

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
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.

Vickie B. Graham, Respondent-Appellant,

v.

Town of Latta, South Carolina, Appellant-Respondent.

**RESPONDENT'S BRIEF
OF APPELLANT-RESPONDENT**

RECEIVED

MAY 13 2014

SC Court of Appeals

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STATEMENT OF THE CASE

This is an appeal from an inverse condemnation, trespass, and negligence action arising from a sewer overflow occurring in the Town of Latta on September 5-6, 2008.

The Respondents-Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") filed companion civil actions on November 19, 2008. Those actions were later consolidated for discovery and trial.

This litigation involves a residence owned by Vickie Graham in the Town of Latta located at 220 East Rice Street. The home was purchased in 1989 for \$60,000.00. (R. 138, 275). On the night of September 5, 2008 and the morning of September 6, 2008, Tropical Storm Hanna dumped 7.5 inches of rain on the Town of Latta causing severe flooding throughout the Town. (R. 170, 232, 279, 370, 501-502). The Grahams alleged that their property was flooded on those dates. The record reflected that the property is located within a flood plain as determined by the Federal Emergency Management Association (FEMA). (R. 539-540). In addition, the Grahams maintain that the flood waters included sewage from nearby sewer lines including a manhole that overflowed on East Rice Street. The evidence further reflects that a sewer line crosses the Grahams' property. The Grahams maintain that the sewer line traveled underneath the house, while the

Town contends that the line was not underneath the house but rather ran underground between the house and the Grahams' swimming pool.

In their original complaints, the Grahams alleged that on the night of September 5-6, 2008, the municipal wastewater/sewer system operated by the Appellant-Respondent Town of Latta backed up, overflowed, and flooded their property causing damage to their residence and vehicles. (R. 24-25). Specifically, Vickie Graham alleged damages to the residence, which was titled in her name alone. (R. 35). Claude Graham also alleged damages to two vehicles which were titled in his name only. (R. 25).

The Grahams additionally alleged that on September 13, 2008, the Town's municipal wastewater/sewer system again backed up, overflowed, and flooded their property again causing damage to the residence. (R. 25, 34). Moreover, the Grahams alleged they became physically ill as a result of these events. (R. 26, 36). No other flooding or overflow events were alleged in the original complaints or any amended complaint.

Claude Graham raised only a claim for negligence in his complaint. Vickie Graham raised a negligence claim and an inverse condemnation claim in her original complaint. She amended her complaint twice during the pendency of this litigation, and in the Second Amended Complaint she added a cause of action for trespass.

After completion of discovery, the consolidated cases were tried beginning on October 8, 2012, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on October 11, 2012. During the trial, Judge Lee granted a directed verdict in favor of the Town of Latta with respect to the trespass and inverse condemnation claims. (R. 6-9, 489-493). Additionally, Judge Lee directed a verdict in favor of the Town as to any claims arising out of the events that occurred on September 5-6, 2008. (R. 496). As a result, the only remaining claims that were to be submitted to the jury were the negligence claims related to the events occurring subsequent to September 5-6, 2008. The jury ultimately returned a verdict in favor of Vickie Graham in the amount of \$225,000.00 and a verdict in favor of Claude Graham in the amount of \$100,000.00. (R. 20-23).

The Town of Latta timely filed post-trial motions, which included both a motion for a judgment notwithstanding the verdict (JNOV) and a motion for a new trial absolute. (R. 52-61). Those motions were denied by Judge Lee in her Order filed March 8, 2013. (R. 10-19).

The Town of Latta thereupon filed this appeal. Subsequently, the Grahams filed a cross-appeal whereby they have appealed the directed verdict granted with respect to Vickie Graham's trespass and inverse condemnation claims.

ARGUMENTS

I. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's inverse condemnation claim.

The Respondent-Appellant Vickie Graham contends that Judge Alison Renee Lee erred in granting a directed verdict on her inverse condemnation cause of action.¹ On appeal, Graham bases her inverse condemnation claim on a factual basis that was never pled and legal arguments that were never made during the trial. Graham further argues that Judge Lee relied on outdated case law and a test that is no longer applied by the South Carolina Supreme Court, both of which contentions are without merit.

