THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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 FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

Appellant Lucille H. Ray ("Appellant" or "Ray") respectfully appeals the Order Granting Partial Summary Judgment to the City of Rock Hill of the Honorable S. Jackson Kimball, entered on August 12, 2014, the Order Denying Plaintiff's and Defendant's Motions for Reconsideration of the Honorable S. Jackson Kimball, entered on April 21, 2015, and the Order Granting Defendant's Motion *in Limine* and Directed Verdict against Plaintiff of the Honorable D. Garrison Hill, entered on September 13, 2016. Ray raises the following issues on appeal:

I. Did the trial court err in its summary judgment order by dismissing Ray's claims for inverse condemnation and injunctive relief, and by failing to reconsider and alter its summary judgment order?

II. Did the trial court err in excluding the testimony of Ray's expert witness, Michael Leonard, regarding abatability which resulted in a directed verdict on Ray's trespass claim?

STATEMENT OF THE CASE

Ray filed this action against the City of Rock Hill, South Carolina ("Respondent" or the "City") and the South Carolina Department of Transportation ("SCDOT") on November 6, 2012, asserting claims for trespass and inverse condemnation. The Complaint was later amended to assert claims for trespass, inverse condemnation, injunctive relief, and attorneys' fees against the City. The gravamen of the complaint is as follows. The case centers around a stormwater pipe which flows directly under the house that Ray has lived in for 30 years. The Amended Complaint asserts that the City built and maintains the stormwater pipe and continues to direct surface water runoff through the pipe, and that as a result Ray's residence has experienced structural damage.

The City answered the Amended Complaint on December 27, 2012, denying all liability. SCDOT answered the Amended Complaint on March 15, 2013, also denying all liability. On March 24, 2014, SCDOT filed a motion for summary judgment on each of Ray's claims. The Court granted SCDOT's motion on August 1, 2014, and SCDOT was dismissed from the case.

The City filed for summary judgment on May 19, 2014, arguing in part that the statute of limitations barred all claims. On August 12, 2014, the Honorable S. Jackson Kimball entered an Order Granting Partial Summary Judgment to the City of Rock Hill ("Summary Judgment Order"), granting partial summary judgment on Ray's claims for inverse condemnation, injunctive relief, and attorney's fees, but permitting Ray's claims for trespass to proceed. The City filed a motion to alter or amend the Summary Judgment Order, while Ray filed her own motion for reconsideration focusing on issues separate from those raised by the City. Judge Kimball reaffirmed his prior ruling and denied both motions by entry of an Order Denying Plaintiff's and Defendant's Motions for Reconsideration on April 21, 2015 (the "Reconsideration Order"). The City filed an additional motion for summary judgment on August 5, 2015, which was denied by order entered September 23, 2015.

On the day of trial, September 12, 2016, the City brought a motion *in limine* seeking to exclude the testimony of Ray's expert, Michael Leonard ("Leonard"), as to abatability, causation and damages. The motion was heard by the presiding trial judge, the Honorable D. Garrison Hill, who granted the motion and excluded Leonard's expert testimony on abatability. Accordingly, the City moved in open court for a directed verdict against Ray, which Ray acknowledged was appropriate in light of Judge Hill's

determination on the motion *in limine*. Judge Hill then granted the City's motion for directed verdict. The Order Granting Defendant's Motion *in Limine* and Directed Verdict was entered by the Court on September 13, 2016 ("Directed Verdict Order"). Ray timely appealed the Summary Judgment Order, Reconsideration Order, and the Directed Verdict Order by serving its Notice of Appeal on October 12, 2016.

STATEMENT OF FACTS

Ray lives at 330 College Avenue in Rock Hill (the "Property"). She purchased the house and lot in 1985. There is a storm water pipe which runs beneath her house. The pipe receives stormwater from a roughly 29 acre watershed area. That area is managed through a system of pipes, including pipes on College and Strait Street over which the City acknowledges dominion. They flow into the disputed pipe.

Ray received a survey as part of the real estate closing on the property which showed those easements encumbering her property which were of record. There was no easement shown for the stormwater pipe. (R. p. 802, ¶ 4). She granted an easement to the City in 1999 so the City could construct improvements to its sewer pipe system. (R. pp. 727-728). The line was not discovered at that point, either. Further excavation occurred when she had an addition constructed in 2001-2002. (R. p. 726). There was still no evidence of the pipe.

