

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas  
Edgar W. Dickson, Circuit Court Judge

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Case No. 2007-CP-38-938

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Ajoy Chakrabarti and Sukla Chakrabarti, ..... Respondents

v.

City of Orangeburg, ..... Appellant.

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**APPELLANT'S PETITION FOR REHEARING**

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MAY 16 2013

**SC Court of Appeals**

Pursuant to Rule 221, South Carolina Appellate Court Rules, (SCACR), Appellant, City of Orangeburg, petitions this Honorable Court for Rehearing. The bases for this Petition are as follows:

- I. In affirming the Trial Court’s denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence of any duty owed to Respondents.**
- II. In affirming the Trial Court’s denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence of a grossly negligent breach of duty owed to Respondents.**

#### ARGUMENT

- I. In affirming the Trial Court’s denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence any duty owed to Respondents.**

“To recover on a claim for negligence, a plaintiff ‘must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.’” Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). The very first component or element of a negligence cause of action, for which a plaintiff has the burden of proof, is the “duty of care owed by the defendant to the plaintiff”. Respondents’ lawsuit alleged a novel cause of action, asserting negligence in the context of a municipality’s handling of a nuisance and demolition of Respondents’ residential structure. Respondents presented no evidence of that duty which they have contended was owed by City

to the Chakrabartis.

“A plaintiff must identify a duty that the defendant has to protect him or her from a particular harm to merit consideration of his or her claim by a jury.” Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 393, 701 S.E. 2d 776, 781 (Ct. App. 2010). “An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff”. Platt v. CSX Transportation, Inc., 388 S.C. 441, 697 S.E.2d 575 (2010).

“The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict”. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

The South Carolina Tort Claims Act “governs all tort claims against governmental entities”. Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct.App.2003), and “is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents”. S.C.Code Ann § 15-78-70(b) (Supp.2003); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 215, 544 S.E.2d 38, 49 (Ct. App.2001).

While the Tort Claims Act establishes that governmental entities be “liable for their torts in the same manner and to the same extent as a private individual under like circumstances,” subject to certain limitations and exemptions provided in the Act”, Hawkins v. Greenville County, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), there is no private individual counterpart for actions of municipalities in dealing with nuisances. Accordingly, there is no common law private individual duty counterpart. In order for a plaintiff to show a municipality’s

breach of duty in connection with abatement of a nuisance by demolition, a plaintiff has the initial burden of establishing that duty. “A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law”. Platt v. CSXTransportation, Inc., 697 S.E.2d at 577.

Respondents presented the testimony of Ajoy Chakrabarti, R. p. 42 – p. 144; Sam Fields, R. p. 145 – 149; Andrew Beach, R. p. 150 – 157; Thomas Darby, R. p. 158 – 179; Johnnie Coulter, R. p. 180 – p. 213; Bruce Holler, R. p. 214 – 219; Kenneth Middleton, R. p. 220 – 224; Orangeburg City Manager John Yow, R. p. 225 – p. 229; and Code Enforcement Official, Gene Nelson, R. p. 230 – p. 233. None of these witnesses identified that duty owed by City to the Respondents, claimed to have been breached, nor defined nor described the standard of care to be observed by the City when addressing the matter of nuisance structures.

Respondents argued in response to City’s Directed Verdict Motions, (R. p. 237, ll. 17 – 19; p. 238, ll. 1 - 7) that the various letters of the City establish the City’s duty. A quick examination of those documents, R. p. 486, 524, 526 – 534, 536 - 547, reveals no source of duty owed by the City. Other than passing reference to letters of the City, Respondents offered no explanation of the source of duty relating to a municipal handling of a nuisance building. Curiously, the duty which is most apparent in this circumstance is the duty of the municipality, owed to its citizenry, to rid the community of nuisance or unsafe buildings.

For a plaintiff to successfully present a case against a governmental entity

for negligent condemnation, it is essential for the plaintiff to present evidence of a duty arising through statute. Respondents have failed to do so<sup>1</sup>.

