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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

The Honorable Courtney Clyburn Pope, Circuit Court Judge

Case No.: 2018CP0202797

Appellate Case No. 2024-000079

Elroy D. Fischer, Jr.m CD&F Interests, LLC, Howard Lumbar Company, and the Robert E. Pentecost Trust, Respondents,

vs.

South Carolina Department of Transportation, Appellant,

Respondent's Final Brief

RESPECTFULLY SUBMITTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES …………………………………………………………..…… 3

STATEMENT OF ISSUES ON APPEAL ……………………………………………….. 4

STATEMENT OF THE CASE ………………………………………………..…………… 5

STATEMENT OF THE FACTS …………………………………………………………. 6

ARGUMENTS

STANDARD OF REVIEW ……………………………………….………………….. 8

I. RESPONDENT DID NOT PROVIDE SUFFICIENT NOTICE TO COMPLY WITH DUE PROCESS …..….…………..……………………………. …..……. 8

CONCLUSION ……………………………………..…………………………..……... 13

<u>**TABLE OF AUTHORITIES**</u>

<u>**Cases**</u>

Lollis v. Dutton, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017) ..…………..………….. 8

Jordan v. Judy, 413 S.C. 341, 347-48, 776 S.E.2d 96, 100 (Ct. App. 2015) …………………… 8

S.C. Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984) ..…………... 8

Cutchin v. SCHPT, 301 S.C. 35; 389 S.E.2d 646(Ct. App. 1990) ………………………. 9, 11, 12

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL JUDGE SPECIFICALLY STATED BOTH HER LEGAL CONCLUSIONS AND FINDINGS OF FACT IN HER FINAL ORDER WHICH IS SUPPORTED BY THE RECORD IN THIS CASE ………………………………………………………..………. 8

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case as summarized in Appellant’s brief.

STATEMENT OF THE FACTS

Respondents are the owners of a tract of land in Aiken South Carolina that was initially purchased for residential development. **R.368-369.** Respondents began to experience excessive water runoff in 2010. **R.371.** Respondent William Franke met with SCDOT in 2010 to complain about the excessive water being directed at the property. Id. he also testified that the soil has steadily been washing away from the property since 2010, rendering the property "unsellable.". **R.371-372.** Respondents have consistently tried to sell the property for 15 years prior to trial with no success. **R.372** Respondent William Franke actually crawled into the pipes in Appellant's stormwater system and provided a makeshift map at trial. **R.377, R.504.** Respondents also provided pictures of the extensive erosion on their property and described that erosion as a "mini Grand Canyon." **R.382; R.505-512.** In addition to photographs, respondents introduced video evidence of the excessive water being directed at their property. **R.USB.**

Respondents' expert engineer, David Simoneau, testified that the velocity of the of the water coming from Appellant's stormwater drainage system was destructive. **R.133-141**. He further testified that the problem was caused by a defective design implemented by Appellant. **R.144.** "This water is definitely the water that is coming through the DOT piping system … being directed to the plaintiff's [sic] property." **R.147**. Mr. Simoneau testified that he did not believe the volume of water was necessarily excessive.

Appellants made a motion for directed verdict at which time extensive argument was presented to the Court. In his opening statement to the Court, Counsel for Appellant stated that he was "open to the notion" that there were issues of fact with regards to whether a taking had occurred. **R.513**. The focus of Appellant's motion for a directed verdict was the statute of limitations and the prior release executed by some previous owners of the property. **R.513-519**.

Appellant presented four witnesses. The first two witnesses were focused on the legal defenses presented by Appellant regarding the prior condemnation action for 25 acres obtained from Respondents before any construction occurred with regard to I520. Appellant presented an engineer from SCDOT, Bobby Usry, and its expert witness, Donald Auld.

ARGUMENTS

Standard of Review

In a bench trial, the trial judge acts as the finder of fact. *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). "[T]he judge, as the finder of fact, may believe all, some, or none of the testimony, even when [the testimony] is not contradicted." *Id.* (internal citation omitted). A trial judge will be accorded great deference where matters of credibility are involved. *Id.* (internal citations omitted). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to [circuit] court findings where matters of credibility are involved." *S.C. Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984); Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. *Jordan v. Judy*, 413 S.C. 341, 347-48, 776 S.E.2d 96, 100 (Ct. App. 2015).

