THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

Claude W. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

And

Vickie B. Graham, ... Respondent/Appellant,

v.

Town of Latta, South Carolina, ... Appellant/Respondent.

APPELLANTS' FINAL BRIEF OF RESPONDENTS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR WHEN IT GRANTED THE TOWN OF LATTA'S MOTION FOR A DIRECTED VERDICT ON VICKIE GRAHAM'S CAUSE OF ACTION FOR INVERSE CONDEMNATION?**

2. **DID THE TRIAL COURT ERR WHEN IT GRANTED THE TOWN OF LATTA'S MOTION FOR A DIRECTED VERDICT AGAINST VICKIE GRAHAM'S CAUSE OF ACTION FOR TRESPASS?**

3. **DID THE TRIAL COURT ERR WHEN IT, *SUA SPONTE*, DECLARED THE TOWN OF LATTA TO HAVE AN EASEMENT BY PRESCRIPTION FOR A SEWER LINE UNDER THE HOUSE OF THE GRAHAMS?**

STATEMENT OF THE CASE

These actions were initiated by two Complaints filed on November 19, 2008, subsequently amended by Respondent/Appellant Vickie Graham on February 4, 2009, timely answered on May 11, 2009. On December 15, 2010, the Respondents/Appellants initial counsel, Jim Rushton, was replaced by the undersigned with a Notice of Appearance. On January 26, 2011, Vickie Graham filed a Second Amended Complaint, timely answered on February 3, 2011.

The cases were consolidated, stricken from the trial docket pursuant to Rule 40(j), and restored to the jury roster on June 20, 2012.

The case was tried by a jury beginning October 8, 2012. At the close of the Plaintiffs' case, the Defendant moved for a directed verdict on all causes of action and the court granted that motion with respect to the trespass cause of action and the cause of action for inverse condemnation, while at the same time *sua sponte* declaring that the Defendant had an easement by prescription to operate a sewer line through Mrs. Graham's property and under her house. The court denied the motion as to the negligence cause of action. At the conclusion of all the

evidence, the Plaintiffs moved for a reconsideration of the directed verdict rulings, which motion was denied. On October 11, 2012, the jury returned a verdict in favor of Vickie Graham in the amount of $225,000 and Claude Graham in the amount of $100.000.

The Defendant filed post-trial motions on October 22, 2012. On March 8, 2013, the court entered two separate Orders, one memorializing its directed verdict on the inverse condemnation cause of action and the other denying the Appellant/Respondent's Motion for Judgment Notwithstanding The Verdict Or In The Alternative For A New Trial.

Appellant/Respondent filed a Notice of Appeal on April 9, 2013. Respondents/Appellants filed a Notice of Appeal on April 12, 2013.

The Respondent/Appellant Vickie Graham appeals from the Trial Court's Order granting the directed verdicts, but not from the verdict, the judgment, or the Order of the Trial Court denying the Appellant/Respondent's post-trial motions.

FACTS

Vickie Graham purchased her home on Rice Street in Latta, South Carolina in the late 1980's, following which she and her husband spent substantial money and time remodeling and renovating a fine home built in the 1960's, but fallen into disrepair, into one of the very finest homes in Latta. (R. pp. 67-69). Subsequently her husband, Claude Graham, discovered that there was a sewer line located on her land that had been there since the mid 1920's. It is the main sewer line for the Town of Latta and runs from a ditch constituting the northern border of her property, under her house, and to Rice Street. (R. pp. 72-76). There is no written or recorded

instrument conveying an easement for that portion of the sewer system which crosses the subject property. (R. p. 176, ll. 15-25).

On September 5th and 6th 2008, more than six inches of rain fell on Latta, as Tropical Storm Hanna passed along the coast of the Carolinas. Latta's sewer line leaked and overflowed onto the Graham property and under their house on that night and on multiple subsequent dates. The sewage outflow included all the usual, customary, and expected contents of sewage and were visible on the Graham lawn, pool, garage floor, in the tool shed, and under the home. The Grahams spent thousands of dollars repairing the damage from the September 5/6 2008 rain event. On multiple occasions thereafter, however, various heavy rains occurred and the sewage leakage and outflow repeated itself. (R. pp. 77-91, l. 18; 137-141, l. 12). The Grahams' doctor not only treated them for maladies resulting from their exposure to the sewage and mold, etc. arising from the overflows but also recommended they not go back into the house. (R. pp. 177-179). The house was contaminated. (R. pp. 279-283).

