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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,

versus

South Carolina Department of Transportation,

PETITIONER.

REPLY BRIEF OF PETITIONER

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ARGUMENT

- I. In reversing and remanding the Trial Court’s grant of summary judgment to the SCDOT on the Marlowes’ inverse condemnation claim, the Court of Appeals erred in holding that an affirmative, positive, aggressive act which caused the flooding of the Marlowes’ property could be shown by expert opinion testimony which could only speculate as to causation.**

In response to the South Carolina Department of Transportation’s Brief of Petitioner, the Marlowes argue that the Court of Appeals’ Opinion finding a genuine issue of material fact on their inverse condemnation claim was not based only upon their expert’s opinion as to the causation of their flooding, but upon the SCDOT’s own assessment. In making this argument, the Marlowes both distort the record and erroneously rely upon acts which the Court of Appeals held cannot serve as the basis for an inverse condemnation claim.

As the Court of Appeals observed in its Opinion, to prevail in an inverse condemnation claim, the plaintiff must prove an affirmative, aggressive, and positive act by the governmental entity that cause the alleged damage to the plaintiff’s property. [Appx. 504 (quoting Ray v. City of Rock Hill, 434 S.C. 39, 47, 862 S.E.2d 259, 263 (2021)).] The Court of Appeals further found the only potential act by the SCDOT which could constitute an affirmative, aggressive, and positive act was the SCDOT’s construction of the elevated highway and not any alleged failure to install an adequately size culvert:

The focus of the Marlowes’ complaint is SCDOT’s alleged failure to install an adequate culvert and its construction of an elevated highway. The failure to install an adequate culvert is, by its very nature, not an affirmative act.

[Appx. 504.]

The SCDOT's assessment, which the Marlowes state creates a genuine issue of material fact on their inverse condemnation claim, only evaluated the adequacy of the existing culvert and did not investigate the effect of the elevated highway upon the flooding to the Marlowes' property. The January 2017 assessment, conducted by the SCDOT in response to complaints by property owners regarding flooding, examined the performance of the existing culvert and determined the existing culvert was undersized for the widened U.S. 378 highway and would require upsizing to meet the new hydraulic requirements. The study showed the existing culvert would overtop for discharges associated with a 25-year return interval and greater and potentially a 10-year interval. The assessment also concluded that the larger culvert to be installed by the SCDOT would meet the SCDOT's requirements and withstand floods up to a 100-year event. [Appx. 79.]

This January 2017 assessment did not evaluate the impact of the elevated highway and made no determination as to whether the elevated highway was the cause of the flooding to the Marlowes' property. As such, this assessment does not create a genuine issue of fact as to whether the construction of the elevated highway caused the Marlowes' flooding damages for purposes of their inverse condemnation claim. [Appx. 79; 151, ll. 14-18.] The assessment by the SCDOT studied potential flooding caused by the existing culvert. Whether the existing culvert was adequate or inadequate for the 4-day storm events in October 2015 and October 2016 is no longer at issue in this case because the Court of Appeals determined that any failure of the SCDOT to install an adequate culvert was not an affirmative act that could serve as the basis of an inverse condemnation claim. [Appx. 504.]

Furthermore, any argument by the Marlowes that the SCDOT failed to install an adequate culvert cannot, as matter of law, establish an inverse condemnation claim because the Marlowes did not appeal this holding of the Court of Appeals. It is now the law of the case. Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (unappealed portion of Court of Appeals' opinion was law of the case); S.C. Dep't of Soc. Servs. v. M.R.C.L., 393 S.C. 387, 393-94, 712 S.E.2d 452, 456 (2011) (unchallenged rulings of the Court of Appeals are law of the case).

Additionally, and contrary to the Marlowes' claim in their brief, the Court of Appeals did not find that the SCDOT's January 2017 assessment was evidence that the elevated road caused the Marlowes' flooding damages. In fact, the Court of Appeals held that while the storm events of October 2015 and October 2016 produced floodwater that exceeded the capacity of the existing culvert at the time of the weather events, "it [was] less clear if, and to what extent, the flooding on the property could have been averted had the new, elevated roadway not been built." [Appx. 505.] The Court of Appeals relied only upon the Marlowes' expert's causation opinion in holding that a genuine dispute of material fact existed as to whether the elevated highway caused the flooding of the Marlowes' property. [Appx. 505-06.]

The only question at issue before this Court is whether the Marlowes can maintain an inverse condemnation claim based upon the construction of the elevated highway when their only evidence of causation - the opinion of their expert - fails to meet the legal requirements for competency as established by this Court. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). As explained in the Brief of Petitioner, the Marlowes' expert could not opine with any certainty that had the road construction project not existed, the flooding would not have occurred. Furthermore, the Marlowes' expert agreed the flooding might still have

occurred during the 4-day rain events of October 2015 and October 2016 even with the existing unelevated highway. [Appx. 4-5.] The Marlowes' expert could only speculate that it might be "possible" for runoff to be temporarily impounded on the Marlowes' property for significant or historic rain events due to the elevated road. [Appx. 106.] None of these opinions by the Marlowes' expert meet the required standard of probability as required by this Court in Baughman.

