

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

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' FINAL REPLY BRIEF

HOPKINS LAW FIRM, LLC

William E. Hopkins, Jr. (SC Bar No. 66474)
J. Clay Hopkins (SC Bar No. 102053)
171 Church Street, Suite 160
Charleston, SC 29401
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile
Email: bill@hopkinsfirm.com
clay@hopkinsfirm.com

Attorneys for Appellants

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ARGUMENT IN REPLY

I. THE TORT CLAIMS ACT DOES NOT PROVIDE IMMUNITY TO RESPONDENT UNDER THE FACTS OF THIS CASE.

Respondent argues that the trial court properly determined that it is not liable to Appellants pursuant to South Carolina's Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (hereinafter the "TCA") for three (3) reasons: (1) that "[t]he flooding to Appellants' residence was caused by Acts of God, not any negligence on the part of [Respondent]"; (2) that "the trial court correctly found that [the TCA] exempts [Respondent] from liability for natural conditions on a public roadway, or nuisance[]"; and, in a new argument raised for the first time on appeal (3) that "[the TCA] further exempts [Respondent] from liability for design of highways and any defect or condition on a highway 'unless the defect or condition is not corrected within a reasonable time after actual or constructive notice.' S.C. Code Ann 15-78-60(15)." (Resp't Br. 4-5).

A. Respondent did not meet its burden in proving that any "acts of God" were the sole causes of Appellants' injuries and damages.

In its brief, Respondent again claims the flooding to Appellants' property was caused by "Acts of God, not any negligence on [its] part" without citing to any South Carolina precedent (or any precedent for that matter) or any matter in the Record. In fact, Respondent cited to absolutely no authority for the proposition that flooding caused by actions taken during and arising out of construction of a public roadway amount to an Act of God. Respondent attempts to have this Court (as it did with the trial court) make this factual determination by peppering its brief with bald statements that the flooding of Appellants' property was only due to the "1000 Year Flood" and Hurricane Matthew – and not because of any actions or inactions on its part. That determination is precisely the

genuine issue of material fact reserved for the jury's consideration that Appellants argued at the trial court and in their Initial Brief.

Respondent's Answer in this case asserted that Appellants' injuries and damages were caused by "acts of God." As such, this constituted an affirmative defense. *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938). The burden of proof is upon the party who by the pleadings has the affirmative on the issue. *Baker v. Mutual Loan & Inv. Co.*, 218 S.C. 47, 61 S.E.2d 387 (1950); *Ford v. Atlantic Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143 (1932), and *Simonds v. Simonds*, 232 S.C. 185, 101 S.E.2d 494 (1957). One who pleads an affirmative defense has the burden of proving it. *McCabe v. Sloan*, 184 S.C. 158, 191 S.E. 905 (1937).

For the trial court to grant summary judgment on Respondent's "acts of God" defense, the burden of proof was upon Respondent, and the trial court needed to make a two-part determination: (1) that Respondent produced evidence that the sole source of any and all flooding during the statutory period complained of by Appellants were either the "1000 Year Flood" and Hurricane Matthew, respectively; and (2) that Respondent produced evidence that the flooding from those two (2) events (if they were indeed Acts of God) were the **sole** causes of Appellants' injuries or damages.

However, Appellants produced testimony – both by Respondent, its witnesses, and Appellants' expert witness – that Respondent's actions and/or inactions included poor maintenance issues that Respondent had actual or constructive notice prior to beginning construction near Appellants' property; that Respondent's actions and/or inactions contributed to the flooding on Appellants' property, and, furthermore, that there was flooding which was non-contemporaneous with the "1000 Year Flood" and Hurricane

Matthew. As Appellant James Marlowe stated in his deposition, there was additional flooding on Appellants' property that occurred between these two (2) events, as well. (R. p. 271, ¶21 – p. 272, ¶13).

Thus, Respondent did not meet its burden in establishing that “acts of God” were the **sole** cause of any injuries or damages sustained by Appellants. Whether the flooding was caused by “acts of God,” and whether the “acts of God” were the sole cause(s) of Appellants' injuries and damages were questions 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.