The Town of Latta, through its system operator and its mayor, was fully informed of the September 5/6 and subsequent events. (R. pp. 84, l. 7 - 88). The Town of Latta is responsible for the maintenance and repair of its waste water system and chose to continue to run its sewage through the line under the Graham house. (R. pp. 189-190, l. 11; 154)

On at least one, and more likely than not several, occasion(s) the Town shut down its main sewer line. When shut down, obviously, no sewage passed through the line under the Grahams' house. Each time the Town of Latta restarted its sewage system, however, it chose and affirmatively acted to begin draining new sewage through and on the Grahams' property, under their house. The Town chose to continue pumping its sewage through the Grahams' property, to

undertake no repair of its line, and not to reroute its line. With full knowledge of the consequences to the Grahams' property and to them, the Town, knowing it had a duty to repair the line, instead chose to remove its own instrumentalities which had stopped the sewage flowing, thus to unplug the line. (R. pp. 235, l. 11 – 237, l. 13).

The Town of Latta did not produce any map of its main sewer line, but instead its engineer testified that it runs between the Grahams' house and their swimming pool, not under their house. Claude Graham testified that it runs under the house. (R. pp. 227-228; 234, ll. 1-5; 238-244; 287).

The Grahams suffered medical injuries but mitigated them by moving from the house so long as the sewer line runs under it (which it does still) and renting a substitute home. The cost of building that same house on a different piece of property, one without a sewer line running under its house, would be approximately $478,280. (R. pp. 205-206, l. 9).

ARGUMENTS

I. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF LATTA'S AFFIRMATIVE, POSITIVE, AND AGGRESSIVE CONDUCT TO SUPPORT A CLAIM OF INVERSE CONDEMNATION.

The trial court granted the Appellant/Respondent's motion for a directed verdict on Mrs. Graham's inverse condemnation cause of action relying upon a line of cases from the South Carolina Court of Appeals beginning 1992 and culminating in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). The consistent theme through these cases from this Court of Appeals was that an inverse condemnation plaintiff must show "an affirmative, positive, aggressive act on the part of the governmental agency." *supra* at 358 S.C. 290. In 2005 and

2007, however, the South Carolina Supreme Court began the process of defining and refining the nature of a plaintiff's right to recover in an inverse condemnation case: It is premised upon the ability to show that he or she has suffered a taking. *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005); *Hardin v. S.C. Dept. of Transp.* 371 S.C. 598, 641 S.E.2d 437, 441 (2007).

In *Hardin* our Supreme Court recognized that this state has "*embraced* federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." *supra* at 641 S.E.2d 441. (emph. supp.).

> Although no set formula exists for determining whether property has been "taken" by the government, the relevant jurisprudence does provide significant guideposts. Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a whole. *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 246. Stated more specifically, these "*ad hoc*, factual inquiries" involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646); *Byrd*, 365 S.C. at 658-59, 620 S.E.2d at 80 (quoting the same). Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves. *See Loretto*, 458 U.S. at 426-28, 102 S.Ct. 314; *see also Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. Additionally, the enforcement of a government regulation will usually effect a taking when the regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886.

ibid.

The federal jurisprudence *embraced* by the Supreme Court of South Carolina includes a broad view of what constitutes a "taking" by the government, a view which compels concluding that the Town of Latta's continued unauthorized use of the Respondents/Appellants' property not only for its main sewer line but also as a dumping ground for raw sewage is a taking. The United States Supreme Court, Justice Marshall delivering the opinion, held that a permanent physical occupation authorized by the government is a taking according to the Fifth Amendment to the United States Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). He observed that no set formula exists which can determine, in all cases, whether compensation is constitutionally due for a government restriction of the property and that the court must ordinarily engage in *ad hoc* factual inquiries. His opinion went on to observe that such inquiries are not standardless: the economic impact of the government activity especially the degree of interference with financial expectations, is of particular significance in determining whether the government activity constitutes a taking, as also is the character of the governmental action. When physical intrusion by the government reaches the "extreme form of a permanent physical occupation", held the Court, a Fifth Amendment taking has occurred and in such case the character of the government act not only is an important factor in resolving whether the action works as a taking but also is determinative. The Court went on to hold that the historical rule that a permanent and physical occupation of another's property is a taking has more than tradition to commend it, for such an appropriation is the most serious form of invasion of an owner's property interest. An owner suffers a special kind of injury when a third party directly invades and occupies her property; the traditional rule has the added benefit of avoiding otherwise difficult "where do we draw the line" problems.

