STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) FOR THE FOURTH JUDICIAL CIRCUIT

Claude W. Graham and Vickie B. Graham,) Civil Action No.: 2008-CP-17-0376
2008-CP-17-0377

Plaintiff,

v. **ORDER**

Town of Latta, South Carolina,

Defendant.

This matter comes before the Court by way of Defendant Town of Latta's Motion for Judgment Notwithstanding Verdict (JNOV) pursuant to Rule 50(b), SCRCP, or in the alternative, for New Trial Absolute pursuant to Rule 59, SCRCP. Plaintiffs, Claude W. Graham ("Mr. Graham") and Vickie B. Graham ("Mrs. Graham"), are represented by Reynolds Williams, Esquire, and Defendant is represented by Michael Wren, Esquire, and Daniel Plyler, Esquire.

Plaintiffs filed separate Complaints against Defendant on November 19, 2008. Mr. Graham's Complaint contained a cause action for negligence, and Mrs. Graham's Complaint alleged negligence, inverse condemnation, and trespass. A jury trial was held the week of October 8, 2012. Before the matter was submitted to the jury, this Court granted Defendant's Motion for Directed Verdict as to the trespass and inverse condemnation claims. The jury returned with a verdict of $100,000 for Mr. Graham and $225,000 for Mrs. Graham on their negligence claims. Defendant filed post-trial motions on October 26, 2012. Plaintiffs and Defendant submitted memoranda on the post-trial motions.

1. **JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)**

Defendant contends that the evidence adduced at trial does not justify the jury's verdict and that the Court should grant Defendant's motion for JNOV. "A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCP. In ruling on JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom, in the light most favorable to the non-moving party. *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). "The trial judge cannot disturb the factual findings when ruling on a motion for judgment notwithstanding

the verdict unless a review of the record discloses no evidence that reasonably supports them." *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-32, 603 S.E.2d 605, 611 (Ct. App. 2004). "The trial court must deny the motions when evidence yields more than one inference or its inference is in doubt." *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002).

A. Tort Claims Act

Defendant moved for a Directed Verdict at the conclusion of Plaintiffs' case and renewed its arguments as to Plaintiffs' negligence claims at the conclusion of the evidence. Defendant contends that it is entitled to JNOV because it is immune from Plaintiffs' negligence claim for failure to properly maintain the sanitary sewer and drainage system based upon exceptions to the waiver of sovereign immunity under the South Carolina Tort Claims Act, specifically S.C. Code Ann. Sections 15-78-60(1), (2), and (5) (1976). "The governmental entity asserting the Act as an affirmative defense bears the burden of establishing a limitation upon liability or an exception to the waiver of immunity." *Hawkins v. City of Greenville*, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004). "The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the Act." *Id.* at 293, 594 S.E.2d at 564.

Section 15-78-60(1) provides that a "governmental entity is not liable for a loss resulting from . . . legislative, judicial, or quasi-judicial action or inaction," and Section 15-78-60(2) provides immunity for "administrative action or inaction of a legislative, judicial, or quasi-judicial nature." There is no evidence of any legislative, judicial, or quasi-judicial action or inaction or any administrative action or inaction. Plaintiff presented testimony that Defendant had a duty to operate and maintain the sewer system and that the Mayor of the Town of Latta was aware of a problem on Plaintiffs' property after the September 5 - 6, 2008 flooding events. The evidence presented at trial was that the Defendant's governing body did nothing consciously or unconsciously regarding the sanitary sewer and drainage matter on Plaintiffs' property. There was no testimony that any ordinance was enacted in relation to Plaintiff's property or the flooding or that there was any action or inaction of a legislative, judicial, or quasi-judicial nature by the Town of Latta's governing body. In addition, there was no evidence presented that any administrative action or inaction took place. Accordingly, Sections 15-78-60(1) and (2) do not apply.

Section 15-78-60(5) provides a governmental entity immunity for "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." "A finding of immunity under the Act 'is contingent on proof that the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.'" *Sabb*, 350 S.C. at 428, 567 S.E.2d at 237 (quoting *Wooten ex rel. Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999)). The South Carolina Court of Appeals has held that a city exercises discretion in "the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system," and therefore, "is immune from liability for negligence claims arising out of the design and maintenance of the drainage system." *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564.