The record in the case at bar is devoid of any evidence or identification of the City's duty toward Respondents in connection with abating the nuisance; there is no trial presentation of the identification or source of that duty upon which Respondents' lawsuit is based. Most significantly, City moved unsuccessfully for directed verdict at the conclusion of the plaintiffs' case, based in part upon Respondents' failure to establish the duty upon which the claim of breach was based. The failure of proof by Respondents at that point justified the grant of City's motion.

Respondents failed to meet their burden of proof as to the first element of negligence, duty. With no evidence as to duty in the record at the time of City's directed verdict motion, City's motions at that time, and subsequent should have been granted, and the case not submitted to the jury.

**II. In affirming the Trial Court's denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence of a grossly negligent breach of duty owed to Respondents.**

In affirming the trial court's denial of City's motions for directed verdict and for JNOV, this Court said:

[W]hen the facts are viewed in the light most favorable to the Chakrabartis, the record shows Orangeburg issued a second building permit to the Chakrabartis six

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At most there is only comment of counsel during argument on Directed Verdict, that the City is supposed to follow their own standards. R. p. 238, ll. 23 - 25.

months before demolishing their house, and Orangeburg produced no evidence of a date when substantial construction on the property had ceased for any significant period, much less the required two years. Further, evidence was presented that the Chakrabartis' contractor was doing work on the house until Orangeburg demolished it. Therefore, evidence was presented that Orangeburg did not follow the proper procedure in demolishing the Chakrabartis' house.

In reaching this conclusion, the Court of Appeals has apparently misapprehended Respondents' lack of evidence and concomitant failure of proof of either the standard of care or breach thereof, or has misunderstood the particular ground for demolition: "cessation of normal construction of any structure for a period of more than two years". IPMC, § 110.1.

The second element of a negligence cause of action which a plaintiff must allege and prove is a breach of duty by a negligent act or omission. Carolina Chloride, Inc. v. Richland County, 714 S.E.2d at 873. "There can be no inference of negligence from the mere fact of injury, and that the burden is on the plaintiff to produce some reasonable evidence tending to show some breach of duty owed to him." Covington v. Atlantic Coast Line R.R. Co., 158 S.C. 194, 155 S.E. 438, 442 (1930).

At that point in trial when Respondents concluded their case in chief and when City made its first motion for directed verdict, Respondents had presented absolutely no evidence of the City's duty to Respondents, nor any breach of such duty, nor the relevant standard of care to be observed by City. The record, as set forth hereinabove, is devoid of any such evidence. At that point, with no evidence of standard of care and consequently no evidence of any breach of that standard, City was entitled to a directed verdict. City's initial directed verdict motion appropriately pointed out the failure of Respondents' proofs, and the

motion ought to have been granted at that time.

Assuming that the International Property Maintenance Code provides the standard of care to be observed by the City for condemnation and demolition activities as to unsafe buildings, Respondents failed to present evidence of the City's deviation from the provisions of that code. Conspicuously, no witness testified that City did not properly follow the IPMC. Again, in their case in chief, Respondents failed to address the IPMC as providing the applicable standard of care. Only during City's case was there evidence of the demolition provisions of the IPMC.

The ground for demolition announced by City in its letter to Respondents on June 13, 2005, was that "it has been over two years that you have been working on this property, and it is still not completed, no more time can be allowed." R. p. 543. The IPMC language refers to "cessation of normal construction of any structure for a period of more than two years". IPMC, § 110.1. It was on this ground that City made the decision to demolish the structure.

In affirming the trial court's denial of City's motions, this Court has referred to testimony of several witnesses which revealed various ongoing construction activities inside of two years before demolition, including that of contractor Johnnie Coulter, being hired in December 2004, performing work on the roof and ceilings, studded walls, place insulation, electrical work, and installed sheetrock, and that he was working on the house until Orangeburg bulldozed it.

