

FORM 13
BRIEF OF APPELLANT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-2211

Appellate Case No. 2015-000079

Nadine Brantley

Appellant

v.

The City of Rock Hill, a body politic and
subdivision of the State of South Carolina
and Wherry Construction Co., Inc., Of which
Wherry Construction Co., Inc. is not a respondent

Of which The City of Rock Hill, a body
politic and subdivision of the State of South
Carolina is the Respondent

Respondent

INITIAL BRIEF OF APPELLANT

Nadine Brantley
Nadine Brantley, *Pro Se*
9501 Greyson Ridge Drive
Charlotte, North Carolina 28277
704-779-2357
Appellant

cc: Jeremy Melville, Esq.
Spencer and Spencer
P.O. Box 790
Rock Hill, SC 29731
803-327-7191

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TABLE OF AUTHORITIES

Hill v. Hanahan 316 S.E. 2d 76 S.C. Court of Appeals

SC code sec. 5-31-450 (2014) 1962 Code Sec. 59-224

South Carolina Constitution Article 1, Section 13

STATEMENT OF THE CASE

On January 12, 2012, Nadine Brantley brought this action alleging

1. Inverse Condemnation
2. Gross Negligence
3. Nuisance

against The City of Rock Hill, a body politic and subdivision of the State of South Carolina, and against Wherry Construction Co., Inc. alleging construction/design defect. Later it was discovered that Wherry Construction Co., Inc. is a defunct entity.

On February 21, 2012, The City of Rock Hill in its response asserted the provisions of the South Carolina Tort Claims Act (S.C. Code Ann. sec 15-78-10 *et seq.* (1976, as amended.) ("SCTCA"), as a bar to Plaintiff's claims.

Two and one half years passed as we exchanged interrogatories and answers in discovery, took depositions, and did two ADRs.

On March 31, 2014 The Defendant filed a Motion for Summary Judgment.

On April 11, 2014 the Plaintiff filed a cross motion for Summary Judgment.

On August 6, 2014 the Plaintiff filed a memo in opposition to to the Defendant's Motion for Summary Judgment.

On August 11, 2014, The Plaintiff filed a Motion in Support of Summary Judgment against the City of Rock Hill.

On August 11, 2014 An action for Summary Judgment by the Defendant was heard in York County South Carolina Court of Common Pleas by The Honorable S. Jackson Kimball, Special Circuit Court Judge.

On September 2, 2014, Summary Judgment was entered in favor of the Defendant

.An action to Reconsider, Alter, or Amend judgment was heard on October 16, 2014. The motion was denied on December 18, 2014 Form 4 Order (Motion Pursuant to Rule 59 (e) denied.

On January 12, 2014 Nadine Brantley served the Notice of Appeal on the City of Rock Hill, a body politic and subdivision of the State of South Carolina and Wherry Construction Co., of which Wherry Construction Co., Inc. is not the Respondent of which Rock Hill, a body politic and subdivision of the State of South Carolina, is the Respondent

STATEMENT OF ISSUES ON APPEAL

The Plaintiff brought three actions against the Defendant addressed in the the Defendant's Motion for Summary Judgment granted by the Lower Court, now presented for the consideration by the Court of Appeals. Within the consideration of all three actions, there remain questions of fact.

Inverse Condemnation

Issue 1 Question of Evidence Regarding "Affirmative, Aggressive acts"

The Court erred in finding there was no affirmative act by the City in directing water. The City did purposely direct and affect water flow from Public streets through Spencer Park and toward 1020 Willowbrook Ave. The evidence would be for a jury to evaluate.

Issue 2 Question of ownership and responsibility to maintain or correct 24" culvert

The court erred in finding there was no question of fact as to the ownership and responsibility of maintaining the culvert under Willowbrook Ave in relation to stormwater. There is evidence for a jury to decide.

Issue 3 Denial of Utility services

Can a department of the City deny electrical service unless the customer makes a promise not to rent the property?

Gross Negligence

Issue 4 Lack of evidence of engineer approval after Defendant required it

The court erred in finding there was no question of fact on Gross Negligence. It is up to a Jury, having heard the evidence, to decide if "something was done that ought not to have been done" and whether even the slightest care was taken by City employees in carrying out their duties.

ARGUMENT

1. Inverse Condemnation

The Plaintiff contends that there are genuine questions of fact on Inverse Condemnation with the following :

Issue 1 question of evidence in Defendant collecting and directing water onto 1020 Willowbrook Ave.

