BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-4600-146

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 REPLY BRIEF OF APPELLANT

Nadine Brantley

Nadine Brantley
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704-779-2357
Appellant

cc: Jeremy Melville, Esq.
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CASES

Brown V. Sch. Dist. of Greenville County, 251 S.C. 220, 225,
161 S.E. 2nd 815, 817 (1998)

Clyburn v. Sumter Cnty. Sch. Dist. No. 17 317 S.C. 50, 53, 451
S.E. 2nd 885. 887 (1994)

Hall v. Greenville, 227 S.C. 375, 386, 88 S.E. 2d. 246, 251 (1955)

Hawkins v. The City of Greenville 358 S.C. 280, 594 S.E. 2d. 557, 563
(Ct. App. 2004)

McNair v. Rainsford 330 S.C. 332, 342, 499, S.e. 2d 488, 493
(Ct. App. 1998)

STATUTES

15-78-10

15-3-640

5-31-450

OTHER AUTHORITIES

S.C. Constitution Art I sect 13

U.S. Constitution V and XIV

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.

Gross Negligence

Issue 3 Lack of evidence of engineer approval after Defendant required it

The court errored 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.

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 it's 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 THE FACTS

The plaintiff disagrees with the The Defense in many of its Statement of the Facts.

We are here to determine if any of these facts should have survived the Defense Motion for Summary Judgment and been allowed to proceed to trial. We are not here to try the case.

Mr James G. Bagley, Deputy City Manager, submitted a sworn affidavit to the Court on August 7, 2014. In looking at the affidavit of Mr. James G. Bagley,Jr. there are serious questions of veracity of statements 4, 6, 7, and 8. There is a serious error of omission in that he does not address the origins of the stormwater that contribute to what the Defense calls "the watercourse".

Mr. Bagley fails to address the fact that in addition to the water that falls onto Spencer Park, the Defendant is channelling stormwater off of Sturgis Street, Cummings St and private and public property. (Plaintiff's Ex. B:1,2,11,12,17,18) These channels are in the form of manmade ditches, culverts, berms and headwalls that increase, collect, pool, and direct the stormwater from public thoroughfares and private and public lands above Spencer Park and into the watercourse and onto the Property at 1020 Willowbrook Road (formerly 536

Cummings St.). The channel does not flow through fixed banks, but opens up and diffuses near the center of Spencer Park. (Plaintiff's exhibit B, pg 13). Also in the same exhibit there are manmade pipes in the watercourse. After flowing through the inadequate and undersized culvert under Willowbrook RD., the water exits, not naturally, (Aff. Bagley pg.1 para. 4) but through a concrete reinforced pipe some 30" in diameter and some 400' in length (Plaintiff's ex. D Brooks page 1). Brooks recommends a 54" culvert and 54" discharge pipe to remedy the problem .(Exhibit. D pg. 2) Bagley Affidavit pg. 2, item 9 states that the SCDOT owns and is responsible for the Willowbrook Culvert. If so, why has the Defendant not contacted the SCDOT about the situation? (Bagley dep. pg. 27: 22-25, pg 29: 1-7, pg. 33: 24-25) Why has the Defendant used Its resources to conduct two studies (Tim Brooks and Stormwater Master Plan by Keck and Wood and ESP, both noted engineering firms) of the flooding of the Property? Why is the Property ranked number 20 on the Defendant's stormwater Capital Improvement Projects list? (Bagley dep. pg.72: 3-4)

The record shows that the Property lies within and is an integral part of the Defendant's Municipal Separate Stormwater System (MS4) which is a

conveyance of stormwater through a series of ditches, culverts, catch basins, retention ponds, pipes, etc. which are the sole responsibility of the Municipality. (Barfield dep. pg. 30.: 8-24.) (Wright dep. pg 99,: 12-15). The Property is below the hydraulic line of the creek and in a catch basin of the conveyance system. (Brooks dep. pg 23: 1-8). Witness Wright reviewed Mr. Brooks findings and found them to be accurate, but the occurrence of flooding would be even more frequent. "I would almost question it maybe should have been a higher coefficient instead of the--what he had used." (Wright dep. pg.44: 15-17) The record shows that there are man made structures in Spencer Park that increase the volume and velocity of the storm water discharged in the Watercourse. (Wright dep pg. 48: 3-10, 89:1-15. If these structures were not installed by the Defendant (whose name appears in the vicinity on the sanitary sewer covers in Spencer Park) then, by whom?

The defense states “that the presence of Spencer Park likely reduces the velocity of water travelling downstream towards the Property.” Water “shoots” through the culverts in the upstream of the Park, builds up in the collection areas behind the retaining walls and could also increase the velocity at which the water flows to the Property. It is established fact that increased water is directed through ditches and culverts on the City’s property from the watershed above the Park. The water is channelled, collected, pooled and directed onto the Property by the Defendant thus constituting a n affirmative, positive, and aggressive act. The stormwater then flows through the Property to an exit which has been deemed to be too small thus causing the Property to flood repeatedly, causing severe, irreparable damage, and endangering the health, welfare, and even the lives of any occupants.