Loretto held that once the fact of occupation of the property is shown, a court should consider the extent of the occupation as one relevant factor in determining the compensation due and for that reason there is "less need to consider the extent of occupation" in determining whether there is a compensable taking in the first place. *Loretto* at 458 U.S. 426-28. The United States Supreme Court has also held, Justice Frankfurter delivering the opinion, that property is taken in the constitutional sense when inroads are made on an owner's use of his property to an extent that, as between private persons, a servitude would have been acquired either by agreement or over the course of time. *U.S. v. Dickinson*, 331 *U.S. 745, 67 S.Ct.* 1382, 91 L.Ed. 1789 (1947).

Such is the federal rubric within which the South Carolina Supreme Court began taking a holistic view of inverse condemnations in 2005, 2007. The trial court's rote reliance upon pre-2004 Court of Appeals jurisprudence is misplaced in the light of the "no set formula" pronouncement of law in *Hardin*, 371 S.C. at 441. The appropriate factual inquiry should have been into the character of the government's action and the extent to which this action interferes with the owners' rights. The "permanent physical occupation" here is beyond dispute. The trial court erred when it ruled otherwise.

II. TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THERE WAS AMPLE EVIDENCE OF THE TOWN OF LATTA'S AFFIRMATIVE CONDUCT TO SUPPORT A CLAIM OF TRESPASS.

The trial court granted Latta's motion for a directed verdict on Mrs. Graham's trespass cause of action "on the same basis" that it had granted the directed verdict for inverse condemnation. In so doing the court referred to the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency," citing, among others the inverse

condemnation case of *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). (R. pp. 217-221). The nature of the act required to constitute a trespass, however, is not the same.

> The mere entry entitles the party in possession at least to nominal damages. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion.

Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) (citations omitted).

The *trespass* act need only be affirmative; it need *not* also be aggressive and positive. As the court correctly noted, an inverse condemnation proceeding is one in equity in which the presiding judge may make the findings of fact and the conclusions of law. Trespass, however, is an action at law, where findings of fact *must* be made by a jury. The landowner presented evidence from which a jury could conclude that the Town of Latta acted affirmatively: it had built and operated a sewage line under her house and on her property with no easement or right to do so, in the course of operating the sewage system it dumped and permitted others to dump fecal and other sewage materials on her land and under her house, and that each shutdown and reopening of the Town's main sewer line was an affirmative act. Although the sewer line had been in operation for decades, Mrs. Graham did not discover that the Town had no easement until 2011. (R. 164-165).

> The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. *Lee v. Stewart*, 218 N.C. 298, 10 S.E.2d 804 (1940). The entry itself is the wrong. Thus, for example, if one

> without a license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure. *See, Moore v. Duke*, 84 Vt. 401, 80 A. 194 (1911); 1 G. Addison, A TREATISE ON THE LAW OF *553 TORTS, 388 (Wood ed. 1991); Restatement 2d of Torts, 158, comment I, illustration 3 (1965). It is immaterial whether any further damage results. *See Brown Jug, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959*, 688 P.2d 932 (Alaska 1984). ... Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. *Snakenberg v. Hartford Casualty Insurance Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. *Id.* Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land.

Snow v. City of Columbia, supra at 409 S.E.2d, 802-803

These acts of the Town of Latta could reasonably, be found to be affirmative, thus a trespass. The jury should have decided this factual dispute. Unlike *Snow* the Grahams presented evidence the Town was not only aware of the sewage discharge but also that its failure to keep the main sewer line was advertent, a voluntary act. "(T)he immediate cause of the entry on the Snows' land was the discharge of water from the leaking pipe joint. However, the City did not intentionally discharge the water. In fact, the City was not aware of the leak until Mr. Snow brought it to their attention. The Snows make no claim to the contrary. Mr. Snow himself testified that the City did *not* intentionally allow the water to escape onto his property. At best, the evidence showed the leak resulted from the City's inadvertent failure to keep its water main in good operating condition. Since the event which constituted the entry was not a voluntary act

of the City, an action for trespass will not lie. To hold otherwise on the facts before us would effectively impose strict liability under the guise of trespass to land." *ibid.*

III. THE TRIAL COURT'S DECISION TO RAISE *SUA SPONTE* THE ISSUE OF AN EASEMENT BY PRESCRIPTION AND THEN TO RULE ON IT ADVERSELY TO THE GRAHAMS WAS CONTRARY TO THE EVIDENCE, WITHOUT LEGAL AUTHORITY, AND DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The trial court declared that the Town of Latta had a prescriptive easement over the Graham property. That was a substantial, perhaps determinative, factor in its finding that the Appellant/Respondent was entitled to a directed verdict on the trespass and inverse condemnation causes of action. (R. pp. 209-216, l. 18; 217, l. 8 – 226, l. 12; 251-252).