The Marlowes argue their expert's opinion on causation is sufficient because he opined that the construction project contributed to the flooding of the Marlowes' property; however, their expert did not quantify to what extent the construction may have contributed to the flooding. Given that their expert could not state that the flooding would have been prevented if the construction project had never existed, any opinion by their expert as to the causation or degree of the Marlowes' flooding is based upon pure speculation. See Gastineau v. Murphy, 331 S.C. 565, 570 n.2, 503 S.E.2d 712, 714 n.2 (1998); Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

The Marlowes rely upon this Court's opinion in Ray v. City of Rock Hill, 434 S.C. 39, 862 S.E.2d 259 (2021) to argue that their expert's testimony is some evidence of causation sufficient to overcome the SCDOT's motion for summary judgment. The Ray decision, however, has no bearing upon the reliability and sufficiency of the opinion of the Marlowes' expert. In that case, the plaintiff had purchased her home in 1985. The home was built in 1920, and before the house was built, a 24-inch underground pipe was installed on the property over which the home would later be built. Id. at 42, 862 S.E.2d at 261.

The city installed three stormwater pipes under various streets in the plaintiff's neighborhood. Stormwater would run through these pipes to a catch basin which would then be channeled through the pipe running underneath the plaintiff's home. The plaintiff's home had a history of sinking and settling for many years, and in 2008, she learned of the pipe running beneath her home. Id. at 42-43, 862 S.E.2d at 261.

The plaintiff brought suit against the city in 2012 for inverse condemnation. Around the time the plaintiff filed her lawsuit, the city, while performing maintenance work, disconnected its three stormwater pipes from the catch basin which stopped the flow of water underneath the plaintiff's home. Despite the plaintiff's demand to the city that it not reconnect the pipes, the city did reconnect the pipes, thus resuming the flow of water underneath the plaintiff's home. Id. at 43-44, 862 S.E.2d at 261.

This Court found the city's reconnection of its stormwater pipes to the catch basin, which had the effect of directing water into the catch basin and through the pipe underneath the plaintiff's home, was sufficient evidence of an affirmative, positive, aggressive act that caused damages to the plaintiff's property. Id. at 48, 862 S.E.2d at 264. Significantly, in Ray, there was no issue with the reliability or sufficiency of any expert's opinion on causation as there is in this case.

Furthermore, while the Marlowes contend that Ray can support its apparent theory that there are distinct damages to their property from natural flooding and from the SCDOT's construction of the elevated highway, the opinion in Ray does no such thing. In Ray, this Court applied a three-year statute of limitations and barred damages that arose from the city's stormwater pipes which occurred more than three years before the plaintiff brought her lawsuit.

Id. at 48-49, 862 S.E.2d at 264. This Court held that the plaintiff could recover at trial, assuming she could carry her burden of proof, damages as a result of the city's reconnection of the stormwater pipes for which the statute of limitations had not expired. This Court thus found there were two separate and distinct time periods of damages to the plaintiff's home. This Court also found that the plaintiff overcame the city's motion for summary judgment with expert testimony that the city's reconnection of its pipes caused damage distinct from those damages barred by the statute of limitations. That expert testimony, unlike here, was not challenged for reliability and sufficiency. Id. at 49, 862 S.E.2d at 264-65.

In this case, for each flooding event, the Marlowes' expert did not apportion the Marlowes' flooding damages between natural flooding and flooding allegedly caused by the elevated highway and could not do so as he conceded it was possible the Marlowes' property would have flooded even without the existence of the elevated highway. [Appx. 5.] Unlike the Ray case where there was evidence of distinct damages, there is no legally sufficient evidence in this case creating a genuine issue of material fact as to damages caused from natural flooding distinct from damages caused by the elevated highway. For these reasons, the Ray decision does not support the Marlowes' inverse condemnation claim.

The Marlowes failed to present competent evidence showing that the SCDOT's construction of the elevated highway caused their flooding damages and rely solely upon speculation to support their inverse condemnation claim. The Court of Appeals therefore erred in remanding the Marlowes' inverse condemnation claim for further proceedings. Accordingly, this Court should reinstate the Trial Court's grant of summary judgment to the SCDOT on the inverse condemnation claim.

CONCLUSION

For the reasons set forth herein and in the Brief of Petitioner, the SCDOT respectfully requests this Court to reverse the Opinion of the Court of Appeals and reinstate the grant of summary judgment by the Trial Court on the inverse condemnation claim.

Respectfully submitted,

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