THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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SC Court of Appeals

D. Garrison Hill, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002118

Lucille H. Ray, Appellant,

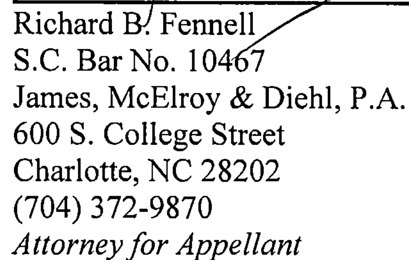
v.

City of Rock Hill, South Carolina, a Municipal Corporation, and South Carolina Department of Transportation, an agency of the State of South Carolina, Defendants,

Of which City of Rock Hill is the Respondent.

APPELLANT'S INITIAL REPLY BRIEF

June 27, 2017



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Appellant Lucille H. Ray respectfully submits this memorandum of law in reply to the Brief of Respondent City of Rock Hill, South Carolina.[1]

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF.

Because genuine issues of material exist with respect to whether the City is committing a continuing trespass entitling Ray to injunctive relief, and whether the City committed an affirmative act sufficient to constitute an inverse condemnation, the trial court improperly entered the Summary Judgment Order in the City's favor, as well as the Reconsideration Order upholding that ruling. Both the Summary Judgment Order and the Reconsideration Order should be reversed with respect to Ray's claims for injunctive relief and inverse condemnation.

A. *There Is a Genuine Issue of Material Fact as to Whether the City Is Committing a Continuing Trespass Entitling Plaintiff to Injunctive Relief.*

In its Brief, the City argues that the Summary Judgment Order properly dismissed Ray's claim for injunctive relief for trespass because "monetary damages provided an adequate remedy at law." Respondent's Brief, p. 14. According to the City, the sum identified by Ray and Leonard as necessary to remediate the structural damage to her property was sufficient to "make Plaintiff whole." Id. at p. 15.

However, both the City and the trial court failed to take into consideration the continuing nature of the City's trespass upon Ray's property. The South Carolina Supreme Court has recognized that though a legal remedy may be sufficient for each given act of trespass "if it stood alone," the repetition of a continuing trespass is only

[1] All capitalized terms have the same meaning provided for in Appellant's initial brief.

avoided and "the entire wrong . . . prevented or stopped by injunction . . . ." McClellan v. Taylor, 54 S.C. 430, 437, 32 S.E. 527, 529 (S.C. 1899). A continuing trespass must be enjoined "because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages," and no adequate remedy at law exists. Id.; accord Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (S.C. Ct. App. 1991) (upholding injunctive relief for trespass in the form of flowing water).

The trial court incongruously recognized that genuine factual issues exist as to whether the City has created an abatable trespass onto Ray's property by discharging stormwater into the pipe, but failed to acknowledge that in order to be abatable the stormwater discharge has to be continuing in nature. Summary Judgment Order, pp. 2-4. Indeed, Ray has proffered evidence that stormwater is continuously discharged into the pipe with every storm. Ray Dep. Tr. 62:4-62:13. Her fundamental theory is that stormwater is escaping from that pipe, and degrading the soil beneath her home, leading to structural damage. The City would have Ray file a new action every time it rains, recover the damages caused by that particular rainfall event only, and await the next storm. That is simply not the law in South Carolina.

The City argues that a drainage system is "permanent and subject to a single, set limitations period," relying upon Glenn v. Sch. Dist. No. 5 of Anderson Cty., 294 S.C. 530, 366 S.E.2d 47 (S.C. Ct. App. 1988) and Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (S.C. Ct. App. 1999). Respondent's Brief, p. 21. Yet the Court in Glenn, acknowledged that if a trespass arising from a drainage system is "abatable [plaintiff] can recover damages sustained within the statutory period" even if the drainage system was constructed years earlier. 294 S.C. at 536, 366 S.E.2d at 50