The existence of a prescriptive easement in an action at law is a question of fact. *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005); *Kelley v. Snyder*, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012); *Slear v. Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1998); *Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996); *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994); *Goodwin v. Johnson,* 357 S.C. 49, 591 S.E.2d 34 (Ct. App. 2003); *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987); *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 423 (Ct. App. 1997).

The party claiming a prescriptive easement bears the burden of proving all of the elements. *Morrow v. Dyches*, *supra* at 328 S.C. 527; *Kelley v. Snyder*, *supra* 396 S.C. at 573. The Town of Latta did not plead a counterclaim that it had a prescriptive easement, nor did it seek during the trial to amend its pleadings to assert such a counterclaim. At the time the trial court granted its motion for a directed verdict, at the conclusion of the Plaintiff's case, the Town

of Latta had advanced no evidence in support of an entitlement to a prescriptive easement. The parties did not expressly consent to try the issue of a prescriptive easement, so the Circuit Court's *sua sponte* ruling not only deprived Mrs. Graham of the opportunity to prepare for the issue of a prescriptive easement and raise appropriate affirmative defenses at trial but also denied her due process of law. *See Hennes v. Shaw*, 397 S.C. 391, 403, 725 S.E.2d 501, 509; *Armstrong v. Collins*, 366 S.C. 204, 230, 621 S.E.2d 368, 381 (Ct. App. 2005) ("In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised.")

Article I of the South Carolina Constitution, Section 3 of the Declaration of Rights provides, "nor shall any person be deprived of life, liberty, or property without due process of law ... ." Notice, opportunity to prepare, and the right to have a factual dispute (the existence of prescriptive easement) determined by a jury are each fundamental to the concept of ordered liberty in South Carolina. The trial court's ruling deprived Mrs. Graham of her property without due process of law.

To establish prescriptive easement the Town of Latta needed to prove (1) a continued and uninterrupted use or enjoyment of the right for a period of twenty years, (2) the identity of the thing enjoyed, and (3) the use was adverse or under a claim of right. *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Pittman v. Lowther*, *supra*; *Kelley v. Snyder*, *supra; Loftis v. S.C. Elec. & Gas,* 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004).

There is some evidence, albeit disputed, from which a finder of fact could determine elements 1 and 3. For example, Mr. Graham described one occasion when the Town's system supervisor and he may have caused the use of the line to be discontinued in 1998, and there is

evidence that the Grahams did not learn of the adverse use (it not being open and obvious) until 1998. As to the "identity of the thing enjoyed", unique among the prescriptive easement cases, here there is a direct and incontrovertible *dispute* about the identity of the easement. Does it run from the ditch of the Graham property to Rice Street *under* their house or does it run near their house but *not under* it? (R. pp. 284-287; 227-231; 234, ll. 1-5; 238, l. 9 - 244).

That disputed fact should have been presented to the jury for resolution, not decided by the presiding judge. When the existence of the easement is in issue, it is a question of fact in a law action. The jury should have determined whether "the claimant has established that the use was open, notorious, continuous, and uninterrupted" and the "identity of the (easement)". *Pittman v. Lowther, supra.*

CONCLUSION

Since material facts were in dispute, this Court should reverse the directed verdicts of the circuit court on the trespass and inverse condemnation causes of action and affirm the circuit court's denial of the Appellant/Respondent's post-trial motions.

Respectfully submitted,

February 14, 2014

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PROOF OF SERVICE AND
211(b) CERTIFICATION

I certify that I have served the **Appellants' Final Brief of Respondents/Appellants** on the *Appellant/Respondent*, through its attorney of record, by depositing three (3) copies of same in the United States Mail, postage prepaid, to:

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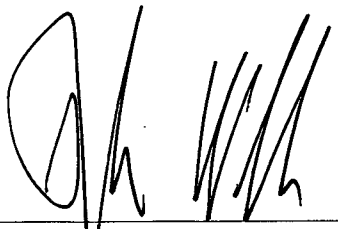
I do also certify that the Appellants' Final Brief of Respondents/Appellants complies with Rule 211(b) SCACR.



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