 637 (1982). In *King,* a case involving the collapse of the roof of a warehouse following a heavy rainstorm, the Supreme Court stated that "it is generally sufficient to prove the event insured against was the efficient cause of the loss, even though not the

sole cause." *Id.* at 414. The *King* Court found that "[w]here an expert has testified that the accumulated water on the roof would not by itself have caused the roof to collapse, a reasonable jury could find that the clogging of the downspouts was the efficient and proximate cause." *Id.*

Nevertheless, the Marlowes again emphasize, as they did in its briefing to the trial court, SCDOT could have used cross-examination to question Gregorie's conclusions and identify any potential flaws in his causation argument for the jury. The dispute in facts between Gregorie and SCDOT, however, is quintessentially a fact-finding issue that created a genuine issue of material fact. Thus, the Marlowes' expert witness's opinions – and any defects in those opinions – were reserved for adjudication by a jury. For this reason, taking the evidence presented by the expert witness in the light most favorable to the Marlowes, a genuine issue of material fact existed, rendering the trial court's granting of summary judgment erroneous. Thus, reversal of the trial court's order is warranted, and these issues should be submitted to a jury for consideration.

IV. THE TRIAL COURT FAILED TO CONSIDER, OR RULE UPON, THE MARLOWES' DISCRETIONARY IMMUNITY ARGUMENT.

In its order granting SCDOT's motion for summary judgment, the trial court failed to consider or address the South Carolina Supreme Court's decisions finding liability against SCDOT under the Marlowes' "discretionary immunity" arguments. For that reason, the Marlowes addressed this deficiency in their Rule 59(e) motion for reconsideration. "A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Elam v. S.C. Dept. of Transp*., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may file such a motion "when [he or she] believes the court has misunderstood, failed to fully consider, or

perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780. "A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id*. (emphasis in original).

The trial court determined that "[i]f there is no defect in the construction or design [of the Project], then there is no basis for liability on the part of [SCDOT]." (Order, at 5). This holding misapplied South Carolina precedent regarding the Tort Claims Act and discretionary immunity, which the Court failed to consider or address in its order.

In its order, the trial court found that the Tort Claims Act, and specifically, S.C. Code § 15-78-60(15), completely shielded SCDOT from liability in this case, which is in contravention of South Carolina jurisprudence on the subject. § 15-78-60(15) sets forth exceptions to the state's waiver of sovereign immunity, stating, in pertinent part, that a governmental entity is not liable for loss resulting from:

> (15) absence, condition or malfunction ... of any ... median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.... Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity.... Governmental entities are not liable for the design of highways and other public ways . . .

The Tort Claims Act, § 15–78–60(5), also provides that a "governmental entity is not liable for a loss resulting from: (5) 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.C. Code Ann. § 15–78–60(5) (2005). The South Carolina Supreme Court has

repeatedly explained that "the burden of establishing a limitation on liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Id.* "Furthermore, 'the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.'" *Id.* at 230, 540 S.E.2d at 90–91 (quoting *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

The Marlowes presented substantial evidence, including expert witness testimony and SCDOT's 30(b)(6) testimony, that SCDOT failed to weigh any competing considerations or alternatives with regard to, *inter alia*, (1) its decision to delay installation of the new culvert either before or after the 2015 rain event, (2) its decision that traffic should not be rerouted to install the culvert sooner, and (3) its failure to consider the simultaneous existence of the existing Highway 378 roadway, with its existing culvert having very limited flow capacity, adjacent to the new elevated Highway 378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction. The trial court's failure to consider this theory of liability, the Marlowes' presentation of evidence establishing SCDOT's liability under these theories, and SCDOT's failure to present evidence establishing it was entitled to the defense of discretionary immunity

created a genuine issue of material fact, which not only warranted reconsideration of this issue by the trial court, but barred summary judgment on this issue.