B. Respondent did not meet its burden in establishing Appellants' injuries and damages were solely caused by natural conditions not affirmatively caused by a negligent act.

Next, Respondent baldly asserts that “[t]he rain event and hurricane were natural conditions, and as such, [Respondent] had no control over those natural conditions or their impact on Appellants' property. While the statute specifically mentions snow or ice, it also refers to ‘temporary or natural conditions’ which would include stormwater.” (Resp't Br. 4-5). Respondent again cites to no authority to support its contention that stormwater is recognized as a temporary or natural condition for purposes of immunity under the TCA. However, the failure to cite to any comparable or controlling authority is not nearly as egregious as Respondent's failure to acknowledge that the TCA's “temporary or natural conditions” provision more fully states:

The governmental entity is not liable for a loss resulting from:

snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions ***unless the snow or ice thereon is affirmatively caused by a negligent act of the employee.***

S.C. Code Ann. § 15-78-60(8) (emphasis added). Again, Respondent has attempted to piecemeal favorable quotes from governmental immunity statutes in order to falsely portray that it is entitled to absolute immunity for **any** temporary or natural condition.

As discussed above, the factual determination by the trial court as to the proximate cause of Appellants' injuries and damages was inappropriate at the summary judgment stage where there was conflicting evidence concerning causation. Specifically, the question of whether Appellants' injuries and damages were caused by a temporary or natural condition (and, now, for the first time on appeal, whether stormwater is a temporary or natural condition) or, rather, "affirmatively caused by a negligent act of" Respondent, its agents, or employees, was a factual question for the jury's determination.

C. Respondent utterly failed to address Appellants' argument that a defect or condition existed which was not corrected within a reasonable time after actual or constructive notice.

Additionally, Respondent relies on another liability exception of the TCA, which states, among other things,

Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the ***defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice;***

S.C. Code Ann. §15-78-60(15) (emphasis added). Again, Respondent fails to cite to any evidence in the Record that it was entitled to summary judgment based on this liability exception under the TCA, and, in fact, Appellants produced uncontradicted evidence that

a defect or condition existed (the box culvert adjacent to Appellants' property), that Respondent had actual or constructive notice of the defect or condition (Respondent's 30(b)(6) testimony paired with its Project plans and addendums), and that this defect or condition caused Appellants' injuries and damages. While Respondent's Brief cites the applicable language from the TCA, there is virtually no discussion, case citation or reference to the record in support of the defense, just a conclusory statement that the defense applies.

In fact, though, Appellants produced uncontradicted evidence that showed: (1) Respondent had knowledge of a defect or hazard in the culvert adjacent to Appellants' property; (2) Respondent failed on multiple occasions to remedy that defect or hazard, and (3) that the inadequate culvert was the cause of the flooding on Appellants' property. Thus, summary judgment was inappropriate because Respondent did not carry its burden in establishing that these conditions were natural or temporary, or that they were the sole causes of Appellants' injuries and damages. Thus, these issues were genuine issues of material fact reserved for the jury considering the conflicting evidence submitted. *Giannini v. Dept. of Transp.*, 664 S.E.2d 450, 378 S.C. 573 (2008).

D. Respondent failed to even discuss or refute Appellants' discretionary immunity argument or the trial court's failure to address it.

As Appellants argued in their Initial Brief, and as Respondent failed to address in its brief¹, the trial court failed to consider or address the Supreme Court's decisions finding liability against Respondent under Appellants' "discretionary immunity" arguments. The failure to argue an exception in a brief ordinarily amounts to an abandonment of it. *Howell*

¹ Respondent did include this issue in its "Statement of Issues on Appeal."

v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987); see also *Mixson v. Westinghouse Elec. Corp.*, 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 1991). For those reasons, and the reasons previously stated in Appellants' Initial Brief, the trial court's order granting summary judgment should be reversed so that Appellants may have a trial on the merits to determine whether their claims were subject to any discretionary immunity defenses of Respondent.

