THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

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

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Appellate Case No. 2016-002118

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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 . . . . . Respondent.

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Statutes



## Other Authorities

## STATEMENT OF ISSUES ON APPEAL

DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF?

DID THE TRIAL COURT ERR IN EXCLUDING THE TESTIMONY OF MICHAEL LEONARD REGARDING ABATABILITY?

DID THE TRIAL COURT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIM FOR TRESPASS?

## STATEMENT OF THE CASE

Plaintiff Lucille H. Ray ("Plaintiff") filed this lawsuit against the City of Rock Hill ("City") and the South Carolina Department of Transportation ("SCDOT") on November 6, 2012. Plaintiff filed an Amended Complaint asserting four causes of action against the City: trespass, inverse condemnation, injunction, and statutory attorneys' fees. The City filed an Answer in accordance with Rule 12, SCRCP, asserting a qualified denial and affirmative defenses.

On May 19, 2014, the City filed a Motion for Summary Judgment ("Motion"). After a hearing on the City's Motion, the Honorable S. Jackson Kimball entered an Order Granting Partial Summary Judgment to the City of Rock Hill ("Summary Judgment Order") on August 12, 2014.[1] In the Summary Judgment Order, the lower court dismissed Plaintiff's claims for inverse condemnation, injunctive relief, and statutory

[1] The South Carolina Department of Transportation filed a Motion for Summary Judgment which was granted in full in a separate Order by the Court. All causes of action asserted against the SCDOT were dismissed (trespass, inverse condemnation, attorneys fees and injunctive relief).

attorneys' fees. (Summary Judgment Order, R. p. 9.) The lower court further ruled that the statute of limitations began to run on all of Plaintiff's claims no later than 2008, with the exception of a potential claim for continuing trespass. Thus, all of Plaintiff's claims were dismissed except for Plaintiff's claim for trespass, and the trespass claim was limited to damages occurring on or after November 6, 2009. (Summary Judgment Order, R. pp. 8-9.)

The City and Plaintiff each filed motions for reconsideration which were denied pursuant to the lower court's Order Denying Plaintiff's and Defendant's Motions for Reconsideration entered on April 21, 2015.

On August 5, 2015, after deposing Plaintiff's expert witnesses, the City filed a Motion for Summary Judgment based on new and additional grounds. By order dated September 23, 2015, the lower court denied the City's motion.

Trial was set to begin on September 12, 2016. On the first day of trial, the City moved to exclude certain categories of opinion testimony, including opinions expected to be offered by Michael Leonard ("Leonard") a structural engineer designated by Plaintiff in this action. This motion was heard by the Honorable D. Garrison Hill. The trial court granted the City's Motion in Limine, in part, excluding any opinion testimony regarding the issue of the Abatability of

the alleged trespass. Upon granting the Motion, Plaintiff moved to have judgment entered against her on the grounds that Plaintiff would not be able to satisfy the burden of proof for the continuing trespass claim. (Trial Trans., R. p. 682, line 23-p. 683, line 3.) The trial court did not address the other issues raised by the City in its Motion in Limine. On September 13, 2016, the trial court entered an order directing verdict in favor of the City.

## STATEMENT OF FACTS

Plaintiff's claims against the City in this action relate to a 24-inch terra cotta pipe located on her property at 330 College Avenue in Rock Hill, South Carolina (the "Property"). The 24-inch terra cotta pipe begins on the Property's border with College Avenue and extends to a manhole behind the back of the structure constructed on the Property (the "Subject Pipe"). The Property and Subject Pipe are located at the topographical low point of a watershed comprising approximately 29 acres ("Watershed"). (Bagley Aff., Exhibit A, R. p. 882; Summary Judgment Order, R. p. 6; Appellant Initial Brief, p. 3.) The upstream portion of the Watershed includes residences, businesses, Winthrop University property, Rock Hill School District III property, SCDOT streets and City streets. (Bagley Aff., ¶¶ 4-5, R. pp. 879-80, Exhibit A, R. p. 882.) Within these properties are various ditches, pipes

and drainage infrastructure owned by various public entities and private landowners. (Id.) The Property and Subject Pipe are the natural downstream collection point for surface waters within the Watershed. (Summary Judgment Order, R. p. 6.)

Plaintiff's predecessors-in-title constructed a residential dwelling on the Property in the 1920's. (Ray Dep., R. p. 752, lines 5-10.) The Subject Pipe was installed on the Property prior to construction of the dwelling. (Ray Dep., R. p. 753, lines 8-20; Cummings Dep., R. p. 790, lines 9-16; Leonard Dep., R. p. 767, lines 13-21.) The dwelling was constructed over the Subject Pipe approximately 90 years prior to the filing of this action. (Ray Dep., R. p. 753, lines 8-17, R. p. 754, lines 16-20; Cummings Dep., R. p. 791, lines 11-21; Amended Complaint, ¶ 16, R. p. 39.)