THE TRIAL JUDGE SPECIFICALLY STATED BOTH HER LEGAL CONCLUSIONS AND FINDINGS OF FACT IN HER FINAL ORDER WHICH IS SUPPORTED BY THE RECORD IN THIS CASE

Appellant claims the trial court did not provide sufficient findings of fact or law to allow an effective appeal. Respondents disagree. The Order of the lower court unambiguously stated:

Legal Issue

> The Court finds that Plaintiffs did not release the claims in this matter in the previous condemnation procedure. The Release in question was executed before any construction or land disturbance began with regards to I-520. More importantly, the Executed Release was in relation to the sale of land from Plaintiff to Defendant. The matter before the Court deals the remainder of Plaintiffs' land after the sale to Defendant. The language in the Release pertaining to future and unknown claims is confined to the property that changed hands, not the property unaffected by the sale. It is axiomatic that Plaintiff could not anticipate Defendant would begin directing excessive runoff onto

> its remaining property once I-520 was complete. It is hard to imagine that Plaintiffs agreed to allow Defendant to take the rest of its land without compensation in signing the release for only a portion of that land in the original condemnation action. This Court finds that Plaintiff did not waive or release its future claims based on bad acts that had yet to occur. Therefore, Defendant's motion for directed verdict is denied.
>
> ***Factual Determination***
>
> After reviewing the testimony and evidence submitted at trial, this Court finds that Defendant did permanently and inversely condemned the remainder of Plaintiffs' property. The Court agrees with David Simoneau, the expert engineer for Plaintiff, that the design of the outfall adjacent to Plaintiffs' property is defective and transmits water onto Plaintiffs' property with excessive speed and volume. The pictures and video evidence demonstrate visible damage to Plaintiffs' property.

Legal Conclusions

Appellant focused on two legal issues to move the lower court to dismiss Respondent's case at directed verdict. The first was the statute of limitations. However, this case is controlled by *Cutchin v. SCHPT,* 301 S.C. 35; 389 S.E.2d 646(Ct. App. 1990). *Cutchin* dealt with a defectively designed culvert pipe that caused flooding on the plaintiff's property. The expert testimony presented by the plaintiff in that case indicated that the flooding could be stopped by replacing the defectively designed pipe. That pipe was designed and installed nearly ***40 years*** before the plaintiff filed suit in *Cutchin*. Defendant moved to dismiss the case on the grounds that it was barred by the statute of limitations and was denied. On appeal, the SC Court of Appeals held that since the problems caused by the defective design of the culvert were abatable, each and every flooding event was a new cause of action that restarted the running of the statute of limitations. Every witness presented by Respondents in the trial of this case testified that flooding occurred in the three years prior to the lawsuit being filed. Moreover, Respondents' expert testified that the implementation of control measures would stop the issues damaging

Respondents' property. Therefore, pursuant to *Cutchin*, the lower court properly denied the motion for directed verdict.

The lower court provided sufficient explanation with regards to denying Appellant's argument that Respondents were barred from bringing suit due to a Release signed in a previous condemnation action. While the lower court did not provide citations to any previous caselaw, the issue before the lower court was based on the fundamental aspects of contract. Appellant argued at trial, and now to this Court, that Respondents should be barred from bringing any action for the bad acts of Appellant after the Release was signed. There is no such language indicating this within the Release itself. More importantly, there is only one signed Release with language that can possibly be interpreted as relating to future claims. The release signed by Respondent Howard Lumber Company and Robert Leaver only releases claims related to the underlying condemnation action and can never be interpreted to relate to future claims. **R.517-519**.