II. APPELLANTS' EXPERT WITNESS'S TESTIMONY ESTABLISHES A SIGNIFICANT CAUSAL LINK BETWEEN RESPONDENT'S NEGLIGENCE AND APPELLANTS' INJURIES AND DAMAGES.

Respondent argues that "the trial court correctly found that Appellants' expert failed to opine as to any alleged defect and causation between the alleged defect and the flooding." (Resp't Br. 5). "When expert testimony is the only evidence of proximate cause relied upon, the testimony must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 190, 805 S.E.2d 212, 214 (Ct. App. 2017) (quoting *Jamison v. Hilton*, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (Ct. App. 2015)). "Only on the rarest occasion should the [circuit] court determine the issue of proximate cause as a matter of law." *Id.* (quoting *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010)). Nevertheless, "in determining whether particular evidence meets this test it is not necessary that the expert actually use the words 'most probably.' It is sufficient that the testimony is such 'as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes.'" *Baughman v. American Tel. & Tel. Co.*, 306

S.C. 101, 111, 410 S.E.2d 537, 543 (1991) (quoting *Norland v. Washington General Hospital*, 461 F.2d 694, 697 (8th Cir.1972)).

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 *Gianinni* plaintiff's expert witness's testimony is almost identical to Appellants' expert witness's:

"So I – and that's really one of the ultimate conclusions is that, my opinion is that the new roadway is obviously much higher than the prior roadway in elevation, and it does – the fact that it's much higher, it has the ability to impound or cause the impoundment of flood waters on [Appellants'] property."

(Gregorie Dep. p. 60, ¶21 – p. 61, ¶2).

"And the significance is that all the information suggests that the prior US378, which was situated at a lower elevation water would have overtopped that road.

And when water overtopped that prior US378, it would have prevented or exceptionally reduced the amount of flooding on [Appellants'] property.

And because water can no longer overtop the road, because the new US378 is constructed significantly higher, that impounds water on the – helps impound water on [Appellants] property and can increase the flood depth on [Appellants'] property."

(*Id.*, p. 74, ¶¶18 – p. 75, ¶¶6).

“I can say – I do say to a reasonable degree of engineering certainty that the flood depth would have been less on the Marlowe property, and ***I believe the impact on the Marlowe property would have been less.*** I say that it’s possible that it would have been prevented.”

(*Id.*, p. 77, ¶¶14-20) (emphasis added).

“I can say to a reasonable degree of engineering certainty that the construction project ***contributed to the flooding. I believe that it increased the flood depth on the property[.]***”

(*Id.*, p. 79, ¶¶1-5) (emphasis added).

“What’s significant to me is the conditions by which the – any flood waters that were on the Marlowe property exited the Marlowe property, those conditions were altered by the construction project.”

(*Id.*, p. 81, ¶¶9-13).

“And the slope – I attribute the failure of the slope to it impeding the hydraulic efficiency of the culvert, and I attribute that loss of hydraulic efficiency to a contribution to the flooding on the Marlowe property.”

(*Id.*, p. 106, ¶¶18-22).

“I mean, basically, there’s no evidence that [the slope sheeting] was even attempted to be – it was never installed.”

(*Id.*, p. 110, ¶¶5-7).

“What I’m saying is that if the project had not been constructed, there would have been relief to the flooding because water would have overtopped the prior US378.”

(*Id.*, p. 109, ¶¶1-4).

“The simultaneous existence of the US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction were ... a ***substantial contributor*** to the flood damages to the Marlowe Property.”

(*R.* p. 110, ¶¶5-6) (emphasis added).

Here, as in *Giannini*, Appellants' expert witness states that it was highly – or substantially – likely that the injuries and damages to Appellants were exacerbated by, and would have been significantly less without, Respondent's actions and/or inactions. And although Appellants' expert witness may not have contributed Respondent's actions and/or inactions as the sole cause of Appellants' injuries and damages, this was not necessary in order to withstand Respondent's motion for summary judgment. See *Sims v. Hall*, 357 S.C. 288, 299, 592 S.E.2d 315, 319 (Ct. App. 2003) ("Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury."). Furthermore, in holding that similar expert testimony to that presented here, the *Giannini* Court held that any defects in the plaintiffs' expert witness's testimony were matters of weight for the jury's consideration – and not the trial court. *Id.* at 454-55.