Here, like the case of *Summer v. Carpenter*, the Marlowes presented evidence that SCDOT failed to consider critical stages of construction for the Project, and, ultimately, failed to consider anything, much less competing considerations or alternatives. 328 S.C. 36, 492 S.E.2d 55 (1997). In *Summer*, the Supreme Court determined (in a legal malpractice action concerning an attorney's failure to sue the DOT before the statute of limitations ran) that the defendant presented evidence which indicated (1) the design used for the intersection was common and (2) while respondent's expert would have selected another design, the chosen design was not wrong. 328 S.C. 46.

The Supreme Court determined this evidence did not establish that defendant considered various design options for the intersection and then selected the chosen design plan after carefully weighing competing considerations. *Id.* Accordingly, the Supreme Court held that the trial judge erred in concluding the Highway Department would have been immune from liability under the discretionary exception to the Act as a matter of law. *Id.*

Likewise, for these reasons, SCDOT failed to meet its burden that it was entitled to discretionary immunity, and because the trial court failed to address or determine whether it could be liable to the Marlowes for these failures, the trial court's order warranted reconsideration. However, because SCDOT failed to present any arguments or evidence establishing that it was entitled to a discretionary immunity defense, the Marlowes created a genuine issue of material fact which precluded the trial court's

granting of summary judgment, and the trial court's order should be reversed, and this issue presented to a jury for trial on the merits.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' INVERSE CONDEMANATION CLAIM WHEN RESPONDENT FAILED TO EVEN RAISE THAT ISSUE IN ITS MOTION FOR SUMMARY JUDGMENT.

At oral argument on its motion for summary judgment, SCDOT argued, for the first time, the trial court should grant summary judgment in its favor on the Marlowes' inverse condemnation claim. Undersigned counsel for the Marlowes objected on the ground this relief was not stated or sought in SCDOT's motion. Despite these glaring deficiencies, and the Marlowes' objection, the trial court ruled SCDOT was entitled to summary judgment on the inverse condemnation claim. Because SCDOT failed to move for summary judgment on the Marlowes' inverse condemnation claim in its Notice and Motion for Summary Judgment, the trial court's granting of summary judgment should be reversed and remanded for trial.

In its Notice and Motion for Summary Judgment, SCDOT stated, "This motion is based upon the fact that [SCDOT] is not liable to [the Marlowes] as a matter of law pursuant to 15-78-10 et seq." In its memorandum in support of the motion, SCDOT restated this position and went on to argue, "there is no evidence that [SCDOT] breached any alleged duty to [the Marlowes]." Neither SCDOT's motion nor its memorandum referred to or even mentioned the Marlowes' inverse condemnation claim but only discussed the negligence claims. SCDOT raised, for the first time, a new argument at the hearing on its motion that the Marlowes could not establish inverse condemnation. Undersigned counsel objected to this new argument being heard for the first time since it

was not raised in either SCDOT's Notice of its Motion, or its memorandum in support of its Motion.

"One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "Ordinarily, a court may not grant relief beyond the limits or scope of such notice." *Id.; s*ee also, *Turbeville v. Floyd*, 341 S.E.2d 651, 288 S.C. 171 (Ct. App. 1986). However, our Supreme Court has indicated in dicta that the Circuit Court may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection. *See Salvo v. Hewitt, Coleman & Associates*, 274 S.C. 34, 260 S.E.2d 708 (1979). At oral argument, undersigned counsel objected to SCDOT's argument regarding the inverse condemnation claim. Because undersigned counsel objected, and SCDOT did not raise the issue in its Notice or Motion for Summary Judgment, the trial court's granting summary judgment on the inverse condemnation claim should be reversed.

VI. THE TRIAL COURT ERRED BY IMPROPERLY MAKING FACTUAL DETERMINATIONS RESERVED FOR THE JURY IN DETERMINING SCDOT'S ACTIONS COULD NOT CONSTITUTE INVERSE CONDEMNATION.

A. South Carolina appellate courts have consistently held that the acts taken by SCDOT in this case amount to an affirmative, positive, and aggressive act.