. The Court states under on Pg 3, under Analysis Item 1. inverse condemnation paragraph 3 "There is no evidence that the City has performed any work upstream of Spencer Park to increase either volume or rate of flow, of stormwater discharged into the stream running through Spencer Park since well before Plaintiff's purchase that would have such effect." Plaintiff contends that there are man made structures (Plaintiff's exhibit B, pages 5,11,12,17,18) in Spencer Park that are not naturally occurring..

. In the above issue The Defendant denies that the structures are there but then states that they do not know who is responsible for the creation of these structures. This statement alone would be a genuine question of fact. The Plaintiff contends that these structures would be reasonably deduced at a jury trial to have been constructed and installed by the City of Rock Hill. Expert witness testimony in the depositions, when not taken out of context

but, read in its entirety states that these structures collect, concentrate, channel, and intensify water flow onto 1020 Willowbrook Rd. Reference of Ronald E. Wright. P.E. deposition pg 49 Lines 18-21, pg 55 line 20, pg 74 line 6-10 & 20,21, pg 89 line 11, pg 90 line 17.

Issue 2. Question of ownership and responsibility to maintain and/or correct the culvert

The Court states under analysis on pg.3 paragraph 3, "It is also apparent from the record , including the opinion of the Plaintiffs experts, the flooding occurs directly as a result of the undersized culvert running under Willowbrook Ave, which is entirely the responsibility of the SCDOT."

This statement is an assumption made merely by the virtue of the culvert running under a State owned roadway. Though it is a State owned roadway there are genuine questions as to the City's responsibility to maintain it as part of the Stormwater System for which the City collects fees, and as such may be Federally required to maintain. There is a question of whether the City had addressed this culvert with SCDOT after as many as 6 floods.

Additionally, part of the culvert problem is not only the culvert under Willowbrook Ave., but also the 30" rcp (reinforced concrete pipe) of 400' in

length installed by the City under its multi family property on Willowbrook Ave. and Gordon St. This pipe identified by Tim Brooks (Plaintiff's exhibit D) alters the natural flow of the water as it leaves the 24" culvert and effectively creates a dam which offers protection from flooding of the City's apartments (which are in the FEMA floodplain) adjacent to the Plaintiff's property. Plaintiff contends that responsibility for the maintenance and repair of this culvert is a genuine question of fact to be determined by a jury.

The Court states when denying the Plaintiff's motion for Summary Judgement on pg. 56, line 23-25. "Okay. Implicit in what you say, Mr. Halford, is that there's a question of fact so I deny the motion" The Plaintiff contends that if there is a question of fact on the record as such, then all of the Defendant's motions should have been denied and both motions should have been dismissed..

The Plaintiff's expert Ronald E. Wright P. E. testified when asked by Plaintiff's Counsel in deposition, "Take me down and tell me about that culvert down at Willowbrook Avenue . Is that culvert serving as part of the City's stormwater management system? Answer from Ronald E Wright 'Yes'-

"Even though SC may or may not own the Culvert it is being used as part of the City's Stormwater management system". This makes it a genuine question of

fact as to it being a responsibility of the Defendant. Reference Ronald E. Wright P. E., deposition pg 77 line 14-25, pg 78 lines 1-3, pg 99 lines 12-14, additional Robert Glenn Barfield, AIA, NCARD deposition pg 30 line 11-18

Issue 3. Denial of Utility Service

When applying for utility services, which are sold by the Defendant, utilities were denied unless Plaintiff promised not to rent the house. This condition was imposed by Risk Management.

II. Gross Negligence

Issue 4. Lack of evidence of evidence of Engineer approval after Defendant required it

The Plaintiff identified gross negligence in the allowance of the continued building of a structure once a City inspector issued a stop work order by writing the comment "disapproved-deep-near branch-filling with water- Need Engineer to OK" on the very first line of the inspection card for 1020 Willowbrook Ave. Plaintiff's exhibit A(1). (At that time the address was 536 Cummings St.) The same requirement also was issued on the adjoining property being built at the same time by the same Builder simultaneously at

1012 Willowbrook Ave. There are several items that would make the determination that an engineer approval was ever obtained that would create a genuine question of fact:

Item 1. As is a rule with SC labor and licensing , along with common industry standard there would have to be a written engineer approval stamped and sealed for the building to continue. This point has been raised many times. The defendant has been unable to produce any report. The claim has been that it must have been lost from both 1020 and 1012 Willowbrook Ave files .