In sum, Respondent reserves the right to impeach or attack Appellants' expert witness's credibility at trial. The dispute in causation theories between Appellants' expert and Respondent, however, is quintessentially a genuine issue of material fact. Thus, reversal of the trial court's order is warranted, and these issues should be submitted to a jury for consideration.

III. SOUTH CAROLINA PRECEDENT IS CLEAR THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO APPELLANTS' INVERSE CONDEMNATION CLAIM.

In its brief, Respondent states the trial court's order granting summary judgment on Appellants' inverse condemnation claim was correct, raising the identical arguments made in its motion for summary judgment: (1) that "Appellants failed to show that [Respondent] and its employees had any affirmative, positive, and aggressive acts that

caused [] Appellants' alleged harm[;]" and (2) "Appellants failed to show that they suffered special damages, 'different in kind' from that suffered from the public at large as required in *Hardin*." (Resp't Br. 8-9).

A. Respondent failed to address its deficient motion for summary judgment where it failed to move for summary judgment on appellants' inverse condemnation claim.

Likely recognizing the clear case law on this issue, Respondent's brief did not address its failure to include Appellants' inverse condemnation claim its notice and motion for summary judgment. As previously stated in Appellants' initial brief, Respondent's notice and motion for summary judgment stated, "This motion is based upon the fact that [Respondent] is not liable to [Appellants] as a matter of law pursuant to 15-78-10 et seq." (R. p. 54). In its memorandum in support of the motion, Respondent restated this position and went on to argue, "there is no evidence that [Respondent] breached any alleged duty to [Appellants]." (R. p. 56). Neither Respondent's motion nor its memorandum referred to or even mentioned Appellants' inverse condemnation claim, but only discussed the negligence claims. At oral argument, Respondent raised, for the first time², a new argument that Appellants 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 Respondent's notice, its motion, or its memorandum in support of the motion for summary judgment. Despite these glaring deficiencies, and Appellants' objection, the trial court ruled Respondent was entitled to summary judgment on the inverse condemnation claim.

² Most likely because Appellants made the trial court aware of this deficiency in their memorandum in opposition to Respondent's motion for summary judgment.

"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.*; see also, *Turbeville v. Floyd*, 288 S.C. 171, 341 S.E.2d 651 (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). Because undersigned counsel objected to Respondent's raising of a new ground for summary judgment not contained in its notice or motion, and because Respondent failed to address this issue in its brief, the trial court's order granting summary judgment on Appellants' inverse condemnation claim should be reversed.

B. Respondent's conduct amounted to an affirmative, positive, and aggressive act under South Carolina precedent.

In its first contention, Respondent primarily relies on *Hawkins v. City of Greenville*, where this Court addressed inverse condemnation and municipal drainage systems. 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). In that case, the plaintiff filed suit against the defendant municipality asserting a cause of action for inverse condemnation and alleging the defendant's neglect in designing and maintaining its stormwater drainage system led to flooding which damaged his property. 358 S.C. at 285-86, 594 S.E.2d at 560. This Court found the plaintiff failed to allege any affirmative, positive, and aggressive acts by the defendant which damaged his property. *Id.* at 291, 594 S.E.2d at 562. Specifically, the Court found: (1) the acts the plaintiff alleged were merely failures to act; and (2) the only affirmative act the plaintiff cited as a basis for his inverse condemnation claim was

the replacement of a culvert and the installation of material around a nearby creek. *Id.* at 291, 594 S.E.2d at 562-63.