ARGUMENT

THE LOWER COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS TO ALL OF THE CAUSES OF ACTION BY PLAINTIFF AGAINST THE CITY

"The party seeking Summary Judgment has the burden of clearly establishing the absence of a genuine issue of material fact." McNair v. Rainsford, 330 S.C. 332,342,499 S.E.2d 488,493(Ct. App. 1998) The Court Grants Summary Judgment when It finds that there is no genuine issue of material fact, and determines that the party moving for summary judgment is entitled to judgment as a matter of law. The Plaintiff will point out to the Court of Appeals that there are existing issues of material fact in each of the Plaintiff's Motions that entitle the Plaintiff to a jury trial to determine those issues of fact. The evidence is viewed in the light most favorable to the nonmoving party.

A. Summary Judgment was not proper with respect to Nuisance Cause of Action

Governments are generally acting as "landowners" when they construct and operate structural measures. Courts therefore consider governments to b acting in a "proprietary" rather than a "governmental" capacity. Sovereign Immunity

does not apply and adjacent landowners may sue governments, like adjacent private landowners, for nuisance, trespass, strict liability, and violation of riparian rights.Impacted landowners may also sue governments for "inverse condemnation."

It has been established repeatedly in the record that the Property and the Park adjoin each other on two sides. Given this fact, the City is treated as any other proprietary landowner and does not benefit from the protection of the SCTCA. There is a special relationship between the City and it's next door neighbors and the City is liable just the same as any other landowner for it's torts including nuisance. Every lawyer in the room, including the Court, should have known that and the Cause of Action should not have been dismissed.

The record also shows that the watercourse and the installations which bring additional water through the Park from the watershed above are not natural, do not flow in a course contained within banks. (Wright pg 77: 5-13)

As to quiet enjoyment, the Property is not habitable. It cannot be rented or sold

without bringing harm to others. It would be unconscionable to do so. The City, through Risk Management, has refused utility service absent a promise by The Plaintiff not to rent the house. It is totally unpredictable as to when and how badly the house will flood, only that it will. The County Tax Assessor has assigned no value to the structure. What use and enjoyment can the Defense possibly think can be derived for the ownership of the Property? The finding of the Lower Court was improper and the Plaintiff requests that the Court of Appeals reverse the nuisance claim of action in favor of the Plaintiff.

B. Summary Judgment was improper with respect to Inverse Condemnation

The Plaintiff respectfully asserts that the evidence in the case shows that there indeed is

1. an affirmative, positive, aggressive act on the part of the governmental agency. The record shows the increase in water flow from the watershed above the elevation of the Park through ditches, culverts. It shows pooling, ponding, collecting and directing of this extra water that then flows

through an unnatural watercourse, lacking banks in places, and containing man made elements. Plaintiff's exhibit B pgs 11,13, 14,17,18

2. a taking. The governmental entity is using the Property without just compensation. There have been many times in the past when The City could have bought this property or brought a condemnation procedure (Hall v. Greenville). In fact, the record shows that the City did buy a 10' strip adjoining the Property on the left hand side. Since the City did not exercise condemnation as prescribed, the Plaintiff may sue for inverse condemnation (a taking).

3. The taking is for a public use. It has already been established that The City is using the Property as part of the stormwater management system and that this property catches and retards water that would otherwise increase flooding possibilities to City owned apartments across Willowbrook on Gordon St.

4. The taking has some degree of permanence. Claims for flooding of the structure began shortly after being built (2001) until the present. The record documents at least 3 floods prior to the Plaintiff's in 2011. Plaintiff has had at least 4 floods since 2011. It has also been demonstrated that prior to the

house being built, City staff had knowledge of potential flood problems, the foreseeability of floods and resulting damage to individuals, the degree of risk involved, the norms of profession, applicable regulations, and the amount of discretion involved

Hawkins is indeed the controlling case. The differences are that the Defendant committed all the acts that favor the Plaintiff. All of the elements of inverse condemnation are present. In Hawkins, Greenville took action to lessen the flooding by installing a pipe to increase capacity. In Rock Hill, the City installed culverts and ditches that brought in increased water from properties and streets above the Park (Plaintiff's exhibit I pg 1-2) and into a watercourse too small to handle it. (~~Hill~~ Hall v. Greenville) The Defendant directed this increased stormwater onto and through the Plaintiff's adjoining property without right of way or easement or adequate exit, causing permanent and irreparable damage. In Hawkins the Greenville stormwater system was deemed to be adequate. In Rock Hill, the Plaintiff has provided evidence that the culvert on Willowbrook is not adequate and needs remediation. (Plaintiff exhibit D), (Plaintiff exhibit G) On page 10 of its Initial Brief the Defense states that " the record

amply demonstrates that the Culvert underneath Willowbrook Avenue is

the responsibility of the South Carolina Department of Transportation."