As a threshold matter, it is critical to examine the factual basis for Graham's inverse condemnation claim as pled. On appeal, Graham argues that the Town's placement of the sewer line in 1924 constitutes a "permanent physical occupation" of Graham's property that gives rise to an unconstitutional taking. That claim, however, was never pled. In her second cause of action, Vickie Graham alleges as follows:

¹ The inverse condemnation and trespass claims were filed by Vickie Graham only. Claude Graham did not plead those claims in his complaint. Therefore, it is incorrect for Claude Graham to be identified as an Appellant with respect to the cross-appeal filed in this action. To the extent that Claude Graham has filed a cross-appeal, his appeal should be dismissed.

19. On the evening of September 5, 2008 and the subsequent day of September 6, 2008 and on subsequent dates, the Defendant's municipal wastewater/sewer system backed up and overflowed causing severe, permanent, and irreparable damage to the Plaintiffs property and residence. The Defendant had prior notice of problems with the operation and maintenance of its municipal wastewater/sewer system.

20. The failure of the Defendant to properly construct, operate, and maintain its municipal wastewater/sewer system has resulted in a *de facto* taking of the property of the Plaintiff.

(R. 37). Vickie Graham never pled that a taking resulted prior to September 5-6, 2008, or that it resulted from the placement of a sewer line across the property in 1924. Moreover, in directing a verdict on the inverse condemnation claim, Judge Lee never addressed any allegation that the sewer line's construction or placement on the property constitutes a taking. (R. 6-9). Therefore, on appeal, Graham is impermissibly arguing a new theory of liability – one that was not pled nor adjudicated by the trial court. It is well settled that "[t]he same ground argued on appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (a party may not argue one ground at trial and a different theory on appeal).

Furthermore, Graham is basing her legal argument on appeal on federal case law that was never argued or presented during trial. Graham contends that the

existence of the sewer line itself is a taking because it represents a "permanent physical occupation" under the Fifth Amendment case of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Neither that legal argument nor the supporting authority was ever cited by Graham's counsel in the trial court.

In addition, Graham misstates the current status of inverse condemnation law in South Carolina. Graham maintains that there was some dramatic transformation in the applicable case law in the mid-2000s and that the South Carolina Supreme Court has abandoned the requirement of an "affirmative, positive, and aggressive act" as an element of an inverse condemnation claim. That is simply not correct. Indeed, in 2011, the Supreme Court still described the elements of an inverse condemnation claim as "(1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use." *Carolina Chloride, Inc. v. South Carolina Dept. of Transportation*, 391 S.C. 429, 706 S.E.2d 501, 504 (2011). *Accord, Carolina Convenience Stores, Inc. v. City of Spartanburg*, 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012). Moreover, in *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011), which was another 2011 inverse condemnation case, the Supreme Court still explained that "[t]o prevail in such an action, a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." 714 S.E.2d at 877.

Therefore, the South Carolina Supreme Court did not abandon the test on which Judge Lee based her ruling and furthermore has not overruled the case law specifically cited by Judge Lee.

Relying on such cases as *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) and *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987), Judge Lee ruled that Vickie Graham failed to establish her claim for inverse condemnation arising from the alleged sewage overflow or leaks on September 5-6, 2008 and thereafter. Judge Lee specifically wrote:

The Plaintiffs have set forth no evidence that the Defendant Town of Latta, or any agent or representative thereof, undertook any affirmative, aggressive or positive act, which resulted in the damages alleged by the Plaintiffs. At most, the Plaintiffs have asserted that the Defendant failed to act with regard to the subject sewer line located on the Plaintiffs' property. As is stated above, mere failures to act are an insufficient basis upon which to maintain a claim for inverse condemnation.

(R. 8). On appeal, because Graham has now changed her theory of liability, she does not challenge Judge Lee's actual rulings in that regard.