Specifically, the Court wrote, the plaintiff asserted the defendant improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the adjacent creek's drainage pipes beyond their capacity and then failed to replace those pipes. *Id.* at 291, 594 S.E.2d at 563. The Court found that the only affirmative acts the plaintiff cited as forming the basis of his inverse condemnation claim were the replacement of the double-box culvert with the large arched pipe in the adjacent creek and the installation of the riprap material along the banks of the creek. *Id.* The Court held there was no evidence in the record that either of these acts caused the flooding on the plaintiff's property. *Id.*

The Court noted that the plaintiff's own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. *Id.* Regarding the effect of the riprap material on drainage in the creek's basin, experts for both parties either offered no opinion on the impact of the riprap or opined that it was impossible to determine whether installing the riprap negatively or positively affected drainage. *Id.*

Initially, Appellants contend this case is distinguishable from *Hawkins* in that Appellants' expert witness testified that Respondent's maintenance, planning, and installation of the box culvert and the failure of the sheeting along the slopes of the project's road contributed to the flooding on Appellants' property:

"What's significant to me is the conditions by which the – any flood waters that were on the Marlowe property exited the Marlowe property, those conditions were altered by the construction project."

(*Id.*, p. 81, ¶¶9-13).

“And the slope – I attribute the failure of the slope to it impeding the hydraulic efficiency of the culvert, and I attribute that loss of hydraulic efficiency to a contribution to the flooding on the Marlowe property.”

(*Id.*, p. 106, ¶¶18-22).

“I mean, basically, there’s no evidence that [the slope sheeting] was even attempted to be – it was never installed.”

(*Id.*, p. 110, ¶¶5-7).

“What I’m saying is that if the project had not been constructed, there would have been relief to the flooding because water would have overtopped the prior US378.”

(*Id.*, p. 109, ¶¶1-4).

“The simultaneous existence of the US378 roadway, with its existing culvert with limited flow capacity, adjacent to the new elevated US378 roadway, with its new culvert with a range of flow capacities depending on the stage of construction were ... a **substantial contributor** to the flood damages to the Marlowe Property.”

(*R.* p. 110, ¶5-6) (emphasis added). These opinions and testimony directly contradict the Court’s sole bases for dismissal of the inverse condemnation claims in *Hawkins*. For those reasons alone, this Court should determine that, taking the evidence in the light most favorable to Appellants, a genuine issue of material fact exists as to Appellants’ inverse condemnation claim.

However, this Court recently reviewed and addressed a case discussing *Hawkins* in *Ray v. City of Rock Hill, S.C.*, 428 S.C. 358, 834 S.E.2d 464 (Ct. App. 2019). In *Ray*, the plaintiff alleged the defendant municipality’s maintenance of drainage pipes situated under a street in front of her property constituted an affirmative act sufficient to give rise to a claim for inverse condemnation. *Id.* at 366, 834 S.E.2d at 468. She maintained the

defendant, after repairing several broken pipes under that street, reconnected the subject pipe to the defendant's storm water drainage system against her wishes. *Id.*

The plaintiff also asserted the defendant undertook a permanent public project to modernize its infrastructure along the street, and, as a result, the defendant took positive steps to direct its storm water system flow directly under her home. *Id.* at 366, 834 S.E.2d at 469. The defendant asserted there was no evidence it installed or owned the subject pipe or that any new construction or improvements upstream from the pipe resulted in an increase in the amount or flow rate of water toward the plaintiff's property. *Id.* The defendant contended its maintenance of the pipes under the street was not to the subject pipe or to a pipe directly connected to the subject pipe. *Id.* The defendant argued summary judgment was proper because the plaintiff was unable to produce any evidence to attribute the flow of water through the pipe to any action by the defendant. *Id.* at 367, 834 S.E.2d at 469.