That there was some activity at the location within the two years prior to demolition, does not signal the inapplicability of the 2 year ground for demolition. The requirement is cessation of “normal construction” for over two years – not cessation of all, or any, construction activity.

Respondent has taken the position, accepted by the trial court and by this Court, that there needed to be stoppage of work altogether, which Respondents attempt to equate with cessation of normal construction. Intermittent surges of work at random times within the two-plus years does not equate to normal construction activity. There is no evidence to contradict that there was, really, never normal construction.

The only testimony directly on-point on this issue is that of Jim Meggs, Dan Cherry, Durwood Bowden and Gene Nelson, set forth in Appellant’s Reply Brief at pages 2 – 7. Their testimony discusses the utter lack of progress on the structure during the life of the project. Meggs, in particular, testified that “It doesn’t, just given the chronology here **it doesn’t seem that there was ever normal construction.**” R. p. 358 (Emphasis added).

Durwood Bowden testified, “And let me, on the last question, one of the things that’s important is whether activity continues on the project”. R. p. 284, ll. 1 – 3.

Dan Cherry, serving as Code Enforcement Officer during the summer of 2004, testified about his observations when he visited the house **more than 15 months after issuance of the first permit**: “Went and looked at the structural part of the house, and when we were there you could see that the fire had went

through the house and the integrity of the frame had been breached so that the house was going to have to be reconstructed or repaired”. R. p. 251, ll. 13 – 17.

In negligence actions it is plaintiff’s burden to establish the defendant’s negligence through evidence of breach of the standard of care. When considering a directed verdict motion, the Court is not concerned with the weight of evidence nor with countervailing evidence adduced by the moving party, but solely with existence of evidence, showing a breach of the standard of care. “The court should be concerned only with the existence or nonexistence of evidence”.

Hamilton v. Charleston County Sheriff’s Dept., 399 S.C. 252, 731 S.E. 2d 727 (Ct. App. 2012). In this case, Respondents have simply produced no evidence of any such breach.

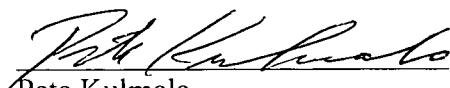
The burden is not on the Defendant to establish the standard, and to present evidence that there was no breach. In this matter, it appears that plaintiff’s burden has been overlooked, and the burden shifted to defendant to establish that there was no breach. Respondents failed to demonstrate normal construction for any period within the 26 months following issuance of the first permit. On the basis of more than 2 years without normal construction, the structure was demolished. Moreover, Respondents failed to present evidence that the City had not exercised slight care, as is required under the gross negligence standard.

## CONCLUSION

Respondents failed in their burden of establishing both the existence of a duty owed to them by the City, in connection with decisions of condemnation and demolition of unsafe structures and a breach of that duty. City appropriately raised these evidentiary deficiencies in motions for directed verdict at the conclusion of Respondents' case in chief, and again at the close of all the evidence. In denying those motions, and City's post trial motion, City asserts that the trial court erred. The absence of the requisite evidence on both issues is clear. Additionally, with respect to Respondents' lack of proof of breach, this Court has apparently accepted Respondents' misdirected equating "cessation of normal construction for more than two years" with a requirement that there be no work whatsoever for a period of two years. Respondents simply failed to present evidence of a grossly negligent breach of an applicable standard of care. For these reasons, Appellant respectfully requests this Court reconsider its decision in the matter of May 1, 2013.

Respectfully,

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May 16, 2013  
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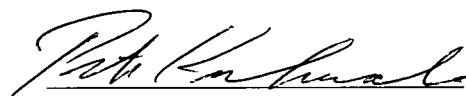
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PROOF OF SERVICE

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I certify that I have served the Appellant's Petition for Rehearing on Respondent's Counsel, C. Bradley Hutto, by depositing a copy of it in the United States Mail, Postage prepaid, on May 16, 2013, addressed as follows:

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