Item 2. The court is relying hearsay contained in the James G. Bagley, Jr deposition (PG 47 Line 10 thru pg 50 line 16) Mr Bagley states that in his conversation with Cindi Helms and Harry Peart, that he is told the engineer, Mr. Goody Thomas, (now deceased) approved both 1020 and 1021 Willowbrook Ave . However this is merely Mr. Bagley's statement of what he says he was told. The Inspectors were not deposed, did not submit an affidavit and were not available to be cross examined, and these statements were not under oath.

Plaintiff contends that this is convenient hearsay not rising to the level of admissible evidence. Also, in Mr Bagley's deposition there is testimony referencing a claim submitted by Asia Renwick, the first owner of the house at

1020 Willow Brook Ave. In that claim form, Chris Costner, an employee of the City of Rock Hill, states that "It appears footings were never approved".

(Plaintiff's exhibit 8) This event was in 2003, her second flood and only 2 yrs after construction, when an engineer letter would have been readily accessible in the file, but Mr. Coster did not find it.

Also on the permit card according to Mr Bagley's own testimony he states the permit card indicates the footings were poured prior to approval. This would not be the case if the engineer had previously approved said footings. (Mr Bagley's Deposition PG 55 Lines 5-9

The Plaintiff was denied due process in the hearsay being entered as evidence. This definitely does not comply with rule 56(c) requirement that the evidence and all inferences which can be reasonably drawn therefrom must be view in the light most favorable to the nonmoving party (the Plaintiff).

Item 3. Plaintiff's experts have testified under oath in a deposition the belief that no professional engineer would have okayed the issue on the first line of the inspection cards of both referenced properties on which the inspector wrote "disapproved-deep, close to branch filling with water-need engineer to OK".

Ronald E. Wright P. E. Deposition pg 84 lines 21-25 & pg 85 Lines 1-3.

Item 4. Tim Brooks - Rock Hill City plan review engineer as stated on City of Rock Hill's website, tasked with evaluating the flooding of 1020 Willowbrook Ave states in his deposition "the property is in the hydraulic gradeline of that channel or that creek." (Tim Brooks deposition pg 22 Lines 22-25, pg 23 1-8.) Thus making it extremely improbable that any engineer would have approved the situation being addressed by the first inspector. The first inspector indicated that there was a problem with water on the property. When the Plaintiff, Defendant, and the expert witnesses all state that no such report was found in either file, that would refer to a written record. Plaintiff contends that if even this "slight care" had been taken, the houses would not have been built and Plaintiff and several other parties would not have sustained any losses.

Item 5. Gross Negligence definition cited in the court's decision :

Gross Negligence is the Intentional, conscious failure to do something which it is incumbent upon one to do or **doing of a thing intentionally that one ought not to do**...Negligence is a failure to to exercise due care, while **Gross Negligence is the failure to exercise even slight care.**" Contrary to the findings of The Court, Plaintiff contends there is **NOT** confirmation of an engineer's approval, but, merely a suggestion of available witness testimony.

Testimony the validity of which Plaintiff contends is up to a jury to decide.

The Plaintiff contends that there exists a genuine question of fact of gross negligence on the part of the Defendant by its allowance of the continuation of a building project once it's own body issued a stop work order that could not be lifted without the required engineer approval. There is a reasonable question as to whether the engineer approval was ever provided by the builder to the department requiring the engineer's approval.

3. Nuisance:

The nuisance claim should not have been dismissed because the record repeatedly states, and no one disputes, that the subject property of the Plaintiff, Nadine Brantley, is in direct contact on two sides with property (Spencer Park), owned and operated by the Defendant, The City of Rock Hill.

CONCLUSIONS

The Court erred in granting Summary Judgment to the Defendant, The City of Rock Hill, SC, in that there is far more than "a mere scintilla" of evidence supporting the Plaintiff, Nadine Brantley's claims of

1. INVERSE CONDEMNATION

2. GROSS NEGLIGENCE

3. NUISANCE

There are existing issues of genuine questions of fact that entitle the Plaintiff to a jury trial to determine those issues of fact. The Plaintiff respectfully asks the Court Of Appeals to reverse the Order of Summary Judgment on all Plaintiff's claims that were made in favor of the Defendant, the City of Rock Hill, and uphold the Plaintiff's right to a trial by jury.