In granting summary judgment on the Marlowes' inverse condemnation claim, the trial court found the facts of this case did not amount to a taking because "[the Marlowes] failed to show that [SCDOT] and its employees had any affirmative, positive, and aggressive acts that cause the [Marlowes'] alleged harm." (Order, at 7). The trial court's decision cited to *Kiriakides v. Sch. Dist. of Greenville*, and stated, "[i]nstalling culverts and

construction to public roadways is a 'legitimate government action' on behalf of the SCDOT as discussed in the *Kiriakides* case[.]" (*Id.*) (citing 382 S.C. 8, 675 S.E.2d 439 (2009)).

This conclusion was somewhat baffling and unusual to say the least, as the *Kiriakides* case never mentions culverts, and involved a situation where a school district attempted to take property by eminent domain after sale negotiations fell through. 675 S.E.2d at 441.In fact, *Kiriakides* held that the institution of condemnation proceedings does not constitute a taking, even where the condemning authority abandons the action nine months later. *Id.* at 443. There was no construction, no installation of culverts, and no designs of any kind at issue in *Kiriakides*. The case is not on point, not similar, and not relevant either factually or legally. The case only involved the potential institution of condemnation proceedings. For those reasons alone, the trial court's reliance on *Kiriakides* supporting its granting of summary judgment on the Marlowes' inverse condemnation claim was misplaced, erroneous and warrants reversal.

However, South Carolina Courts have consistently acknowledged the well-established principle that government-induced flooding may, in some circumstances, constitute a taking that would justify compensation under the Takings Clause. *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 776 S.E.2d 900 (2015) (citing Arkansas Game & Fish Comm'n v. United States, ____ U.S. ____, 133 S. Ct. 511, 518, 184 L.Ed.2d 417 (2012) ("'[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.' ") (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181, 13 Wall. 166, 20 L. Ed. 557 (1871)). For flooding to amount to a taking,

there must be a causal connection between the challenged government act and the increased flooding — a question of fact for the jury given Gregorie's opinions regarding the increased severity and levels of flooding. *Id.,* at 443 ("In addition to the requirement of a causal connection, a compensable taking occurs only where a claimant shows an actual increase in the frequency or severity of flooding.").

At oral argument, undersigned counsel pointed the trial court's attention to *Tipperary Sales v. S.C. Dep't of Transp.*, 2016-UP-351 (Ct. App. filed June 30, 2016), which is more analogous to the facts herein, and is in line with South Carolina precedent without piecemeal citations of relevant quotes to support one party's desired conclusion. Although an unpublished opinion, the Court of Appeals' decision in *Tipperary* involved similar facts as the instant case and relied on well-settled South Carolina law in determining the DOT's actions could constitute inverse condemnation.

In *Tipperary*, the Court of Appeals held the circuit court erred in dismissing the plaintiff's inverse condemnation claim against the DOT. In concluding the plaintiff's allegations against the DOT amounted to only a mere failure to act, the Court of Appeals found that the circuit court referenced the plaintiff's allegations about DOT's construction and installation of developments upstream from the plaintiff's store as well as DOT's alleged failure to remedy drainage defects caused by the flooding on the plaintiff's store premises.

Citing *Hawkins v. City of Greenville* (on which the trial court relied in its decision that SCDOT conduct did not constitute a taking), the trial court held that DOT's purported failure to act or to remedy the drainage defects did not constitute the type of affirmative, positive, aggressive acts by a governmental agency that would result in liability for inverse

condemnation. 358 S.C. 280, 291, 594 S.E.2d 557, 562 (Ct. App. 2004) (recognizing "an affirmative, positive, aggressive act on the part of the governmental agency" is an element of an inverse condemnation claim). The Court of Appeals held, however, that the trial court appeared to ignore the plaintiff's allegations that (1) DOT was aware of a study documenting the long history of flooding in the area surrounding the plaintiff's store; (2) the flooding problem was caused by an inadequate box culvert and two eighty-four inch drainage pipes that the DOT had installed; (3) in September 2002, the DOT began a construction project that contributed further to the flooding; and (4) a study commissioned by the DOT's resident engineers indicated the project would add 13.7 acres of impermeable surface adjacent to the choke point in the DOT's right-of-way, which in turn could result in flooding which would exceed the capacity the existing drainage system could handle.