Nonetheless, to the extent still germane to Graham's cross-appeal, the cases cited do fully support Judge Lee's analysis and rulings. In *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), this Court affirmed summary judgment for a municipality on an inverse condemnation claim arising out of allegations that the municipality failed to properly design and maintain its

stormwater drainage system which resulted in flooding of the plaintiff's building. Similar to the case at bar, the facts in *Hawkins* show multiple flooding events and include the allegation that the City failed to take the appropriate remedial action to address the increased water flow through the existing drainage pipes. This Court emphasized that "[a]llegations of mere failure to act are insufficient" to establish the requirement of an "affirmative, positive, aggressive act" by the municipality. 594 S.E.2d at 563.

Likewise, in *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987), this Court agreed with the trial court that the plaintiff "failed to allege the damage resulted from an affirmative, aggressive, positive act on the part of the City." 363 S.E.2d at 387. The plaintiff had alleged damage to real and personal property resulting from the backup of sewage from a sanitary sewer line. This Court explained:

The effort of Rolandi to allege a "taking" of her property is similar to the effort of the plaintiff in *Belue*. In that case, the damage to the property arose from a burst water line. The South Carolina Supreme Court rejected the unauthorized taking claim of the plaintiff. We believe this is an analagous situation.

*Id.*²

² The reference in *Rolandi* was to the case of *Belue v. City of Spartanburg*, 276 S.C. 381, 280 S.E.2d 49 (1981), where the South Carolina Supreme Court rejected an inverse condemnation claim for damage resulting from a burst water main.

In sum, the trial court correctly directed a verdict on Vickie Graham's inverse condemnation claim. The alleged failure to act by the Town of Latta was not sufficient to satisfy the requirement that an "affirmative, positive, aggressive act" by the Town resulted in an unconstitutional taking of Graham's real property.³

II. The Circuit Court ruled correctly in directing a verdict and dismissing Vickie Graham's trespass claim.

Vickie Graham has also appealed the directed verdict on the trespass cause of action. "Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property." *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 565 (Ct. App. 2004). "To constitute an actionable trespass, ... there must be an affirmative act, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 802 (Ct. App. 1991).

³ Even if this Court were to consider Vickie Graham's new, unpled theory of liability – that the placement of the sewer line underneath her property in 1924 and its continued use constitutes a "permanent physical occupation" – that claim still fails on two bases. First, as also determined by Judge Lee, the Town enjoys a prescriptive easement that allowed for the presence of the sewer line on the property. Second, Graham never presented any evidence of damages attributable specifically to the alleged presence of the sewer line. As the Supreme Court has held, the measure of damages in an inverse condemnation claim is the diminution in the market value of the property. *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468, 475 (2013). Graham, however, never presented any evidence of any diminution in the market value of her property as a result of the presence of the sewer line.

Judge Lee granted a directed verdict on the basis that "there is not an affirmative act on the part of the Defendant for the same reasons as inverse condemnation." (R. 489). She did not incorporate the element of an "affirmative, positive, and aggressive act," as Graham contends on appeal. But Judge Lee did require proof of an affirmative act, which is an element of a trespass claim. The failure to act is not sufficient to support a trespass claim. That is supported by the *Snow* case, where this Court specifically stated that "[t]respass does not lie for nonfeasance or failure to perform a duty." *Snow*, 409 S.E.2d at 802.

Yet, that is the basis for Graham's trespass claim. She insists that the operation of the municipal sewer system by the Town of Latta is sufficient evidence of a trespass. More specifically, she claims that the failure of the Town to properly maintain the sewer line and its failure to respond to the Grahams' complaints by taking remedial action to the line constitute the "affirmative" act giving rise to the trespass. That argument finds no support in any case law, and not surprisingly, Graham cites no case in support of her position. In actuality, Graham is claiming that the Town's nonfeasance or failure to take appropriate or remedial action constitutes the trespass. However, that is inconsistent with this Court's holding in *Snow* which rejects the notion that nonfeasance or failure to act can support a trespass claim.