The trial court in *Ray* determined the plaintiff's claim that the defendant collected water into its storm water drainage system and channeled it under her home did not support her claim of inverse condemnation. *Id.* at 366, 834 S.E.2d at 468. The trial judge found no positive, aggressive acts were committed by the defendant. *Id.* The trial judge also noted that the plaintiff did not allege the construction of any new improvements causing water to flow through the subject pipe under her property, and the plaintiff failed to cite any case law which would categorize maintenance of the storm water drainage system as a positive, aggressive act. *Id.*

This Court wrote that it believed *Hawkins* was distinguishable from the facts alleged in *Ray*. *Id.* In reversing summary judgment on the plaintiff's inverse condemnation

claim, this Court held that a genuine issue of material fact existed as to whether the defendant engaged in an affirmative, positive, and aggressive act in reconnecting defendant's pipes to the subject pipe after the defendant admitted it did not have an easement and the plaintiff told the defendant not to reconnect. *Id.*

Likewise, the trial court's, and Respondent's reliance on *Hawkins* was misplaced because, here, as Appellants' expert witness testified, *supra*, Respondent's actions and/or inactions increased the flood level on the Appellants' property. For those reasons, this case is distinguishable from *Hawkins* and is more analogous to a nearly identical factual scenarios in *Cutchin v. S.C. Dep't of Highways and Public Transp.* 301 S.C. 35, 389 S.E.2d 646 (1990) and *Tipperary Sales v. S.C. Dep't of Transp.*, 2016-UP-351 (Ct. App. filed June 30, 2016)³, which Appellants' counsel directed the trial court's attention to at oral argument on Respondent's motion for summary judgment.

In *Cutchin*, the defendant in constructed a cement culvert, which was approximately 40 yards from the plaintiffs' home. *Id.* at 36. Later, the plaintiffs' yard was flooded by rainwater on several occasions. *Id.* Subsequently, during a rainstorm, flood waters rose above the windowsills of the plaintiffs' home, causing severe damage. *Id.* A second, similar flood occurred the next year. *Id.* The plaintiffs instituted an inverse condemnation against the defendant, alleging that the cement culvert was improperly constructed, causing damage to their home from the flood waters. *Id.* at 37. The plaintiffs received a jury award of \$70,000. *Id.*

³ 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 Respondent's actions could constitute inverse condemnation.

On appeal, the 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 *Cutchin* Court disagreed. *Id.* In reaching its decision, the *Cutchin* Court noted that the plaintiffs' expert testified that the culvert was inadequate when built and inadequate at the time of its decision.⁴ *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. *Id.* Viewing this evidence in the light most favorable to the plaintiffs, the *Cutchin* Court held that the trial court correctly submitted the case to the jury. *Id.*

In *Tipperary*, the Court of Appeals held the circuit court erred in dismissing the plaintiff's inverse condemnation claim against the DOT. *Id.* at 6. 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. *Id.*

Citing *Hawkins*, the *Tipperary* 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. *Id.* This Court held, however, that the trial court appeared to ignore the

⁴ Likewise, here, Respondent admitted (in its 30(b)(6) deposition) that the box culvert adjacent to Appellants' home was inadequate. (Resp't Dep. p. 11, ¶¶17-20) ("The existing culvert was undersized.")

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. *Id.* For those reasons, the Court held the DOT's alleged conduct could constitute an affirmative, positive, and aggressive act that would support the plaintiff's inverse condemnation claim. *Id.*

This Court also reversed the trial court's dismissal of the plaintiff's inverse condemnations against the defendant municipality, finding that the plaintiff alleged the defendant municipality's construction of nearby streets directly led to the flooding of its store because the defendant municipality's construction, maintenance, and operation of graded streets and thoroughfares caused storm water to collect directly in front of and behind the plaintiff's store. *Id.* at 7. The Court held that unlike the situation in *Hawkins*, then, the defendant municipality's conduct that the plaintiff complained of amounted to an affirmative, positive, and aggressive act that could support a claim for inverse condemnation. *Id.*

The facts in *Tipperary* are nearly identical to the facts in this case, and, thus, Respondent's conduct could constitute an affirmative, positive, and aggressive act that would support Appellants' inverse condemnation claim. Here, Respondent admitted it had the information necessary in 2013 to determine that the existing culvert adjacent to

Appellants' property could not withstand a 25-year rain event, and that a 10-year rain event would likely cause flooding on Plaintiff's property. (R. p. 148, ¶¶1-5). Respondent admitted the existing culvert was undersized. (R. p. 123, ¶¶17-20).