The house did show evidence of settlement over the years. Ray did not worry, at least not initially. She made repairs, and was told that the settlement she was witnessing was not unusual. (R. p. 803, ¶ 7). New, more substantial manifestations of damage have appeared in the last few years, particularly since 2011. (R. p. 883, ¶ 6). Ray knew there was a stormdrain in front of her house, and began to wonder if it had an impact on what

was happening in her home. (R. pp. 747-748). She had contact with City officials, and was told many different things about the pipe. (R. pp. 719-724; R. p. 803, ¶ 8). For example, she was told specifically in April 2011 that there was, in fact, a pipe on her property, but it did not run under her house. The City took a video of the pipe, but would not disclose its results. She was then told that a pipe ran under her house, but that the City would "never" move it. (R. pp. 719-724; R. p. 803, ¶¶ 8-9). She knew that the pipe ran under her house, then, as of June 3, 2011, and that the City claimed to control it, at least to the extent that it stated that it would never be moved. (R. p. 724).

A number of maps produced in discovery reveal that the location of the pipe has been known to the City since at least 1941. (R. p. 841, ¶ 16). The direction of the water flow was in fact altered in 1941, over to pipes located beneath Lucas Street. (R. p. 804, ¶ 12). There is a manhole cover located at approximately the point where the pipe hits another junction point and the water is channeled to Lucas Street. (R. pp. 688-691; R. p. 841, ¶ 16). The manhole also appears on City maps since 1941.

Ray hired Mike Leonard in early 2012 to help her determine what was happening with the advancing damage to her house, and specifically to determine its cause. (R. pp. 802-803, ¶ 5; R. p. 840, ¶ 7). Mr. Leonard asked for stormwater maps from the City in order to further his analysis. The City at first refused to provide anything. (R. p. 803, ¶ 10). A map was eventually provided, but turned out to be inaccurate. (R. pp. 744-745). Mr. Leonard was able to learn a good deal about the physical condition of the stormwater pipe at issue in late 2012. The City was doing some work on the sanitary sewer system on College Avenue. (R. p. 804, ¶ 11). In the process, several sections of pipe were disconnected from the pipe section running under Ray's house. (R. p. 841, ¶ 9). The

pipe was revealed to be old, made of terra cotta, 24" in diameter, and, without question, actively channeling water under Ray's house. (R. pp. 692-700; R. p. 841, ¶ 10). The visual evidence confirmed what Leonard suspected: the area in front of Ms. Ray's house serves as a junction which receives water from a number of sources, including a pipe which runs down Strait Street, which in turn collects and channels stormwater from Oakland Avenue, a state maintained road. (R. pp. 840-841, ¶¶ 9, 14; R. pp. 866-875; R. p. 811). The City maintains Strait Street and College Avenue. Id. It appears from documents produced in discovery that the total watershed is approximately 29 acres. (R. p. 841, ¶ 13).

Mr. Leonard ultimately concluded that the pipe is no longer adequately sized to perform the function it must now perform. The pipe is also significantly damaged. Water is leaking from it into the soils surrounding it, impacting their stability. (R. p. 841, ¶ 9; R. p. 922, ¶ 3). A video was shot of the pipe which shows the degree of damage that existed in April, 2014. (R. pp. 924-978). That is, in turn, causing physical damage to the house. Leonard Dep. Tr. pp. 78-87; R. p. 922, ¶¶ 3-5). The damage is in a number of locations, but is concentrated along the location of the pipe. (R. pp. 729-743). Ray's evidence shows that it will cost approximately $190,000 to block the pipe and repair the resulting damage to her property. This is independent of the cost that will be associated with changing the flow of the water so it no longer is channeled beneath Ray's house. (R. pp. 876-877). This could be accomplished in a number of ways, including by changing the flow of water away from Ray's house and down Lucas, instead of beneath the structure. (R. p. 841, ¶ 17; R. p. 922, ¶ 7). There is evidence that the City considered such a fix. (R. p. 922, ¶ 7).

This change in how the water is managed should have taken place in November 2012, when the City disconnected the pipes on College Street from the disputed pipe. Ray told the City in November 2012 that it could not reconnect to the pipe on her property. (R. pp. 803-804, ¶¶ 10, 13). The City did so anyway, water continues to flow through the pipe beneath Ray's house, and the resulting damage to the house was increased in magnitude.

ARGUMENT

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

Appellate courts review "questions of law de novo." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Similarly, review of an order granting summary judgment is de novo, as appellate courts apply the same standard governing the trial court under Rule 56(c), SCRCP: "summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Appellate courts must take "all ambiguities, conclusions, and inferences . . . in a light most favorable to the nonmoving party below." Id. The nonmoving party is only required to "submit a mere scintilla of evidence to withstand a summary judgment motion . . . ." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Because genuine issues of material exist with respect to whether the City is committing a continuing trespass entitling Plaintiff 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 Plaintiff'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.