The language relied upon by Appellants states that Leroy Fischer released Appellant "from any and all claims, demands, damages, actions, causes of action, and suits at law or in equity of whatever kind and nature arisen, arising, or to arise from or because of any matter relating to the construction of the Palmetto Parkway, Bobby Jones Expressway, I-520 in Aiken County, South Carolina." This language does not reference any other holdings or property of Leroy Fischer other than the property being sold to Appellant. This language does not say Leroy Fischer is releasing claims related to "future acts of negligence" or "future violations of your constitutional rights" or "future governmental taking of your property." This language cannot be interpreted as clear and unambiguous, therefore it is left to the lower court to decide what the meeting of the minds was in this contract. As the lower court explained in both of her Orders,

there is no evidence that any Respondent believed they were giving Appellant permission to take their property after I520 was built. In fact, the only evidence regarding the intent of the parties was offered by Respondents, and it all supports the ruling of the lower court. **R.448-449; 396.** The lower court found Appellant's argument without merit as the result proposed by Appellant was irrational. Why would the condemned only receive money for 25 of 165 acres when they knew they were waiving any future takings claims for the remaining 140 acres? Such a result is absurd and was rejected by the lower court.

Appellant made another argument that conflicts directly with *Cutchin*. In trying to extrapolate the Badger release into the permanent bar of any claims related to the Palmetto Parkway, Appellant argued that since Respondent was aware of the erosion occurring at the time the release was signed in 2007, any claim related to erosion is barred under the plain language of Badger release. However, this directly contradicts *Cutchin*. *Cutchin* dictates that a separate claim arises with each event of flooding. More importantly, the positive, aggressive act Respondents sued for in this action was the design and construction of I520. Neither the design nor construction of I520 had begun when the releases were signed.

Factual Findings

The trial before the lower court was typical for construction and water intrusion cases. The issue of liability was presented by competing expert testimony. The lower court was very succinct in its ruling with regard to liability: she believed Respondent's expert over Appellant's expert. She stated such in her Order. The only thing for this Court to do under the appropriate standard of review is to determine whether there was any evidence to support a finding of liability based on the testimony of David Simoneau. He testified that the velocity of the of the water coming from Appellant's stormwater drainage system was destructive. **R.143-146**. He

further testified that the problem was caused by a defective design implemented by Appellant. **R.144**. Specifically, he cited the total lack of controls in the design of the system as the primary cause for the damage to Respondent's real property. **R.139 – 143**. "This water is definitely the water that is coming through the DOT piping system … being directed to the plaintiff's [sic] property." **R.147**.

Thus, the testimony of David Simoneau alone is sufficient to support the factual findings of the lower court with regard to the excessive speed of the water directed at Respondent's property. He found a positive aggressive act in the design and construction of the stormwater system from I-20 and I-520. **R.144**. He further found that design was faulty as it did not implement any controls for the water being released on Respondent's property. The facts of this case are nearly identical to the factual background in *Cutchin v. SCHPT,* 301 S.C. 35; 389 S.E.2d 646(Ct. App. 1990). As stated above, the defective design cited by the engineer in that case was done nearly 40 years prior to the trial.

Thus, the lower court's reference to the findings of Respondent's expert witness, is all that is needed to support her finding that a taking occurred in the case at the bar and no other factual findings are necessary to explain the lower court's ruling with regard to a taking. But the remaining evidence supports the lower court's decision as well. Respondent Franke testified that prior to the construction of I520, there was a single 24" pipe directed at the land. After the construction of I520, there was an additional 52" pipe directed at the land. **R.374**. This is clearly a positive, aggressive act by Appellant to direct more water towards the property of Respondents. The Appellant's own engineer agreed that the water intrusion was abatable. **R.293** Finally, as cited by the lower court, the pictures and videos presented as evidence visually demonstrated the erosion occurring on the land of Respondents, which is a taking in and of itself.

There is voluminous evidence to support the lower court's decision and therefore, the lower court must be affirmed.

CONCLUSION

Appellants argue the lower court failed to address the factual issues in her final order, preventing them from identifying issues to address on appeal. However, the lower court was very clear that it believed Respondent's expert witness, as opposed to the expert presented by Appellant. Within the testimony of that expert is sufficient proof to support a taking under South Carolina law. The Releases relied upon by Appellant offer differing language but no clear and unambiguous waiver of future bad acts by Appellant. There is voluminous evidence to support the lower court's decision and therefore, the lower court must be affirmed.

RESPECTFULLY SUBMITTED

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