The burden was on Defendant to show that it not only actually weighed competing considerations and alternatives regarding the action or inaction taken to remedy the problems with its sanitary sewer and drainage system on Plaintiffs' property, but that, in doing so, it utilized accepted professional standards appropriate to resolve the issue. The standard to prove discretionary immunity is inherently factual. *See Pike v. South Carolina Dept. of Transp.*, 343 S.C. 224, 232, 540 S.E.2d 87, 91 (2000). A government entity "should not be entitled to discretionary immunity as a matter of law by creating an issue of fact." *Id.* "It is not enough to say the defect was noted and a decision was made not to repair it." *Id.* Defendant claims that the testimony of Mike Hanna established that Defendant considered and weighed competing alternatives, and then used accepted professional standards in deciding that there was nothing needed to be done regarding the portion of its sanitary sewer and drainage system at issue. Testimony was given at trial that Defendant was presented with several choices to remedy the drainage problem: move the pipe on Plaintiffs' residence, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing. Testimony was also presented that Defendant conducted smoke tests to determine whether there was a defect, and attempted to snake a camera through the line, then made a decision not to repair the pipe. Roger Davis, Plaintiffs' expert in mechanical engineering and environmental engineering in the field of waste disposal, testified that DHEC reports indicated that the Defendant was warned to take action or investigate an inflow problem in the Town's water system. Mr. Davis further testified that this

type of problem may get worse if not remedied. Thus, testimony was presented that Defendant was on notice of defects in the Town's water system and also at Plaintiff's residence in particular, yet made a decision not to repair the defects.

Furthermore, a duty arose on Defendant's part once Defendant was placed on notice of the problem at Plaintiffs' residence after the flooding events on September 5 - 6, 2008. *See Sabb*, 350 S.C. at 429, 567 S.E.2d at 237. Danielle Watson of the South Carolina Department of Health & Environmental Control (DHEC) testified that Defendant had a duty to operate and maintain the sewer system. Roger Davis provided testimony that there was a breach in the system and that Defendant failed to properly maintain the system. Whether Defendant breached its duty to maintain its drainage system by failing to exercise one of the options available to fix the flooding at Plaintiffs' residence was a question for the jury. *See Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). The jury considered the evidence of whether Defendant's inaction constituted maintenance and rejected the discretionary immunity provision of the Tort Claims Act. Because there is evidence to support the jury's verdict, Defendant's Motion for JNOV on the grounds that Plaintiffs' negligence claim is barred by application of the South Carolina Tort Claims Act is **DENIED.**

B. Standard of Care and Proximate Cause

Defendant maintains that Plaintiffs failed to produce evidence at trial regarding the applicable standard of care for proper maintenance of the portion of Defendant's sanitary sewer and drainage system at issue. Defendant also asserts that the matters at issue were not within common knowledge, and that design, operation, and maintenance of a municipal drainage system requires specialized training and knowledge.

There was evidence presented at trial relating to duty and Defendant's breach of that duty. Testimony was presented by Danielle Watson that Defendant had a duty to operate and maintain the sewer system. Roger Davis provided testimony that there was a breach in the system and that Defendant failed to properly maintain the system. If the duty to maintain a municipal drainage system is outside the realm of common knowledge, Plaintiff provided expert witness testimony on that duty.

Defendant also claims that Plaintiffs failed to present evidence establishing that their damages were proximately caused by Defendant's acts or omissions. Taking the evidence in the light most favorable to Plaintiffs, there was evidence to establish that there was a problem with

Defendant's sewer line on Plaintiffs' property. There was also evidence that Defendant took no steps to correct the problem to stop the damage to Plaintiffs after it became aware of the problem. Davis' testimony was that Defendant's sewer and drainage system maintenance records showed infiltration and/or inflow problems. Evidence was also presented as to the location of Defendant's sewer line in relation to Plaintiffs' house. Mr. Graham testified that he discovered the location of Defendant's sewer line, which he identified as running directly running under his house, when he hired a plumber and the line was revealed. From these facts, competing inferences might be reasonably drawn as to Defendant's failure to exercise due care in the maintenance of its sewer and drainage system on the Graham's property and the issue of proximate cause. *See Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). The jury weighed the evidence and concluded that the Defendant was liable. Defendant's Motion for JNOV on these grounds is **DENIED**.

C. Damages

Defendant argues that Plaintiffs failed to present any evidence establishing that their damages were proximately caused by events subsequent to September 5 - 6, 2008. Defendant claims that Plaintiffs only pled damages caused by two events, one occurring on September 5 - 6, 2008, and the other occurring September 13, 2008. This Court determined, as a matter of law, that Defendant is not responsible for damages stemming from the September 5 - 6 event. Specifically, Defendant claims that Plaintiff Claude Graham failed to present any evidence that his alleged damages relating to personal property were caused by an event subsequent to September 5 - 6.