In his deposition, however, Mr. Bagley states that he is "not aware of any

consultations with the SCDOT related to this property." (Bagley dep.p. 27:22-25.)

There is further discussion of contact with SCDOT and claimants "if it is a DOT

road......." Bagley dep.p 28 1-23,p.29 1-21.

On page 11 of the initial brief, Defense contends, " The City does not own or

exercise control over the Culvert." If that statement is true, why has the culvert

and the repeated flooding there been studied by Mr. Brooks and Keck and Wood

at the City's expense? Why does the Property appear as priority number 20

on a Capital Improvement Projects list as part of the City's Stormwater Master

Plan? Why are many of the other projects on the list also on State owned roads?

The questions for the Court are

1. have the facts been established in the record, or

2. are there material facts that need to be decided by a jury?

a.Did the City increase the water flow through the Park by bringing

water into the Park via man made structures?

b. Did that action increase the quantity and/or velocity of the water coming to the Plaintiff's property?

c. Was the watercourse contained in banks and devoid of manmade elements and in a natural state?

d. Which governmental entity is responsible for maintaining and/or remediating the culvert and the flooding conditions present at Willowbrook?

e. Just because Willowbrook is a State maintained road, does it automatically follow that the City is not responsible for the City's MS4 (Municipal separate stormwater sewer system) (stormwater conveyance system)of which the Property and the culvert are parts?

5. The Plaintiff produced pictorial evidence of the conditions in the Park. The Plaintiff has expert testimony and there are 2 studies of a culvert that the City paid for even though it now claims it has no responsibility for since it is under a state road. Is it part of the City's MS4? That is a fact worth considering. Why would the City not contact the SCDOT over a 12 year period to inform SCDOT

of the problem? Why did the City not inform even one of the flood claimants to contact the SCDOT if the SCDOT were responsible for the culvert?

The Defense simply denies that the structures at the top of the Park exist and then presents only Lawyer testimony and an affidavit (Bagley) that has been discussed earlier. The Defense has no evidence at all.

The Plaintiff respectfully requests that the Appeals Court reverse the Lower Court's order for Summary Judgment of the claim of Inverse Condemnation due to disputed questions of fact.

C. Summary Judgment was improper with respect to Gross Negligence Claim

"Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d. 885, 887 (1994). "When the evidence supports but one reasonable inference.... the question (of gross negligence) becomes a matter of law for the court."

Id. at 53, 451 S.E. 2d at 887-88 (1994)

The Plaintiff contends that the gross negligence occurred early on in the permitting process. The Plaintiff has NOT claimed that the City is negligent in the issuing of the permit. The Plaintiff alledges gross negligence on the part of the inspector who overstepped his authority by not obtaining from the builder an appropriate indication from an engineer certifying the construction on the site to be "OK". The first comment on the inspection record says, "disapproved-deep, near branch & filling with water-need engineer to OK". Exhibit A(1) The inspector cites a water problem on the Property. In just a few months after the Certificate of Occupancy is issued, the first flooding incident occurs. If there had been an engineer "OK" would it not be on file? There is no indication in the construction file, or in the file from the house next door which has the same comment that any engineer gave an "OK". The second inspector wrote "OK" on the inspection card and eventually the construction moved on. The inspection card is part of the record. It has been pointed out that dates are out of order. The Plaintiff believes that an engineer report must be in writing, sealed, and retained

as part of the record and has so stated in the record. A verbal "OK" as the Defense contends was provided would be useless. In addition, it is a matter of record that the City has undertaken two studies of the Property and the water flow. The preliminary study was done by Tim Brooks. exhibit D The Plaintiff's witness, Ronald Wright, an engineer,confirmed Mr. Brooks study to be accurate, except he would have given an even higher coefficient than the ten year incidence of flooding of the Property. The City hired Keck and Wood and ESP engineering firms to conduct stormwater studies throughout the City. As a result, the Property was found to flood frequently and was placed on a floodplain Exhibit F and was also placed on the City's Capital Improvement list as priority number 20. Exhibit G Mr. Bagley in deposition stated that the study was complete and promised to provide the study to the Plaintiff. (dep Bagley p66: 17-25) 9Aug 15, 2013).The study has not been produced by the Defense, and even when requested in Discovery 12/2013, it was denied to the Plaintiff by reason of not being complete and a statement that the Property was not in it. (the study). A summary of the purpose and the findings of the study was published on the Municipal Association of South Carolina website in June 2013.