The facts in *Tipperary* are nearly identical to the facts in this case, and, thus, SCDOT's conduct could constitute an affirmative, positive, and aggressive act that would support the Marlowes' inverse condemnation claim. *Tipperary* at 6; s*ee also WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 33, 630 S.E.2d 479, 481 (2006) (reversing summary judgment in favor of the county because capping a landfill, which resulted in methane gas venting onto the plaintiff's property, was "an affirmative, aggressive, positive act"), *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (ruling "the removal of a public sidewalk and support in the course of an urban redevelopment project constitutes the affirmative, positive, aggressive act our cases require for a taking"); *Kline v. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597, 599-

600 (1967) (finding that improving and widening a public street is an affirmative, aggressive, and positive act).

Furthermore, the trial court's reliance on *Hawkins* was misplaced because the *Hawkins* Court determined that the record contained no evidence the acts alleged caused the flooding of the plaintiff's property. 358 S.C. at 291. In fact, the plaintiffs' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. *Id.* Furthermore, both experts for plaintiffs and defendants testified it was impossible to determine whether installation of a riprap negatively or positively affected drainage on plaintiffs' property. *Id.*

Here, though, there was evidence presented (uncontradicted by SCDOT) that it's actions increased the flood level on the Marlowes' property. Although Gregorie testified that the Marlowes' property may have flooded regardless of SCDOT's actions, he also testified that the Project likely exacerbated flooding on the property. For those reasons, this case is distinguishable from *Hawkins* and is more analogous to *Tipperary*.

In sum, because SCDOT's actions increased the flood hazard to which the Marlowes' property has historically been exposed – according to both SCDOT's own testimony and Gregorie's uncontradicted testimony, respectively – a taking occurred. *See Columbia Venture*, 413 S.C. at 445 (citing *Jacobs v. United States*, 290 U.S. 13, 16, 54 S. Ct. 26, 78 L. Ed. 142 (1933) (finding a compensable flowage easement was created by reason of the government's construction of a dam along a tributary of the Tennessee River, which caused an increase in the frequency of intermittent overflows upon claimant's farmland, destroyed claimant's crops, and impaired his use of the land for agricultural purposes); *Cotton Land Co. v. United States*, 75 F .Supp. 232, 233–35 (Ct. Cl. 1948)

(finding compensable taking occurred where the construction of a dam and the impounding of water in its reservoir caused over 7,000 acres of claimant's land to be flooded); *Barnes v. United States*, 538 F.2d 865, 870–73 (Ct.Cl.1976) (finding claimant had shown a government taking of a flowage easement by demonstrating significant damages resulting from frequent and inevitably recurring flooding which was the natural consequence of the government's control of the flow of a river through a nearby dam)).

Thus, taking the evidence in the light most favorable to the Marlowes, whether SCDOT's conduct reached the level of an affirmative, positive, and aggressive act is a genuine issue of material fact, and the trial court's ruling should be reversed and remanded for trial.

B. THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE SUPREME COURT'S HOLDING IN *CUTCHIN v. S.C. DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION* – A NEARLY IDENTICAL CULVERT INSTALLATION CASE.

The trial court's order granting summary judgment warrants reversal based on the Supreme Court's holding in a nearly identical factual scenario in *Cutchin v. S.C. Dep't of Highways and Public Transp.* 301 S.C. 35, 389 S.E.2d 646 (1990). In 1954 or 1955, the defendant in *Cutchin* constructed a cement culvert under U.S. Highway 123 By-Pass in Easley. *Id.* at 36. The culvert was approximately 40 yards from the Cutchins' home. *Id.*

During the 1970's, the Cutchins' yard was flooded by rainwater on several occasions. *Id.* In August 1984, during a rainstorm, flood waters rose above the window sills of their home, causing severe damage. *Id.* A second, similar flood occurred in August 1985. *Id.*

The Cutchins instituted an inverse condemnation against the State defendant, alleging that the cement culvert was improperly constructed, causing damage to their home from the flood waters. *Id.* at 37. The Cutchins received a jury award of $70,000. *Id.*