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

Additionally, Defendant argues that Plaintiffs failed to present evidence establishing diminution in fair market value to the property at issue. Generally, "[t]he measure of damages for permanent injury to real property by pollution, whether by nuisance, trespass, negligence, or

inverse condemnation is the diminution in market value of the property," or the difference between value of the land before injury and value after injury. *Ravan v. Greenville County*, 315 S.C. 447, 465, 434 S.E.2d 296, 307 (Ct. App. 1993). In this case, Plaintiffs pled damages for the cost to rebuild their house, not the value of the land itself. "[T]he cost of repair or restoration is a valid measure of damages for injury to a building." *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992). Plaintiffs presented evidence through John Benton of the cost to repair or rebuild the Plaintiff's house. Mr. Benton provided an itemization of the costs of the materials needed to rebuild Plaintiff's house, including electrical wiring, plumbing, appliances, and painting. Thus, Plaintiffs presented evidence to support their damages as the cost to rebuild or repair the house. Defendant's Motion for JNOV on these grounds is **DENIED**.

2. NEW TRIAL ABSOLUTE

Defendant also contends that it is entitled to a new trial absolute. The trial court's decision to grant or deny a motion for a new trial absolute is within its discretion. *See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). A trial court may grant a new trial pursuant to Rule 59(a) when there is prejudicial error in the admission of evidence or if the "the verdict is excessive or inadequate." *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). For a trial court to order a new trial based on erroneous admission of testimony, "the record must show not only error but also prejudice." *Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976). When deciding a motion to grant a new trial, "this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000).

A. The Witnesses

Defendant moves for a new trial absolute on the grounds that the Court erred in allowing the testimony of Plaintiffs' expert witness, John Benton. Defendant claims that during voir dire it was elicited from Mr. Benton that he only performed an estimate of what it would cost to completely rebuild the house owned by Plaintiffs, and that Plaintiffs failed to produce evidence that the house needed to be completely rebuilt.

"A competent estimate of the cost of repair to a building creates a factual issue regarding damages." *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989). Mr. Benton testified as to an estimate to rebuild the house as it was prior to the damage

sustained. Mr. Benton's estimate did not include the land upon which the house is built, Plaintiffs' swimming pool, carport, or driveway. While Mr. Benton did not testify as to the nature and extent of the damages or whether the house needed to be completely rebuilt or partially repaired, there was sufficient evidence for the jury to infer that the Plaintiffs' house had become a total loss. Ms. Graham testified that she was unable to enter the house due to health concerns. Thomas Manning Robertson presented evidence that testing inside the Plaintiffs' house indicated that a quantity of mold was present. Dr. David Culpepper presented evidence that Plaintiffs had respiratory problems that may have been related to the presence of mold in their house after the flooding events. Therefore, there was evidence for the jury to infer that the house needed to be rebuilt, and because Plaintiffs only asked for damages in the form of the building itself, the correct measure of damages was used. Because the admission of Mr. Benton's testimony was not an error, Defendant is not entitled to a new trial absolute on this basis.

Defendant also claims that the court erred in allowing Plaintiffs' witness, William Benton Henry, to review, in front of the jury, photographs that had been excluded by the court during the pre-trial conference. Defendant further claims that the photographs were not needed to "refresh" Mr. Henry's memory, as it was not established through proper questioning whether his memory needed to be refreshed. The photographs were not introduced into evidence or given to the jury. This Court allowed the photographs to refresh Mr. Henry's recollection as to the dates of the events at issue. Defendant made no objection to the foundational questions used to establish that Mr. Henry needed to refresh his recollection as using the photographs. Mr. Henry testified that he witnessed several significant flooding events at Plaintiffs' house, and had taken pictures of these events on various occasions. Thus, Defendant is not afforded a new trial absolute on these grounds.

In addition, Defendant argues it is entitled to a new trial absolute because the court erred in failing to exclude Plaintiffs' Exhibit 1 after the Court granted a directed verdict as to Plaintiffs' claims associated with the September 5 - 6 events. Plaintiffs' Exhibit 1 consisted of photographs taken on September 6, 2008 by Plaintiffs. These photographs purported to show resulting debris that collected on Plaintiffs' property following the September 5 - 6 flooding events. This Court determined at trial that the photos were allowed to go to the jury not to support Plaintiffs' claim for damages, but to show conditions that led to Defendant having notice

of the alleged sewer flooding. The Court is accorded broad discretion in ruling on the admissibility of testimony and exhibits. *See State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000); *State v. Von Dohlem*, 322 S.C. 234, 471 S.E.2d 689 (1996). Because Defendant has not shown prejudice, Defendant is not afforded a new trial on this basis.