(simply holding that plaintiff failed to provide evidence that the stormwater runoff through the drainage system could be abated where he testified only that the school could "quit putting water in that ditch"). Whitfield is completely inapposite, as the alleged trespass there was the actual construction of a drainage and sewer system without the landowners permission, *not* damage from stormwater flowing through a drainage system onto plaintiff's property. 338 S.C. at 218, 525 S.E.2d at 894. The City makes no attempt to address the Court of Appeals' holding in Mack that trespass in the form of water in a detention pond constructed years before a lawsuit nonetheless constituted a continuing and recurring trespass sufficient to support an injunction. 306 S.C. at 437, 412 S.E.2d at 433-434.

The City also contends that the Summary Judgment Order and Reconsideration Order should be affirmed on the grounds that Ray has not set forth evidence that the City made an upstream modification resulting in greater stormwater drainage than what would naturally result from the reasonable development of the City's property. Respondent's Brief, p. 23-24. Yet the City conveniently ignores the exceptions to this "common enemy rule" adopted by South Carolina: "an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land." Lucas v. Rawl Family Ltd. P'shp, 359 S.C. 505, 509-510, 598 S.E.2d 712, 714 (S.C. 2004). That is precisely what the City has done here by collecting stormwater from the City streets surrounding Ray's property, channeling that water through the City's stormwater drainage system, and directing that concentrated stormwater flow off of City streets onto Ray's property.

Because injunction is the proper remedy for a continuing trespass like the City's ongoing discharge of storm water into the pipe under Ray's house, the Summary Judgment Order and Reconsideration Order should be reversed and Ray's claim for injunctive relief permitted to proceed to trial.

B. *There Is a Genuine Issue of Material Fact as to Whether the City Should Be Liable for Inverse Condemnation.*

As Ray has presented evidence of affirmative acts sufficient to create a genuine issue of material fact as to whether the City committed an inverse condemnation of her property, the Summary Judgment Order's and Reconsideration Order's dismissal of that claim should be overruled.

1. Ray Has Provided Evidence of Affirmative Acts by the City.

The City incorrectly contends that Ray "failed to establish any evidence of an affirmative act by the City to support inverse condemnation." Respondent's Brief, p. 10. According to the City, because the City did not install the pipe initially or undertake new upstream construction or improvements which increased the stormwater runoff flowing into the pipe, the City has taken no affirmative action. Id. at p. 11. The City also asserts that its construction work on College Avenue in November 2012 was little more than passive, routine "maintenance" which does not constitute affirmative action. Id. at pp. 12-13.

In so arguing, the City completely mischaracterizes its actions in November 2012. First, the City misconstrues Ray's testimony to mean that only a single, unrelated pipe was severed when the City dug up College Avenue. Respondent's Brief, p. 13. In reality, the City broke apart a number of pipes in 2012 directly in front of Ray's house, *including* the problematic pipe flowing under Ray's house. Ray Dep. Tr. 52-60, 131:1-

135:2; 2014 Ray Aff., ¶ 11; 2014 Leonard Aff., ¶ 9-10. For a number of days, while construction continued, the City's stormwater system did not flow under the Property. Id. At that point, Ray notified the City that they did not have permission to reconnect the pipe leading under her house to the City's stormwater system. 2014 Leonard Aff., ¶ 17; 2015 Leonard Aff., ¶ 7; 2014 Ray Aff., Ex. F. Despite knowing of Ray's complaints that the pipe was damaging her house, and that Ray had specifically forbidden the City from reconnecting the pipe, the City nonetheless voluntarily reconnected that pipe to the City's stormwater system over Ray's objections. 2014 Ray Aff., ¶ 11. Ray's inverse condemnation claim is based upon the City having undertaken a permanent public project to modernize its infrastructure along College Avenue, and as a result, taking positive steps to direct its stormwater system to flow directly under Ray's house. The Summary Judgment Order and Reconsideration Order failed to take this affirmative conduct by the City into account. Accordingly, Ray has established, at the very least, a genuine issue of material fact as to whether the City engaged in an affirmative, positive, and aggressive act sufficient to give rise to a claim for inverse condemnation, and summary judgment was improper.