Furthermore, not only was Respondent aware that the existing culvert was undersized, Respondent knew or should have known that the existing US378 roadway served as an outlet for water for Appellants' property, even at 25-year rainfall levels. (R. p. 139, ¶¶15-19). Respondent knew this was unsafe. (R. p. 140, ¶¶4-6). Despite its own models indicating overflow, Respondent took no steps to speak to Appellants or adjacent property owners to confirm overtopping caused by the inadequate existing box culvert. (R. p. 147, ¶¶1-4; R. p. 165, ¶¶2-11). Respondent did not even consider contacting them whatsoever. (R. p. 165, ¶¶17-19).

Finally, as Appellants' expert witness's report indicates, the 1-day rainfall totals for both 2015 and 2016 at the two (2) weather stations closest to Appellants' property both showed rainfall events greater than 10-year but less than 25-years. (See R. p. 99). Thus, even if the 2015 and 2016 rain events were isolated to one (1) day, the evidence showed that Respondent knew the existing culvert would likely cause injuries and damages to Appellants.

In sum, the facts of this case are nearly identical to those presented in *Cutchin* and *Tipperary*, and Respondent's actions increased the flood hazard to which the Appellants' property was historically exposed. Thus, taking the evidence in the light most favorable to Appellants, whether Respondent'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.

C. *Hardin's* "Special Injury" test has been abandoned.

In support of its inverse condemnation argument, Respondent next contends that Appellants "failed to show that they suffered special damages, 'different in kind' from that suffered from the public at large as required in *Hardin*." (Resp't Br. 9). Again, Respondent's reliance on *Hardin* is misplaced because that case, and the "special injury" test, has been abandoned. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citing *Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 609, 641 S.E.2d 437, 443 (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.

Prior to *Hardin*, "a landowner's ability to recover damages as a result of a re-configuration of road access depended on the location of his land with reference to the road vacated and the effect of the vacation on his rights as an abutting landowner." *Carolina Chloride*, 391 S.C. at 433, 706 S.E.2d at 503 (citing *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946)). "The *Cothran* Court held a landowner is not entitled to recover damages unless he has sustained a 'special injury,' which is an injury different in kind and not merely in degree from that suffered by the public at large." *Id.* (citing *Cothran*, 209 S.C. at 368–69, 40 S.E.2d at 243–44). "In *Hardin*, the Court **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.* (citing *Hardin*, 371 S.C. at 609, 641 S.E.2d at 443) (emphasis added).

Thus, the trial court relied on an abandoned test in granting summary judgment on Appellants' inverse condemnation claim, which alone warrants reversal. See *Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc.*, 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988) (circuit court order applying wrong standard of review reversed and remanded for redetermination). However, because the cases cited herein establish that Respondent's conduct was a taking of Appellants' 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. For those reasons, the trial court's order warrants reversal and the inverse condemnation claim should be submitted to the jury.

IV. THE STORMWATER MANAGEMENT AND SEDIMENT REDUCTION DOES NOT APPLY TO THE FACTS OF THIS CASE AND RESPONDENT'S INTERPRETATION OF THE ACT IS AN EXPANSION OF THE GENERAL ASSEMBLY'S INTENT.

In its brief, Respondent essentially regurgitates the same arguments made to the trial court in support of its motion for summary judgment. Again, Respondent argues that South Carolina's Stormwater Management and Sediment Reduction Act⁵ (hereinafter the "Stormwater Act") "does not impose any liability on [Respondent] and [its] agents or employees for the road construction near the Appellants' residence." (Resp't Br. 10). The trial court cited no authority for its conclusion or holding in this respect; Respondent's brief

⁵ S.C. Code Ann. § 48-14-10, *et seq.*

cites no authority therefore, and Appellants' research has so far disclosed no such authority for such a broad interpretation of the Stormwater Act. *Pamplico Bank & Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972).

The Stormwater Act provides that:

Nothing contained in this chapter and no action or failure to act under this chapter may be construed:

- (1) to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees thereof for the recovery for damages caused by such action or failure to act; or
- (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.

