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Nov 22 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS
THE HONORABLE MICHAEL G. NETTLES
CIRCUIT COURT JUDGE

Appellate Case No. 2023-001808
Civil action No. 2017-CP-21-01168

Opinion No. 6028 (S.C. Ct. App. filed September 27, 2023)

James Marlowe and Lori Marlowe,

Respondents,

v.

South Carolina Department of Transportation,

Petitioner.

RESPONDENTS' BRIEF

J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
HOPKINS LAW FIRM, LLC
Post Office Box 1885
Pawleys Island, South Carolina 29585
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile

Attorney for Respondents

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COUNTERSTATEMENT OF ISSUES PRESENTED

I. Did the Court of Appeals correctly apply this Court's precedent in holding the evidence in the Record, viewed in the light most favorable to Respondents, created a genuine issue of material fact as to whether Petitioner's conduct amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation?

II. Did the Court of Appeals correctly interpret the Stormwater Act in holding it did not provide immunity to Petitioner in this case?

STATEMENT OF THE CASE

Respondents own a single-family home in Pamplico, South Carolina, in Florence County (the "Property"). In August 2013, Petitioner conducted a hydraulic design study in preparation for a project to widen sections of U.S. Highway 378 (the "Project"). As a part of the study, Petitioner examined various conditions related to the roadway abutting the Property and concluded that existing bridge box culverts in the area would continue to protect against a 100-year flood event.[1] SCDOT also planned to replace the existing culvert near the Property with a larger one to alleviate drainage issues associated with the Project. Construction had begun in 2015 and by 2016, the new elevated roadway had been laid adjacent to the existing highway.

In October of 2015, South Carolina experienced historic rainfall levels, with one-day rainfall levels at the two (2) closest NOAA weather stations to the Property experiencing greater than 10-year but less than 25-year rainfall levels. After that, Respondents repaired their home with assistance from the Federal Emergency Management Agency and personal loans.

Then, in October of 2016, Hurricane Matthew passed through the region, again

[1] To meet Petitioner's hydraulic requirements, a culvert must be able to divert water away from one side of a highway to another up to a "100-year flood."

bringing historic levels of rainfall to the Property, with 1-day rainfall levels corresponding to greater than 10-year but less than 25-year levels. The Property was again destroyed, with water levels between 15 and 16 inches, and since then, Respondents have been unable to live at their home.

In 2016, Petitioner received a customer service complaint from Respondents asking for an explanation of some of the design elements of the Project. Brian Dix, the program manager of the project, called Respondents to explain the Project's construction status. Specifically, Dix explained that a new culvert was being installed that should assist with drainage, but that the culvert could not be fully implemented until a nearby bridge over the Lynches River was completed. Dix stated that the bridge's construction needed to be prioritized due to traffic difficulties.

In January 2017, the bridge was completed, the old roadway was removed, and the new culvert was fully constructed to support the new elevated highway. Later that year, Petitioner began to receive complaints from property owners affected by the 2015 and 2016 weather events. In response to these complaints, Petitioner conducted a more detailed survey of the area that included the Property. Based on more accurate data than was available in their original survey conducted in 2013, Petitioner found that before the construction began, the existing culvert would be at capacity when impacted by “a flood associated with the 25-year return interval and potentially the ten-year interval.” Floods of greater magnitude would result in a phenomenon known as “overtopping.” Overtopping occurs where an overburdened drainage system fails to divert water away from a roadway and as a result, the roadway becomes flooded with the excess water.

On May 3, 2017, Respondents brought this action against Petitioner, Southern

Asphalt, Inc., and United Infrastructure Group, Inc., alleging causes of action for inverse condemnation, conversion, due process, and negligence. Two (2) consent orders were later filed dismissing all claims against Southern Asphalt, Inc., and United Infrastructure Group, Inc.

On February 10, 2020, a hearing was held in response to Petitioner's motion for summary judgment. On March 25, 2020, the circuit court issued an order granting the motion. This appeal followed. The South Carolina Court of Appeals affirmed the Orders in part, and reversed and remanded the Orders in part, agreeing that Respondents had met their burden to survive summary judgment and that the Stormwater Act did not apply to this case. *Marlowe v. South Carolina Department of Transportation*, Opinion No. 6028 (S.C. Ct. App. filed Sept. 27, 2023). Petitioner filed its Petition for Rehearing, which the Court of Appeals denied. Petitioner then filed its Petition for a Writ of Certiorari on November 12, 2023, which this Court granted on September 9, 2024.

