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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: 2020 – 00614

South Carolina Department
of Transportation,

Respondent,

v.

James Marlowe and Lori
Marlowe, individually and next
friends of K.P., H.M., and B.M,
minors under the age of eighteen
years,

Appellant

CERTIFICATE OF COUNSEL

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

May 14, 2021

s/ John B. McCutcheon, Jr.
John B. McCutcheon, Esquire
S. C. Bar No. 3767
1300 Second Avenue, 3rd Floor
Conway, SC 29526
(843) 248-5741
jmccutcheon@thompsonlaw.com
Attorney for Appellant

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IN THE STATE OF SOUTH CAROLINA
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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 years,

Appellants,

v.

South Carolina Department of Transportation,

Respondent.

RESPONDENT'S INITIAL BRIEF

John B. McCutcheon, Jr., SC Bar #3767
THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
jmccutcheon@thompsonlaw.com
(843) 248-5741 - voice
(843) 248-5112 – fax

Attorney for the Respondent

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in determining the Stormwater Management and Sediment Reduction Act applies to this case and supports granting summary judgment?

II. Did the trial court err in making factual determinations regarding the cause of the flooding on Appellants' property and Appellants' injuries?

III. Did the trial court err in placing itself in the role of the jury by improperly weighing Appellants' expert witness' testimony?

IV. Did the trial court err in failing to consider, or rule upon, Appellants' discretionary immunity arguments in opposition to Respondent's motion for summary judgment and Appellants' Rule 59(e) motion for reconsideration?

V. Did the trial court err in granting summary judgment on Appellants' inverse condemnation claim when Respondent failed to raise that issue in its motion for summary judgment?

VI. Did the trial court err in improperly making factual determinations reserved for the jury in granting summary judgment on Appellants' inverse condemnation claim?

STATEMENT OF CASE

The Appellants own property located at 2479 W Highway 378, Pamplico, South Carolina. In March 2015, the SCDOT began construction on widening Highway 378 in the area near the Appellants' residence. The Appellants allege that on October 4, 2015 and October 5, 2016 their home flooded, and the Appellants further allege that the construction to Highway 378 caused the flooding at Appellants' residence. However, in the same timeframe of October 2015 and October

2016, the Pee Dee experienced the 1000 Year Flood and Hurricane Matthew. Both storms caused extensive flooding throughout the Pee Dee and Grand Strand.

On May 3, 2017, Appellants Lori Marlowe and Jamie Marlowe brought this action against Respondent South Carolina Department of Transportation as well as Defendants Southern Asphalt, Inc. and United Infrastructure Group, Inc. alleging causes of action for inverse condemnation, conversion, due process violations, and negligence. On August 22, 2018, Appellants added their minor children as Appellants against the same Defendants with the same causes of action.

On November 7, 2019, Respondent filed the Motion for Summary Judgment, and a hearing was held on February 10, 2020. On March 25, 2020, the trial court issued the Order Granting Defendant SCDOT's Motion for Summary Judgment.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court. Summary judgment is appropriate "if 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; Knight v. Austin, 396 S.C. 518, 521-522, 722 S.E.2d 802 (2012). Furthermore, the "evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. (citing Fleming v. Rose, 350 S.C. 488, 493-94, 657 S.E.2d 857, 860 (2002). "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).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION IS NOT LIABLE TO THE APPELLANTS PURSUANT TO THE TORT CLAIMS ACT

The 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 on their property and in their homes, including many who had never experienced flooding previously. The flooding to Appellants' residence was caused by Acts of God, not any negligence on the part of the SCDOT.

Furthermore, the trial court correctly found that the Tort Claims Act (SC Code Ann 15-78-10 et seq) exempts the SCDOT from liability for natural conditions on a public roadway, or nuisance. The Tort Claims Act further exempts the SCDOT 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." SC Code Ann 15-78-60(15).