On appeal, the State defendant claimed it was entitled to directed verdict, in that (1) no evidence was presented that the culvert, as initially installed, was improperly constructed, or (2) that in no event did it proximately cause the damages. *Id.* at 38. The Supreme Court disagreed. *Id.*

In reaching its decision, the Supreme Court noted that the Cutchins' expert testified that the culvert was inadequate when built and inadequate at the time of its decision. *Id.* Additionally, the Court noted, there was uncontradicted evidence in the record that the State defendant's own maintenance engineer made the statement that the pipe in the culvert was too small – like Defendant here in its testimony and documents. *Id.* Viewing this evidence in the light most favorable to the Cutchins, the Court held that the trial court correctly submitted the case to the jury. *Id.*

Because the facts of this case are nearly identical to those presented in *Cutchin*, and because they directly contradict the trial court's misplaced reliance on *Kiriakides*, the trial court's order warrants reversal and the Marlowes' inverse condemnation claim should be submitted to the jury.

C. The "Special Injury" test set out in Hardin only applies to non-abutting property owners where there has been no taking; which specifically does not apply to Appellants.

The trial court held that the Marlowes could not establish a claim for inverse condemnation because they "failed to show that they suffered special damages, different in kind from that suffered from the public at large as required in *Hardin*." (Order, at 7).

Again, the trial court's application of *Hardin* warrants reversal because that case, and the "special injury" test, only applies to situations where non-abutting property owners allege governmental taking:

> The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is **whether one whose property does not abut immediately on the part of the street** vacated — the part vacated being in the same block between his property and the next connecting cross street— **is so specially injured** as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007).

In *Hardin*, the plaintiffs filed an inverse condemnation action against SCDOT alleging the closure of a break in the median of an abutting highway deprived the traffic leaving their properties of the ability to cross the highway and constituted a taking. 371 S.C. at 603, 641 S.E.2d at 440. The trial court ruled the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *Id.* at 603, 641 S.E.2d at 440. The Supreme Court reversed the Court of Appeals and found there was no taking. *Id.* at 610, 641 S.E.2d at 444.

In *Hardin*, the Supreme Court actually abandoned the "special injury" analysis which previously existed in this state's jurisprudence and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements. *Id.* at 609, 641 S.E.2d at 443. The *Carolina Chloride* Court specifically found that *Hardin* created no new right or cause of action, but, rather, restated the focus in determining whether a **road re-configuration** amounts to a taking. *Carolina Chloride v. S.C. Dep't. of Transp.*, 391 S.C. 429, 706 S.E.2d 501, 504 (2011) (emphasis added).

In fact, our Courts have previously addressed the specific situations considered by the *Hardin* Court's analysis:

> There is a distinction, however, to be noted between the assessment of compensation in the case of a taking and in the case of damage **when no land is taken**.
>
> **In the former case, the mere fact that there has been a taking entitles the owner to recover for all damages to his remaining land (whether special or shared by the general public), provided they flow from the taking, since he is constitutionally entitled to be made whole for all injuries resulting from the taking of his land.**
>
> But when there is **no taking**, he is entitled only to such damages * * * which are special and peculiar.

Gray v. South Carolina Dept. of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992) (emphasis added).

Thus, the trial court incorrectly analyzed the Marlowes' damages under the wrong standard, which alone warrants reversal. However, because the cases cited above establish that SCDOT's conduct was a taking of the Marlowes' property, including their land and home, they are entitled to all injuries resulting from that taking, and were not required to establish special and peculiar damages as outlined by *Hardin*, on which the trial court relied in granting summary judgment. For those reasons, the trial court's order warrants reversal and the inverse condemnation claim should be submitted to the jury.

CONCLUSION

Based upon the foregoing, Appellants respectfully request the trial court's order granting summary judgment be reversed and remanded for trial on the merits for all of Appellants' claims. Additionally, Appellants would ask that the judgment be reversed for any other reason appearing in the record of the case.

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