2. The Trial Court's Ruling on the Statute of Limitations Does Not Justify Dismissal of the Inverse Condemnation Claim.

The City also points to the trial court's ruling on the statute of limitations as additional grounds to dismiss Ray's inverse condemnation claim on summary judgment, despite the trial court's failure to do the same. Respondent's Brief, p. 16. The City accurately recounts the Summary Judgment Order's conclusion that Ray's claims for trespass arising prior to November 6, 2009 are barred. Id. at pp. 17-18 (citing Summary Judgment Order, pp. 3-4). Though the trial court did not consider the statute of

limitations with respect to Ray's inverse condemnation claim, Ray does not dispute here that the trial court's same logic holds true for inverse condemnation. However, by extension, the trial court's conclusion that Ray's trespass claims arising after November 6, 2009 survive precisely because they may be abatable – i.e. continuing – likewise means that Ray's claim for inverse condemnation arising after that date also survives.

Moreover, as noted above, Ray has provided evidence that on November 13, 2012, her attorney sent a letter to the City instructing them not to reconnect the City's stormwater system to the pipe flowing under Ray's house. 2014 Ray Aff., Ex. F. This affirmative act constitutes an inverse condemnation in and of itself, and falls well within the applicable statute of limitations period. Accordingly, the statute of limitations does not offer additional grounds to dispose of Ray's inverse condemnation claim on summary judgment.

II. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE FROM PLAINTIFF'S EXPERT WITNESS AND ENTERING A DIRECTED VERDICT AGAINST PLAINTIFF.

The trial court likewise erred in granting the County's motion *in limine* to exclude Michael Leonard's testimony and in awarding judgment to the City, such that the Directed Verdict Order should be reversed.

The trial court specifically excluded Michael Leonard's proposed expert testimony as to the abatability of the City's trespass because it found that Leonard "had not done any engineering work on this issue, and it would not meet criteria of being reliable or assist the jury." Sept. 12, 2016 Hearing Tr. 47:14-47:22. As the trial court recognized in the Directed Verdict Order, "[g]iven Judge Kimball's ruling on summary judgment, only an abatable trespass remained as a viable cause of action." Directed

Verdict Order; see also Sept. 12, 2016 Hearing Tr. 48:6-48:16. Judge Hill then correctly acknowledged that "[b]ecause the court excluded Plaintiff expert Leonard's opinion testimony as unreliable concerning abatement, the trespass cause of action became unviable . . . ." Direct Verdict Order.

The trial court erred in its application of the law and abused its discretion by excluding Leonard's testimony.[2] As explained during the hearing on the City's motion *in limine*, Leonard's opinion was that, based on his experience in stormwater design and installing storm drainage systems, the City could change the direction of a specific pipe to alter the flow of stormwater away from Ray's property, thereby abating the trespass. Sept. 12, 2016 Hearing Tr. 38:1-38:23; 2014 Leonard Aff. ¶¶ 6, 17; 2015 Leonard Aff., ¶ 7. The City itself appears to have considered that very same plan, as evidenced by a map depicting a rerouted stormwater system which further supports Leonard's testimony that abating the flow of water by redirection was achievable. Sept. 12, 2016 Hearing Tr. 38:24-38:8; Plaintiff's Trial Ex. 24. Leonard's testimony is grounded in his professional experience designing and installing stormwater systems, and therefore reliable. 2014 Leonard Aff., ¶¶ 6, 17; 2015 Leonard Aff., ¶ 7. Leonard's proffered testimony clearly satisfies the concerns of the Court of Appeals in Glenn v. Sch. Dist. No. 5 of Anderson Cty., 294 S.C. 530, 536, 366 S.E.2d 47, 50 (S.C. Ct. App. 1988), where the Court held that testimony to the effect that the school could "quit putting water in that ditch,"

[2] In its Brief, the City makes much of what it characterizes as Michael Leonard's lack of qualifications and reliance upon another expert's contradictory opinion in determining the cause of the damage to Ray's property. Respondent's Brief, pp. 6-7. None of the City's contentions are relevant to the issue of Leonard's opinion that the City's trespass was abatable, however.

without more, was not sufficient evidence that stormwater runoff through the drainage system could be abated.