Graham's position is likewise contrary to this Court's decision in *Hawkins*, where this Court addressed a similar factual scenario. As Judge Lee did in this case, this Court in *Hawkins* found a similarity in the dispositions of the trespass and inverse condemnation cases:

Hawkins argues the same acts that he claims warrant a finding of inverse condemnation also compel a finding of civil trespass. Hawkins did not offer proof that any action by the City caused the flooding of the Servicemaster property.

Having failed to show any affirmative and intentional act necessary to sustain an action for trespass, we hold the trial court properly granted summary judgment.

Hawkins, 594 S.E.2d at 566.

In sum, Vickie Graham has not shown that Judge Lee committed any reversible error in directing a verdict in the Town's favor on the trespass claim.

III. The Circuit Court correctly ruled that the Town of Latta had a prescriptive easement for the sewer line running beneath Vickie Graham's property.

Finally, Vickie Graham takes issue with Judge Lee's ruling that the Town of Latta had a prescriptive easement for the sewer line running beneath her property. Graham argues that Judge Lee ruled *sua sponte* on the prescriptive easement issue and deprived her of due process by ruling on the issue without allowing her to present evidence on the question. Graham also argues that issues of fact should

have precluded a finding of a prescriptive easement at directed verdict. Graham's position is incorrect on the following bases.

First and foremost, the prescriptive easement issue was not raised *sua sponte* by Judge Lee. The issue was raised and addressed by the Town in its directed verdict argument at the close of the Grahams' case-in-chief related specifically to the trespass claim. (R. 441-443). Graham argued that the placement of the sewer line in 1924 constituted a trespass because the Town had no legal right for its sewer line to cross Graham's property. In response, the Town cited this Court's decision in *Loftis v. South Carolina Electric & Gas Co.*, 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004), and argued the existence of a prescriptive easement. (R. 441-443). Therefore, the issue was not raised *sua sponte*.

Second, at trial, Graham never objected to the trial court's consideration of the prescriptive easement issue. In fact, in her case-in-chief, Graham herself presented evidence related to the elements of a prescriptive easement. Yet, at no time did Graham argue to Judge Lee that the prescriptive easement issue was not properly raised or before the court or that Graham's due process rights were somehow violated by the court's consideration of that issue. Those are all arguments that are improperly raised for the first time on appeal and are therefore not preserved for appellate review. No contemporaneous objection was made at trial, and as a result, Judge Lee did not have the opportunity to consider and rule on

the very procedural objections that Graham now asserts for the first time on appeal. *See, Burke v. AnMed Health*, 393 S.C. 48, 710 S.E.2d 84, 87 (Ct. App. 2011) ("[a] contemporaneous objection is typically required to preserve issues for appellate review").

Third, the evidence presented in the Grahams' case-in-chief fully supports Judge Lee's finding that the Town has a prescriptive easement for its sewer line to cross Graham's property. (R. 489-492). "In order to establish an easement by prescription, a party must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right." *Loftis v. South Carolina Electric & Gas Co.*, 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004). "To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use. *Kelley v. Snyder*, 396 S.C. 564, 722 S.E.2d 813, 817 (Ct. App. 2012). (Emphasis in original). "There is no requirement of exclusivity of use to establish a prescriptive easement." *Id.*

The undisputed facts supporting each of those three elements were presented by the Grahams' witnesses and typically in response to questions posed by the Grahams' counsel. The Grahams' engineering expert, Roger Davis, testified that the sewer line crossing Graham's property "most likely was built in 1924." (R.

341). Based on the records he examined, Davis testified that he saw no evidence that the sewer line had ever been replaced. (R. 342). Thus, the evidence indicated without any contradiction that the line in question was placed in the ground in 1924 and has remained there until the present. That testimony satisfied the first prong. The Grahams' property has been continuously used for the sewer line for a period of at least twenty years.