In their brief, Respondents address two (2) issues that Petitioner appeals to this Court for consideration and on which Respondents respectfully submit this Court should affirm the Court of Appeals.

First, regarding whether Respondents' expert witness's testimony on causation was speculative, the Court of Appeals found it was Petitioner's own assessment – which Respondents' expert witness relied on in forming his opinion – that suggested construction of the elevated highway caused the flooding on the Property. Petitioner suggests the correct standard for causation evidence is "most probably,"

Second, the Court of Appeals determined that the Stormwater Act neither imposes nor relieves liability for actions or failures to act, and, thus, did not provide immunity to

Petitioner in this case.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham*, 349 S.C. at 361-62, 563 S.E.2d at 333. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 362, 563 S.E.2d at 333. "When the circuit court grants summary judgment on a question of law, [the appellate court] review[s] the ruling *de novo*." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634–35, 776 S.E.2d 434, 437 (Ct. App. 2015).

ARGUMENT

I. The Court of Appeals correctly held the evidence in the Record, viewed in the light most favorable to Respondents, created a genuine issue of material fact as to whether Petitioner's conduct amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation.

"An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain." *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "To establish an

inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence.'" *Id.* (quoting *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002); *Gray v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1992), *overruled on other grounds* by *Hardin v. S.C. Dep't of Transp*., 371 S.C. 598, 641 S.E.2d 437 (2007)).

"Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006); *Cobb v. S.C. Dep't of Transp*., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request."). Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law. *Ray v. City of Rock* Hill, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021). "If a genuine issue of material fact exists as to whether the government entity committed an affirmative, positive, aggressive act causing damage to private property, summary judgment is not proper." *Id.* (citing Rule 56(c), SCRCP).

Here, it was Petitioner's burden to show there was no genuine issue of material fact. In this case, Petitioner argues the only evidence the Court of Appeals relied on in finding a genuine issue of material fact was Respondents' expert witness testimony, and, as such, the Court of Appeals erred because Respondents' expert witness was required to satisfy the "most probably" rule set forth in *Baughman v. Am. Tel. & Tel. Co.* 306 S.C.

101, 410 S.E.2d 537 (1991). However, Petitioner's argument ignores a plain reading of the Court of Appeals opinion.

The Court of Appeals noted Petitioner's ***own*** assessment that established the existing culvert would be at capacity during a storm with a 25-year or grater return interval and "***all excess floodwater would soon rise to the elevation of the existing highway***. ***At this point, the excess water would overtop the existing highway, action as an additional outlet for the water to escape the Property.***" (emphasis added). The Court of Appeals specifically cited the fact that the Project was built "***adjacent to, and almost two feet above, the existing roadway***[,]" (emphasis added). Therefore, because both rain events produced floodwater that exceeded the capacity of the existing culvert, the Court of Appeals correctly held that summary judgment was inappropriate for that reason alone by highlighting Respondents' argument that the new elevated roadway acted as a barrier to excess floodwater that would have previously been able to exit Respondents' Property via overtopping during a storm with a 25-year or great return interval.

This Court has previously held that viewing the evidence in the "light most favorable to" the nonmoving party, which included "uncontroverted evidence in the record" that the South Carolina Department of Highways and Public Transportation's "own maintenance engineer made the statement that the pipe in the culvert was too small[]" was sufficient to submit an inverse condemnation claim to the jury. *See Cutchin v. S.C. Dept. Highways and Public Transp.*, 301 S.C. 35, 38, 389 S.E.2d 646 (1989); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (citing *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) (reversing an award of summary judgment and stating "the evidence is susceptible to more than one

reasonable inference, and therefore should be submitted to the jury"); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219 n.4, 578 S.E.2d 329, 334 n.4 (2003) ("The standard for summary judgment 'mirrors the standard for a directed verdict under Rule 50(a)' [SCRCP]."[2] (quoting *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545)).