S.C. Code Ann. § 48-14-160(2). Based on the Stormwater Act's clear language, *supra*, Respondent's position is simply not contained in the statute, and neither is the trial court's reliance thereon contained in its order granting summary judgment. In their complaint and amended complaint, Appellants did not allege any deficiency in Respondent's obtaining of a permit under the Stormwater Act, nor did Appellants allege any deficiency in Respondent's deviation (or lack thereof) from its stormwater management and sediment control plan, which was submitted to South Carolina's Department of Health and Environmental Control ("DHEC").

For those reasons, despite Respondent's insistence that the Stormwater Act explicitly provides immunity in this case, the clear language of the Stormwater Act only address permitting and plan approval processes, and not maintenance, construction, and installation of roads, bridges, and culverts. Furthermore, though, despite Respondent's insistence, the Stormwater Act also expressly states that it does not relieve Respondent from its liability "arising from or incident to the **operations associated with** the land

disturbing activity.” *Id.* (emphasis added). Reading the clear language of the statute, Respondent’s – and the trial court’s – interpretation of the Stormwater Act is simply wrong, and the lack of any precedent or statutory authority to support Respondent’s position is revealing.

However, because Appellants must address Respondent’s interpretation of the Stormwater Act, Respondent essentially asks this Court to read, interpret, and expand the Stormwater Act to provide immunity for any and all “road construction” operations carried out in this State. (See Resp’t Br. 9-10). The Stormwater Act requires a person who intends to engage in a land disturbing activity⁶ 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 Act further requires DHEC to promulgate regulations for the “types of activities that require a stormwater . . . permit” and for “permit application and approval requirements.” *Id.* § 48-14-50(C)(3) & (9).

Reading the Stormwater Act to require Respondent’s seemingly unlimited immunity would result in adding language to the statute, rather than merely interpreting it. See *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) (“Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.”). If the General Assembly intended to provide immunity for **all** road construction activities undertaken in this State, and not just actions

⁶ “Land disturbing activity’ means any use of the land by any person that results in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality and quantity of the stormwater runoff.” S.C. Code Ann. § 48-14-20(8).

related to permitting of land distributing activities and approval of stormwater plans, it could have done so with clear, express language. *Gov't Emps. Ins. Co. v. Poole*, 424 S.C. 1, 817 S.E.2d 283 (2018) (emphasis added). The General Assembly did not, though, and chose only to provide immunity to the State and its agencies for the recovery of damages caused by any “action or failure to act” insofar as it concerns the permitting and approval provisions stated in S.C. Code Ann. § 48-14-30 and § 48-14-50. Accordingly, the Stormwater Act is inapplicable to the facts and issues in this case, and the trial court’s reliance on it in granting Respondent’s motion for summary judgment was a clear error of law that amounted to an abuse of discretion. Thus, the trial court’s Order should be reversed.

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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HOPKINS LAW FIRM, L.L.C.

s/ J. Clay Hopkins

William E. Hopkins, Jr. (SC Bar No. 66474)
J. Clay Hopkins (SC Bar No. 102053)
171 Church Street, Suite 160
Charleston, SC 29401
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile
Email: bill@hopkinsfirm.com
clay@hopkinsfirm.com

Attorneys for Appellants

Charleston, South Carolina

September 29, 2020

Other Counsel of Record:

John B. McCutcheon, Jr.
S. Ashley Gwin
THOMPSON & HENRY, PA
Post Office Box 1740
Conway, South Carolina 29528
(843) 248-5741 – Telephone

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Sep 29 2020

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

HOPKINS LAW FIRM, LLC

s/ William E. Hopkins, Jr.

William E. Hopkins, Jr. (SC Bar No. 66474)

bill@hopkinsfirm.com

J. Clay Hopkins (SC Bar No. 102053)\

clay@hopkinsfirm.com

171 Church Street, Suite 160

Charleston, SC 29401

(843) 314-4202 – Telephone

(843) 314-9365 – Facsimile

Attorneys for Appellants

September 29, 2020