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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.

RETURN TO PETITION FOR REHEARING

On March 26, 2025, the Court issued its Opinion holding that the Trial Court properly granted summary judgment to the South Carolina Department of Transportation on the Marlowes' inverse condemnation claim because the Marlowes did not present sufficient evidence of causation to defeat the SCDOT's motion for summary judgment. The Marlowes filed a Petition for Rehearing of the Court's Opinion on April 10, 2025. The Court requested the SCDOT to submit a response to the Petition for Rehearing.

In their Petition for Rehearing, the Marlowes argue the Court's decision is flawed because it requires the Marlowes to establish the amount of damage purportedly caused by the SCDOT's construction of the elevated highway to survive summary judgment and that this holding conflicts with the Court's previous decision in Ray v. City of Rock Hill, 434 S.C. 39, 862 S.E.2d 259 (2021). To the contrary, the Court's decision reaffirms well-established law that causation may not rest upon speculation. Furthermore, the Court's holding is not inconsistent with the decision in Ray and does not require a different standard regarding the necessary evidence regarding causation to defeat a motion for summary judgment.

As the Court recognized, the opinion of the Marlowes' expert, Jason Gregorie of Applied Building Sciences, failed to meet the legal requirements for competency. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). Mr. Gregorie could not opine with any certainty that had the road construction project not existed, the flooding would not have occurred. Furthermore, Mr. Gregorie 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.] Mr. Gregorie 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 Mr. Gregorie meet the required standard of probability as required by Baughman. Mr. Gregorie could not "definitely" state that if the road construction project had not existed, the flooding would have been prevented. He further agreed that, with the old unelevated highway and the two rain events of October 2015 and October 2016, the Marlowes' home might have still flooded. [Appx. 4-5.] While he opined that the construction

project affected "the flood depth of the property," he offered no methodology to apportion how much of the flood damage might have occurred without the construction project and how much might have occurred with the construction project.

Instead, this determination was left up to sheer speculation. "To warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Gastineau v. Murphy, 331 S.C. 565, 570 n.2, 503 S.E.2d 712, 714 n.2 (1998) (internal citation omitted). "The facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates; the existence of a fact cannot rest in speculation, surmise or conjecture." Id. Correspondingly, liability against another party also cannot be founded upon idle supposition. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

The opinion of Mr. Gregorie does not satisfy these basic legal principles. Therefore, his testimony is not sufficient to create a genuine issue of material fact on the issue of causation for the Marlowes' inverse condemnation claim. "[R]ule 56(e), SCRCP, requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial." Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (internal citation omitted); *see also* Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001) (explaining that "a party opposing summary judgment [must] come forward with affidavits or other supporting documents demonstrating the existence of a genuine

issue for trial"). "A party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact." Hoard, 387 S.C. at 549, 694 S.E.2d at 6.

The Marlowes failed to come forward with specific facts showing the presence of a genuine issue of material fact on causation for an inverse condemnation claim. Mr. Gregorie's opinion on causation did not meet this requirement because his opinion provides no guiding standard upon which a factfinder can determine to what extent the construction project had upon the flooding to the Marlowes' home. Accordingly, the Court properly held that the causation issue could not survive summary judgment because there was no evidence that would allow the factfinder to determine, without speculating, how much of the flooding was caused by the construction of the new roadway.

In their Petition for Rehearing, the Marlowes contend that under the Court's precedent in Ray, they presented sufficient evidence on causation to survive the SCDOT's motion for summary judgment on their inverse condemnation claim and that the Court, in holding that the Marlowes had not presented evidence rising above speculation, overlooked or misapprehended its precedent in Ray.

Ray involved unique, distinguishable facts which are critical to understand the holding of Ray. In that case, the plaintiff 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. Ray, 434 S.C. 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, the plaintiff 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.

The 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 maintain that Ray supports their claim 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, the 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. The Court held that, assuming she could carry her burden of proof, the plaintiff could recover at trial damages as a result of the city's reconnection of the stormwater pipes for which the statute of limitations had not expired. The Court thus found there were *two separate and*

distinct time periods of damages to the plaintiff's home. The 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. Again, 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 could not apportion the Marlowes' flooding damages between natural flooding and flooding allegedly caused by the elevated highway and 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 sufficient 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 construction of the elevated highway. For these reasons, the Ray decision does not support the Marlowes' inverse condemnation claim.

CONCLUSION

For the reasons set forth herein, the SCDOT respectfully requests this Court to deny the Marlowes' Petition for Rehearing.

Respectfully submitted,

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