South Carolina courts have long recognized that where a trespass is continuing and repeated, permanent injunction is the appropriate remedy. E.g., McClellan v. Taylor, 54 S.C. 430, 437, 32 S.E. 527, 529-530 (S.C. 1899); Little v. Little, 223 S.C. 332, 341, 75 S.E.2d 871, 875 (S.C. 1953); Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (S.C. Ct. App. 1991). Injunctive relief is necessary to "protect the landowner's property rights from hurt or destruction" caused by "permanent and recurring . . . injury, which cannot otherwise be prevented." Mack, 306 S.C. at 437, 412 S.E.2d at 434. Moreover, injunctive relief is necessary to avoid a multiplicity of actions for each individual and repeated trespass. McClellan, 54 S.C. at 437, 32 S.E. at 529. "[A]lthough each of these acts taken by itself may not be destructive, and the legal remedy may, therefore, be adequate for each single act, if it stood alone, then, also, the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." Id. Courts will enjoin continuing trespass "because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages." Id. In other words, where the trespass is continuous and repeated, there exists no adequate remedy at law to address the entirety of the wrong. Id. The Court of Appeals has previously held that injunctive relief is appropriate where the

trespass is in the form of water flowing onto another's land. Mack, 306 S.C. at 437, 412 S.E.2d at 434.

In the Summary Judgment Order, (R. pp. 7-8), the trial court recognized that genuine issues of fact existed as to whether the City had trespassed onto Ray's property, given the City's acknowledgment that it discharges stormwater into the pipe going under Ray's house. Yet the trial court went on to opine that Ray's claim for injunctive relief failed because she had an adequate remedy at law for the City's trespass by way of money damages. The City's trespass on Ray's property is clearly continuing in nature, however, as it reoccurs with every storm and passing rainfall. The City continually collects stormwater underneath City streets and directs that water through the pipe flowing under Ray's house. Indeed, the trial court also found genuine issues of fact as to whether the trespass was abatable, such that "each new invasion of plaintiff's property" began a new statute of limitations period. (R. p. 9). In so doing, the trial court recognized the continuing nature of the City's trespass. Its ruling granting summary judgment to the City on Ray's injunction claim is entirely inconsistent with that finding. Simply repairing the damage, while permitting the City to continue channeling water through the damaged pipe beneath Ray's home, guaranties further litigation between the parties. The Summary Judgment Order and Reconsideration Order should accordingly 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 Has Committed an Inverse Condemnation.

In order to establish a claim for inverse condemnation, a plaintiff must show: "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004). The requirement of an affirmative act is met where a city "was widening and improving a public street when a gas line was breached causing an explosion and fire on the neighboring property," "excavating a public street" which then "flooded during heavy rain damaging the property owner's store," or capped a landfill as part of a permanent public project. WRB L.P. v. County of Lexington, 369 S.C. 30, 32-33, 630 S.E.2d 479, 481 (S.C. 2006) (citing Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (S.C. 1967), and Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (S.C. 1981)). Where the government alters the roadways and topography of the land in such a way as to redirect the flow of surface water, it also engages in sufficient "overt or positive action" necessary to establish inverse condemnation. Newsome v. Surfside Beach, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (S.C. Ct. App. 1989).

Ray submitted evidence that in November 2012, the City disconnected several pipes as part of a construction project on College Avenue, including the pipe running beneath Ray's house. (R. p. 804, ¶ 11). Only days later, and over Ray's express objection, the City then reconnected the pipe running under her property to the City's stormwater system. Id. The City reconnected the pipes after specifically being instructed not to do so in a letter from Charles Bradford, Ray's attorney. (R. pp. 837-838). This

positive, aggressive act has continued to damage her property and benefit the City ever since.

Though Ray specifically discussed the City affirmatively reconnecting the pipes in her briefs both on summary judgment, the Summary Judgment Order made no mention of the fact. Ray filed her motion to reconsider the Summary Judgment Order, in part, to request that the trial court re-review those facts and the letter drafted by Charles Bradford. In the April 15, 2015 hearing on the cross-motions to reconsider, Judge Kimball opined that he did "not find that it represents a positive, aggressive act within the meaning of the case." (R. p. 601, lines 21-24 15). Specifically, Judge Kimball stated that cases finding affirmative acts were cases in which "the punitive [sic] condemnor did something different to change the flow of water, for example, reconstructing the roads to create a different pattern of drainage, things like that." (R. p. 602, lines 1-7).

Respectfully, Judge Kimball misinterpreted the appellate courts' guidance in WRB, Kline, Berry's On Main, and Newsome. Those cases stand for the proposition that an inverse condemnation claim requires a local government take an affirmative, independent act – to *do something* of its own initiative – rather than merely fail to take some step or negligently attempt to address some problem. Here, the City, of its own accord, dug up College Avenue, broke apart a number of pipes, and then voluntarily repaired and reconnected those pipes to its stormwater system. For a number of days, the City's stormwater system did not flow under Ray's house. As part of the City's infrastructure project, however, the City then reconnected the pipes and redirected water back onto Ray's property, knowing that Ray disputed the City's ability to do so and had warned the City not to. There are no allegations that the City negligently reconnected the

pipes and by that negligence caused Ray's property to suffer damage. Nor is Ray relying on the City's failure to properly design and construct a stormwater system that could handle the volume of water flowing down College Avenue. Rather, 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. 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.