South Carolina Code Section 15-78-60 (the Tort Claims Act) states in relevant part that:

> The 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;
>
> (7) a nuisance;
>
> (8) 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;

(15) absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or 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. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them 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. The signs, signals, warning devices, guardrails, or median barriers referred to in this item are those used in connection with hazards normally connected with the use of public ways and do not apply to the duty to warn of special conditions such as excavations, dredging, or public way construction. **Governmental entities are not liable for the design of highways and other public ways.** Governmental entities are not liable for loss on public ways under construction when the entity is protected by an indemnity bond. **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;**

SC Code Ann 15-78-60
[emphasis added]

Pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on the Appellants' property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees. The Tort Claims Act relieves SCDOT from liability for the design of highways, which is exactly what the Appellants have alleged in their Complaint. The Tort Claims Act further relieves SCDOT from liability for natural conditions occurring on public roadways. The rain event and hurricane were natural conditions, and as such, SCDOT 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. The stormwater and flooding surrounding the Appellants' residence were temporary natural conditions due to weather. Therefore, SCDOT is immune from liability under the Tort Claims Act for the flooding damage to Appellants' property.

The Tort Claims Act further exempts the SCDOT 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." SC Code Ann 15-78-60(15).

The Appellants have alleged that rainwater during the 1000-year flood and Hurricane Matthew caused flooding to their property. Rainwater is a natural and temporary condition on a roadway that would cause the Tort Claims Act to apply to this case.

Pursuant to the Tort Claims Act, the SCDOT is not liable for the flooding on the Appellants' property as the rain event and Hurricane were natural conditions, not caused by SCDOT or its agents or employees. The Tort Claims Act relieves SCDOT from liability for the design of highways, which is exactly what the Appellants have alleged in their Complaint. The Tort Claims Act further relieves SCDOT from liability for natural conditions occurring on public roadways. The rain event and hurricane were natural conditions, and as such, SCDOT had no control over those natural conditions or their impact on Appellants' property.

II. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS' EXPERT FAILED TO OPINE AS TO THE ALLEGED DEFECT AND CAUSATION

In addition, 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. The Appellants' expert

failed to show that 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. Appellants' expert has failed to give opinions to a reasonable degree of engineering certainty in this case.

Jason Gregorie, PE, the Appellants' expert, testified that he was "not alleging that there's a construction defect or a design defect of the road, in accordance with SCOOT standards." (Gregorie depo, page 61). He further testified "I don't take issue with the design or construction of the road itself." (Gregorie depo, page 61). Gregorie further testified that:

> What I'm going to testify about here today is what I state in my report, is that if the prior U.S. 378 existed and the new U.S. 378 had not been constructed. 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. (Gregorie depo, page 77. 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, but I cannot say definitely that if the project had not existed that it would have completely prevented the flooding. (Gregorie depo, page 79)

> A: Well, I – to a reasonable degree of certainty, I say that it has affected the depth, the flood depth of the property. I think I say that it may – may have or there was a possibility it would have prevented the flooding inside the structure altogether.
> Q: May have?
> A. That's correct.
> Q: So it still–you agree that even with the old US 378 with these two rain events the Marlowe property still could have flooded?
> A: It's possible, yes.
> (Gregorie depo, page 84)

Mr. Gregorie testified that the construction increased the height of the flood waters. However, Mr. Gregorie also testified that absent the widening project and road construction, the Marlowe's residence may have still flooded. Mr. Gregorie could not testify to a reasonable degree of engineering certainty that absent the road construction, the flooding would have been prevented. Stated differently, Mr. Gregorie testified that the Appellants' property still could have flooded even without the road construction.

The Appellants' expert does not find any defect in the construction of Highway 378 near the Appellants' property. Furthermore, the Appellants' expert failed to opine that the actions (or inactions) of SCDOT caused flooding to the Appellants' residence to a reasonable degree of engineering certainty. Therefore, the trial court correctly determined that there was no evidence of breach of any duty the SCDOT owed, and furthermore, that any alleged breach caused damage to Appellants' property.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE INVERSE CONDEMNATION CLAIM

The trial court correctly determined that summary judgment was proper on the Appellants' claim for inverse condemnation. The Appellants argue in their brief that SCDOT failed to move for summary judgment on the inverse condemnation claim. However, the issue was fully argued during the Motion for Summary Judgment hearing (see Transcript of Record), and further alleged in Appellants' Complaint.