What is the logical possibility that any engineer gave an "OK"? It was the City's responsibility to supervise the construction in so as to provide a measure of safety for future owners. At the time the Certificate of Occupancy was given in 2001, the permit reads:

1. "All work must comply with the 1997 Standard Building Code and the 1996 National Electric Code. All provisions of laws and ordinances governing this type of work will be complied with whether specified herein or not." Compliance would require an engineer's report as requested by first inspector.

We must go to the Building Code to determine the applicable facts. The code will determine whether or not a written report needs to be produced.

A Certificate of Occupancy should not have been issued without the report.

"The proof is in the pudding."

Statute of limitations

Plaintiff had no knowledge or warning of flooding prior to August 23, 2011.

Suit was filed in Jan.of 2012.

Reasonable due diligence was performed, including a title search, check of floodplain maps. One should not have to file a freedom of information act

if facts are reasonably discoverable.

Duty arises out of S.C Code Section 15-3-640. The statute ran for thirteen years after the issuance of the Cert of Occupancy, which in this case was 2001.

The construction prior to 2006 was Grandfathered for 13 years. An action filed in Jan. 2012 would have been within those thirteen years. Owners do not have to be in privity. The City is responsible for supervision and enforcement of the Code.

The City would be liable for a grossly negligent action such as allowing construction to continue on a revoked permit, or approving a property that was built prior to proper permitting process.

Summary Judgment for a finding of Gross Negligence in favor of the Defense was improper and the Plaintiff requests the Court of Appeals to overturn the ruling of the Lower Court.

2. Failure to Prevent Flooding

The Defense contends that "it is undisputed that this case involves claims of flooding from a natural watercourse." The fact that this is NOT a natural watercourse is a main point of the dispute. Liability under South Carolina Code Section 5-31-450 mandates:

"Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such a manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys, or other thoroughfare, the municipal authorities may obtain, under proceedings for condemnation or payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation of this State shall fail or refuse to carry out the provisions of this section, and any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person."

The Plaintiff did plead and demonstrate that there are city culverts, ditches and pipes that alter the course of the water coming off public thoroughfares. The water off the thoroughfares and the watershed above the Park increases the amount of water that comes into the Park and through the watercourse, which has elements that are not natural, The Plaintiff contends that these pipes culverts and ditches are the work of the City. The Plaintiff contends that this is an affirmative and overt act of the City. Brown v Sch. Dist of Greenville County , 251 S.C. 220, 225, 161 S.E. 2nd 815, 817 (1968)

"The statute does not purport to make the municipality an insurer against damage from surface water; it is only for such damage as results from the municipality's works that he may recover. By the same token, the municipality may not absolve itself from liability by diverting the surface water from its streets into a natural watercourse too small to carry it off." Hall v. City of Greenville, 227 S.C. 375, 386, 88 S.E. 2d 246, 251 (1955)

"Under this statute proof of negligence , in the usual sense of the word, in the design or construction of the drainage facilities installed by a municipality for the purpose of carrying off surface water along a street or other public thoroughfare

is not an essential ingredient to the cause of action in favor of an adjacent

landowner whose property has been damaged by surface water cast upon it as

a result of such construction." Hall v. Greenville, 277 S.C. at 386, 88 S.E. 2d at 251

The Property adjoins Spencer Park, through which the increased water is

channeled and cast upon the Property. Liability attaches due to the

approximation of the Property to the Defendant's property. The City

cannot bring water off public thoroughfares and private and public land

and collect and channel that water across its land onto the land of an

adjacent or adjoining property owner.

The Plaintiff requests that the Court of Appeals allow this action to

be heard before a Jury.

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 against the City of Rock Hill for:

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.

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Of which The City of Rock Hill, a body politic and
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PROOF OF SERVICE

I certify that the Initial Reply Brief of the Appellant has been served by depositing a copy thereof in the United States Mail, postage prepaid on November 9, 2015, addressed to:

Jeremy D. Melville, Esquire
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November 9, 2015

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina

Re: Nadine Brantley v The City of Rock Hill, et al.
Appellate Case No.: 2015-000079

Dear Ms Kitchings,

Enclosed please find an original and one copy of the Reply Brief of the Appellant, Designation of Matter to be included in the Record on Appeal, and Proof of Service in the above referenced matter.

Respectfully,

Nadine Brantley

Nadine Brantley

cc: Jeremy D. Melville, Esq.

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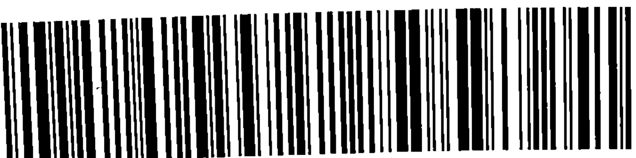

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