Furthermore, Defendant claims that the Court failed to instruct the jury that Defendant was not responsible for claims associated with the alleged damages stemming from the September 5 - 6 events and that Defendant was not liable for the mere presence of a portion of its sanitary sewer and drainage system on Plaintiffs' real property. The Court provided an instruction to the jury on the September 5 – 6 events as it deemed appropriate. Defendant did not request that the Court charge the jury as to Defendant's liability for the mere presence of the sanitary sewer and drainage system on Plaintiff's property. Thus, Defendant is not afforded a new trial on this basis.

Defendant also claims that the Court erred in allowing the rebuttal testimony of Claude Graham and Danielle Watson, as they did not provide testimony that rebutted any of the testimony or evidence presented by Defendant. The admission of reply testimony is within the sound discretion of the court and should only result in a new trial if the admission of such testimony is prejudicial. *See State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998). The two witnesses called in reply, Claude Graham and Danielle Watson, placed in issue two additional facts: (1) the location of the sewer line; and (2) the nature of the testing done by Defendant to determine the location and integrity of the line. Mr. Graham's testimony contradicted Defendant's witness, Will Brown, who also testified about the location of the sewer line. Ms. Watson testified, contrary to Mr. Brown and Plaintiffs' witness Mike Hanna, that Defendant attempted to run a camera through the line on Plaintiffs' property, but was unable to do so because of an obstruction. Thus, the admission of rebuttal testimony was proper and Defendant was not prejudiced.

Defendant further argues that the Court erred in allowing Danielle Watson to testify as to information told to her by James Bailey, the Water/Sewer Department Supervisor of the Town of Latta, which Mr. Bailey obtained from a third party. This testimony dealt specifically with an alleged effort to snake a camera through a portion of Defendant's sewer system. Defendant contends that this testimony was hearsay within hearsay and should have been excluded. Plaintiffs argue that the statement was not hearsay within hearsay pursuant to Rule 801(d)(2) of

the South Carolina Rules of Evidence, because it was "a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment during the existence of the relationship." Unless the error by the court in admitting the testimony affected the substantial rights of Defendant, a motion for new trial absolute must be denied. *See* Rule 61, SCRCP. Danielle Watson's statement did not affect the substantial rights of Defendant and thus Defendant's Motion for New Trial Absolute on these grounds is **DENIED**.

B. Charges to the Jury

Defendant claims that the Court erred in failing to charge S.C. Code Ann. Sections 15-78-60(1), (2), (4), (9), and (13). Defendant also contends that the Court failed to charge language that Defendant requested regarding Plaintiffs' burden to establish proximate cause, and therefore Defendant was prejudiced.

This Court determined at the Directed Verdict stage that Sections 15-78-60(1), (2) do not apply in this case. Section 15-78-60(4) does not apply because there is no claim that there is a violation of a specific regulation or ordinance. Section 15-78-60(9) simply had no applicability relating to the sole surviving cause of action for negligence. Section 15-78-60(13) does not apply because DHEC was exercising its authority and performing inspections in conjunction with DHEC authority, rather than the Town of Latta exercising its authority over businesses and other entities.

In regard to Defendant's proximate cause charge, the Court charged an equivalent proximate cause charge and the Court's charge was neither erroneous nor prejudicial, both of which are required for post-verdict reversal. Thus, Defendant's Motion for New Trial on these grounds is **DENIED.**

C. Inappropriate Verdict

Defendant moves for a new trial absolute based upon the Thirteenth Juror Doctrine. Defendant also claims that the verdict returned by the jury was grossly excessive in light of the evidence presented at trial regarding alleged damages suffered.

Based on a thorough review of the record, the jury's verdict was not grossly excessive in light of evidence presented at trial. Mr. Graham presented evidence that he had been damaged by several hundred dollars in medical bills, $7,500 in equipment, and by $70,000.00 in rent paid or due for substitute housing from November 2008 to April 15, 2012. Ms. Graham testified and evidence was presented that that she sustained several hundred dollars in medical bills, the loss

of a house that would cost at least $457,000.00 to replace, and pain and suffering. A verdict of $100,000 for Mr. Graham and $225,000 for Mrs. Graham is well within the range reasonably inferred by the evidence.

In regard to the Thirteenth Juror Doctrine, this Court finds that there was sufficient evidence in the record to support the jury's verdict and the verdict should not be overturned or disregarded. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when [it] finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "This ruling has also been termed granting a new trial upon the facts." *Id.* "A trial judge may also set aside a verdict and grant a new trial based solely on the judge's view of the evidence." *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 5, 426 S.E.2d 327, 329 (Ct. App. 1992). Because the evidence justifies the jury's verdict, the verdict should not be overturned.

ORDER

For the reasons stated above, Defendant Town of Latta's Motion for Judgment Notwithstanding Verdict, or in the alternative, for New Trial Absolute is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
February 28, 2013

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