The trial court's determination that Leonard's opinion was unreliable rested solely on the fact that Leonard had not performed a cost analysis or feasibility study for a proposed redesign of the stormwater system to direct water away from Ray's property. Sept. 12, 2016 Hearing Tr. 28:13-29:3. Indeed, the City relies upon Leonard's testimony that he could not say "that the flow of water can be reasonably routed around the Property" as supporting the trial court's conclusion. Respondent's Brief, p. 8. Yet Leonard also testified that he believed "it can be done" and that there "is a solution," based on his "[s]ite observations and general practice" and "a study that did that exact thing" which was produced by the City. Leonard Dep. Tr. 125:12-125:24. Accordingly, Leonard was "reasonably certain that it can be rerouted." Leonard Dep. Tr. 123:22-124:3.

While the City could have presented evidence regarding the feasibility of the cost or construction logistics of redesigning a portion of the stormwater system, that does not go to Leonard's testimony that it was absolutely possible for the City to abate its trespass. The City, and the trial court, improperly conflated the issues of reasonableness and abatability, excluding Leonard's testimony on the latter because it did not – and was not intended to – address the former. As the City notes, it is undisputed that an opinion as to the abatability of the City's trespass would have to come from an expert witness. Respondent's Brief, p. 27. By excluding the testimony of Ray's designated expert on this issue, the trial court effectively prevented Ray from prosecuting her claim, dictating the directed verdict then entered against Ray.

The court in this case abused its discretion by granting the City's motion *in limine* which necessitated entry of a directed verdict against Ray, pursuant to the Directed Verdict Order. The Directed Verdict Order should be reversed, and Leonard should be permitted to testify as to the abatability of the City's trespass.

CONCLUSION

For the foregoing reasons, the Summary Judgment Order, Reconsideration Order, and Directed Verdict Order should be reversed, and Ray's claims for trespass, inverse condemnation, and injunctive relief be permitted to proceed to trial.

Dated: June 27, 2017
Charlotte, North Carolina

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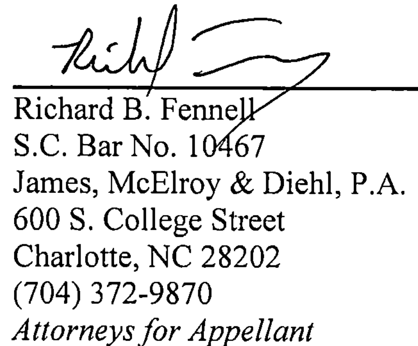
PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 27, 2017, addressed to its attorneys of record, W. Mark White, Spencer & Spencer, P.A., P.O. Box 790, Rock Hill, SC 29731

June 27, 2017



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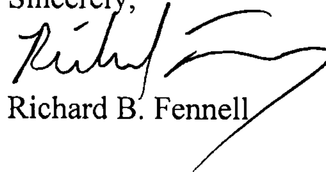
Re: *Lucille H. Ray v. City of Rock Hill, South Carolina, a Municipal Corporation, and South Carolina Department of Transportation, an agency of the State of South Carolina,*
Case No. 2016-002118

Dear Sir or Madam:

Enclosed for filing please find one original and two copies of Appellant's Initial Reply Brief in the above-referenced matter.

Thank you for your assistance, and please do not hesitate to contact me with any questions.

Sincerely,



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RBF/amb
Enclosures