The Summary Judgment Order and Reconsideration Order should therefore be reversed with respect to Ray's inverse condemnation claim, and this claim be permitted to proceed to trial.

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

The trial court 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 purpose of a motion *in limine* is to "narrow the evidentiary issues for trial." Tompkins v. Eckerd, 2012 U.S. Dist. LEXIS 46718, 4-5 (D.S.C. April 3, 2012). Other courts have routinely recognized the dangers of converting a motion *in limine* to a dispositive motion or directed verdict and have accordingly refused to allow non-evidentiary matters to be raised *in limine*. See, e.g., Louzon v. Ford Motor Co., 718 F.3d 556, 561-562 (6th Cir. 2013); Mid-America Tablewares v. Mogi Trading Co., 100 F.3d

1353, 1363 (7th Cir. 1996). Though the "admission or exclusion of evidence is left to the sound discretion of the trial judge," a ruling on a motion *in limine* will be reversed if the ruling constituted an abuse of discretion. State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when "'the decision is controlled by an error of law or is based on unsupported factual conclusions.'" Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 642, 760 S.E.2d 399, 410 (S.C. 2014).

Though South Carolina has not adopted the federal Daubert standard, trial courts are nonetheless required to exercise a gatekeeper function and find that an expert's testimony "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable" before it is admissible. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (S.C. 1999). In determining the reliability of scientific testimony, trial courts must consider several factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Watson v. Ford Motor Co., 389 S.C. 434, 450, 699 S.E.2d 169, 177 (S.C. 2010). However, these factors "'serve no useful analytical purpose' for nonscientific evidence," and in such cases the Supreme Court has declined to provide a list of specific factors to be utilized by trial courts. Graves v. CAS Med. Sys., 401 S.C. 63, 74, 735 S.E.2d 650, 655-656 (S.C. 2012).

As the Fourth Circuit has noted in applying the corollary Federal Rules of Civil Procedure, trial courts "should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence" and "need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct."

Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999). Moreover, "[a]s with all other admissible evidence, expert testimony is subject to being tested by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" Id. Thus, a trial court "has broad latitude to consider whatever factors bearing on validity that the court finds to be useful; the particular factors will depend upon the unique circumstances of the expert testimony involved." Id.

On the day of trial, the City moved *in limine* to exclude the testimony of Ray's expert Michael Leonard on the grounds that it was unreliable. Judge Hill granted that motion with respect to the issue of whether the City's trespass was abatable, because Leoanrd "had not done any engineering work on this issue, and it would not meet criteria of being reliable or assist the jury." (R. p. 682, lines 14-22). 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." (R. p. 17; see also R. p. 683, lines 6-16). 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 . . . ." (R. p. 17). Accordingly, "with no genuine issue of material fact remaining, City was entitled to judgment as a matter of law." Id. In sum, the exclusion of Leonard's testimony through a motion *in limine* did not merely determine a particular evidentiary issue, but the outcome of Ray's entire case.

The trial court erred in its application of the law and abused its discretion by excluding Leonard's testimony. As explained during the hearing on the City's motion *in limine*, Leonard's opinion on abatability was based on his experience in stormwater

design and installing storm drainage systems. (R. p. 673, lines 1-23; R. p. 922, ¶ 7). Specifically, Leonard's proffered testimony is that, based on the available maps of the City's stormwater design, the City could change the direction of a specific pipe and thus alter the flow of stormwater away from Ray's property. (R. p. 673, lines 19-21; R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). The City actually produced a document showing the flow of stormwater being altered exactly as Leonard proposes, upon which Leonard would be entitled to rely as evidence of the feasibility of redirecting the flow of stormwater. (R. p. 973, line 24-p. 974, line 8; R. p. 300). Moreover, Leonard's testimony is grounded in his experience designing and installing stormwater systems. (R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). This extensive, professional experience is sufficient to confirm the reliability of Leonard's proposed testimony on the ability of altering the stormwater system to redirect the flow of water away from Ray's house. The trial court's determination of unreliability appeared to rest 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. (R. p. 664, line 13-p. 665, line 3). While the City would certainly have been entitled to present its own evidence that the cost or construction logistics of redesigning a portion of the stormwater system might make any alteration unreasonable, those issues do 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.

The court in this case abused its discretion by granting the City's motion *in limine* and leaving no choice but to enter 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: August 16, 2017
Charlotte, North Carolina

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