There was likewise no dispute as to the identity of the thing enjoyed. That "thing" was the sewer line. Graham now argues on appeal that there is a dispute as to the exact location of the sewer line, i.e. whether it travels underneath the house or between the house and the swimming pool. Yet, that disagreement does not impact the finding of a prescriptive easement. The easement exists where the sewer line is located.

Finally, as to the third prong, the evidence demonstrates that the City had used the property under a justifiable claim of right. Vickie Graham testified that she learned from her husband that there was a sewer line across her property, and Claude Graham had learned that from a Town official after they had had some problems pre-dating the September 2008 events. She understood that the Town believed it had an easement for the sewer line. (R. 259). Claude Graham also testified that he was told by a Town official that the sewer line ran across the property, and he was shown where the line exited the ground to cross a ditch at the

rear of the property. (R. 81-82). The existence of the sewer line crossing the Grahams' property was obviously known to the Town.

In short, the evidence that supports the trial court's finding of a prescriptive easement is the Grahams' own testimony and their expert's testimony. The existence of that evidence, in fact, was summarized by the Grahams' counsel during the directed verdict arguments:

One is an affirmative act somewhere in the 1920s when the Town of Latta put the sewer line there. ... [The] Grahams at all times thought that the City had – not at all times, but at all times once they were told by the City that the sewer line ran under their house, they thought the City had an easement to have that sewer line there. And the City represented to them they had an easement for that sewer line.

(R. 446). Thus, the evidence shows that the Town believed it had an easement to locate the sewer line across Graham's property. As part of discovery in this litigation, a written instrument could not be located. (R. 291). Yet, a mistaken belief as to the existence of a written easement does not negate the existence of a justifiable claim of right. To the contrary, as this Court explained in *Loftis*, the claim of right may be based on the "mistaken belief" that a legal right exists to use the property. *Loftis*, 604 S.E.2d at 717.⁴

⁴ In her brief, Graham suggests that there is a factual issue in dispute as to whether the use was adverse. However, as this Court explained in *Kelley*, "one need only establish either a justifiable claim of right *or* adverse and hostile use" but not both. *Kelley*, 722 S.E.2d at 817. (Emphasis in original). The evidence here supports a justifiable claim of right by the Town, and

As the foregoing discussion demonstrates, Judge Lee's finding that the Town of Latta enjoys a prescriptive easement for the sewer line is fully supported by the undisputed evidence in the record. To the extent that Vickie Graham raises procedural objections for the first time on appeal that the prescriptive easement issue was not properly before the trial court or that her due process rights were violated by Judge Lee's adjudication of that issue, those objections are simply not preserved for appellate review. Finally, to the extent that Vickie Graham relies on the construction of the sewer line in 1924 as the "affirmative act" for either her inverse condemnation claim or her trespass claim, those claims are barred by the Town's easement by prescription.

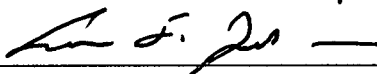
that was the finding by Judge Lee. (R. 490). No finding was made that the use was adverse or hostile, and hence, there is no basis for reversal.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Latta respectfully requests that this Court affirm the oral and written orders of Circuit Court Judge Alison Renee Lee granting the Town's motion for directed verdict on Vickie Graham's inverse condemnation and trespass causes of action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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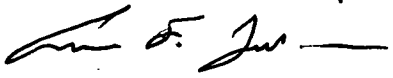
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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Latta certifies that the Final Respondent's Brief of Appellant-Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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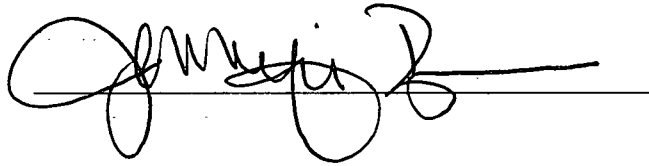
MAY 13 2014

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Latta, does hereby certify that service of **Respondent's Brief of Appellant-Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 13th day of May 2014:

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A handwritten signature in black ink, appearing to read "Reynolds Williams", is written over a horizontal line.

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