"To establish an inverse condemnation, a Appellant must show: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Hawkins v. City of Greenville, 358 SC

280, (Ct.App.2004) 290 (the Court later determined that the permanence factor was no longer required).

"The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient." Hawkins at 291 (citing Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency")).

"[A] regulatory taking by its very nature necessitates the existence of some regulation, statute, ordinance, zoning law, or similar rule of law that impacts a landowner's use of his property. In other words, regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land." Kiriakides v. School District of Greenville County, 382 S.C. 8 (2009) (citing Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886 (1992).

"The Supreme Court of the United States has held that the 'impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." Kiriakides v. School District of Greenville County, 382 S.C. 8 (2009) (quoting Kirby Forest Indus. V. United States, 467 U.S. 1, 15 (1984)).

In this case, the Appellants failed to show that SCDOT and its employees had any affirmative, positive, and aggressive acts that caused the Appellants' alleged harm. As noted by the Hawkins court, a mere failure to act is insufficient. There has been no affirmative conduct on

the part of the SCDOT restricting the Appellants' land. Installing culverts and construction to public roadways is a "legitimate government action" on behalf of the SCDOT as discussed in the Kiriakides case above. Therefore, the Appellants' inverse condemnation allegations fail to meet the standard of an affirmative, positive, and aggressive act by the SCDOT.

"It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages..." Hardin v. South Carolina Department of Transportation, 3714 S.C. 598, 606 (2007).

The Appellants failed to show that they suffered special damages, "different in kind" from that suffered from the public at large as required in Hardin. In fact, the Appellants allege quite the opposite, indicating that several other homeowners near their property also flooded. Furthermore, it is common knowledge that many homes in the Pee Dee flooded during the 1000-year flood and Hurricane Matthew. Because the Appellants have not suffered a special damage, different in kind from the public at large, then they do not have a claim for inverse condemnation. Therefore, the trial court correctly granted summary judgment on the Appellants' inverse condemnation claim.

IV. THE TRIAL COURT CORRECTLY RELIED ON THE STORMWATER MANAGMEMENT AND SEDIMENT REDUCTION ACT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The Stormwater Management and Sediment Reduction Act states:

> (A) Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed.
> (B) Each person responsible for the land disturbing activity shall certify, on the stormwater management and sediment control plan submitted, that all land disturbing activities will be done according to the approved plan.

> (C) All approved land disturbing activities must have associated therein at least one individual who functions as responsible personnel. (SC Code Ann. 48-14-30)
>
> 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 of 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. (SC Code Ann. 48-14-160)

Pursuant to SC Code Section 48-14-160, the Stormwater Management and Sediment Reduction Act does not impose any liability on SCDOT and their agents or employees for the road construction near the Appellants' residence.

CONCLUSION

For the above stated reasons, the Court of Appeals should affirm the trial court's granting of summary judgment in favor of the South Carolina Department of Transportation.

Signature page to follow

John B. McCutcheon, Jr., SC Bar #3767
Attorneys for the Respondent

/s/John B. McCutcheon, Jr.
THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice
(843) 248-5112 - fax
jmccutcheon@thompsonlaw.com

August 5, 2020
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Appellants,

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CERTIFICATE OF SERVICE

I, John B. McCutcheon, hereby certify that on August 5, 2020, I caused a true and correct copy of Respondent's Initial Brief, in the above captioned action to be served on all counsel of record via email and regular U.S. Mail, postage pre-paid, addressed as follows:

William E. Hopkins, Jr.
bill@hopkinsfirm.com
J. Clay Hopkins
clay@hopkinsfirm.com
Post Office Box 1885
Pawleys Island, South Carolina 29585

s/John B. McCutcheon
John B. McCutcheon

Conway, South Carolina