Finally, Respondents' expert witness's testimony certainly is evidence of *some* damage to the Property "attributable" to Petitioner's construction of the Project. In *Ray*, this Court held that a supplemental report from an expert witness opining that "increased water flow" through a water pipe being reconnected "would create a ***risk*** of increased structural damage" to the plaintiff's home. 434 S.C. at 49, 862 S.E.2d at 264-65. The *Ray* Court held that the expert report created a genuine issue of material fact as to whether the governmental entity's reconnection of its pipes caused damage to the plaintiff's property ***distinct*** from the damage caused by the flow of water through the pipe up until that time. *Id.*, 862 S.E.2d at 265. Thus, summary judgment is unwarranted so long as expert testimony establishes that *some* damage to Respondents' Property was caused by Petitioner's affirmative, positive, aggressive act.

In fact, the *Ray* Court remanded the case back to the circuit court for a determination *only* as to whether the governmental entity's reconnection of its pipes constituted an affirmative, positive, aggressive act "causing damage to the [p]roperty ***over and above any damage that had occurred before the three pipes were severed and reconnected.***" *Id.* (emphasis added). Mr. Gregorie's opinion was *exactly* that – "I can say to a reasonable degree of engineering certainty that the construction project ***contributed***

[2] "The standard for directed verdict under Rule 50(a) requires the evidence support a 'reasonable inference' in favor of the non-moving party." *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998).

to the flooding." (emphasis added). Additionally, contrary to the case here, in *Ray*, there was no evidence that any damage occurring to the plaintiff's property during the three years before the action was commenced was any greater than the damage that occurred before that time. 434 S.C. 49, 862 S.E.2d 264. In this case, the record shows multiple property owners – including Respondents – complained to Petitioner during construction of the Project about increased flooding, which caused Petitioner to conduct a more detailed survey that revealed the "overtopping" phenomenon.

For these reasons, Mr. Gregorie's expert testimony, paired with Petitioner's own assessment, created a genuine issue of material fact as to whether Petitioner's affirmative, positive, aggressive act resulted in damage to Respondents' Property. Accordingly, the Court should affirm the Court of Appeals opinion.

II. The Court of Appeals correctly interpreted the Stormwater Act in holding it did not provide Petitioner immunity in this case.

This Court should affirm the Court of Appeals holding that the trial court erred in using the Stormwater Management and Sediment Reduction Act ("Stormwater Act")[3] as a basis for granting summary judgment. Contrary to Petitioner's position, the Court of Appeals correctly determined that Section 48-14-160(1) is not a catch-all provision that provides unchecked immunity to governmental entities once a Stormwater Act permit has been obtained.

In fact, as the Court of Appeals has astutely noted, Petitioner again failed to provide the full picture to this Court. Petitioner – without citing any case from any jurisdiction – argues that the Stormwater Act provides immunity in this case (and

[3] S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2022).

presumably any that involves a governmental entity engaging in any type of "land disturbing activities") for Petitioner's construction of the Project near Respondents' Property. The full reading of the provision Petitioner relies on explicitly states:

> [n]othing contained in this chapter and no action or failure to act under this chapter may be construed:
>
> > (2) to relieve the person engaged in the land disturbing activity of the duties, obligations, responsibilities, or liabilities arising from or incident to the operations associated with the land disturbing activity.

S.C. Code Ann. § 48-14-160(2) (Supp. 2022). Thus, a correct interpretation of the Stormwater Act "reveals the opposite" of Petitioner's position – the Stormwater Act neither imposes nor relieves liability for actions or failures to act. Therefore, the Court of Appeals correctly held the Stormwater Act was inapplicable in this case, and because the circuit court relied upon the Stormwater Act in granting summary judgment, it was in error as a matter of law. *See* Rule 56(c) ("[Summary] judgment sought shall be rendered forthwith if . . . the moving party is entitled to a judgment as a matter of law."). Accordingly, this Court should affirm the Court of Appeals opinion.

CONCLUSION

This Court should affirm the Court of Appeals opinion. The Court of Appeals correctly determined that the evidence in the record, viewed in the light most favorable to Respondents, created a genuine issue of material fact as to whether Petitioner's conduct amounted to an affirmative, positive, aggressive act for the purposes of inverse condemnation. Additionally, the Court of Appeals correctly held the circuit court's reliance upon the Stormwater Act in granting summary judgment was in error as a matter of law.

Respectfully submitted,

HOPKINS LAW FIRM, L.L.C.

s/ J. Clay Hopkins
J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
HOPKINS LAW FIRM, LLC
Post Office Box 1885
Pawleys Island, South Carolina 29585
(843) 314-4202 – Telephone
(843) 314-9365 - Facsimile

Attorney for Respondents

November 22, 2024

Pawleys Island, South Carolina