Though Plaintiff alleged in her Complaint that the City installed the Subject Pipe, she produced no evidence to support that allegation. The record contains no evidence that the City was involved in the design, construction, or installation of the Subject Pipe. (Ray Dep. R. p. 746, lines 11-22, R. p. 754, line 24-p. 755, line 7, R. p. 756, lines 14-17; Cummings Dep., R. p. 792, lines 4-7; Leonard Dep., R. p. 767, lines 13-21.) Accordingly, the lower court concluded that the record lacked any evidence to support that allegation. (Summary Judgment Order, R. p. 7.)

Moreover, the record contains no evidence that the City was involved in the development of the Property or the construction of the dwelling on the Property. (Ray Dep., R. p. 753, lines 18-20, R. p. 754, lines 7-15.) However, the Record does reveal that one of Plaintiff's predecessor-in-title was aware of the Subject Pipe and connected a drainage line into the Subject Pipe. (Bagley Aff., ¶ 9, R. p. 880; Ray Dep., R. p. 757, lines 1-24.)

Plaintiff acquired the Property in May 1985. (Complaint, ¶ 3, R. p. 22.) Plaintiff constructed an addition to the dwelling in 2000 and 2001. (Ray Dep., R. p. 687, lines 11-14, R. p. 725, lines 3-7.) Plaintiff acknowledges a history of sinkholes and cave-ins on the Subject Property since the time of her acquisition. (Ray Dep., R. p. 717, line 25-p. 718, line 22.) In 1992, Plaintiff observed as her gardener fell waist deep into a sinkhole located approximately 10 feet from the back end of her house. (Ray Dep., R. p. 708, line 8-p. 711, line 20.) Plaintiff testified that she was aware of bending and movement in the roof frame of the structure on at least two separate occasions, once in 1995 and again in 2007. (Ray Dep., R. p. 704, line 18-p. 706, line 5, R. p. 706, line 23-p. 707, line 10.) She retained a contractor to fix the structural damage on both occasions.

By 2008, Plaintiff was aware of the Subject Pipe and was concerned that the Subject Pipe may be damaging the dwelling. (Ray Dep., R. p. 751, lines 19-24.) Plaintiff noticed that the front steps of her home appeared to be sinking and requested assistance from the City. (Complaint, ¶ 4, R. p. 22; Ray Dep., R. p. 702, line 23-p. 703, line 10.) Plaintiff requested the City to investigate the storm drain in College Avenue. (Ray Dep., R. p. 749, line 21-p. 750, line 21.) In 2008, City employees came to the Property at least twice and informed Plaintiff that a storm water pipe "ran toward the steps" of Plaintiff's house. (Ray Dep., R. p. 751, lines 10-11.)

During discovery, Plaintiff designated Michael Leonard ("Leonard") as an expert to testify in the field of structural engineering. (Plaintiff Responses to Int., No. 4, R. p. 995.) Leonard admitted that he is not an expert in geotechnical science (Leonard Dep., R. p. 759, line 19-p. 760, line 10), that he is not a geotechnical engineer (Leonard Dep., R. p. 784, lines 18-20), and that he is not an expert with respect to soils under the structure as it pertains to the subject matter of this action. (Leonard Dep., R. p. 762, line 13-p. 763, line 1.)

Plaintiff designated Edward Cummings ("Cummings"), a geotechnical engineer, to testify as to geotechnical matters

and soil mechanics. (Plaintiff Responses to Int., No. 4, R. p. 996.) With respect to geotechnical matters, Leonard testified that he relies upon and defers to Cummings to provide scientific analysis relating to soil mechanics and geotechnical issues. (Leonard Dep., R. p. 759, line 19-p. 760, line 10, R. p. 761, lines 7-17, R. p. 764, lines 21-24.)

However, Cummings' professional opinions failed to support Ray's causes of action against the City. Cummings testified that the sole cause of any damages to the dwelling was the improper placement and compaction of fill soils over the Subject Pipe installed at the time of construction. (Cummings Dep., R. p. 794, lines 2-17, R. p. 797, line 25-p. 799, line 5, R. p. 800, line 22-p. 801, line 10.) Cummings further testified that he did not encounter any evidence of saturated soils and did not encounter any evidence of washout or water erosion through the strata, the absence of which is inconsistent with a water leak. (Cummings Dep., R. p. 795, line 25-p. 796, line 11, R. p. 793, lines 3-5.)

In February 2016, Plaintiff hired another geotechnical engineer to perform non-destructive testing in hopes of finding evidence that water is leaking from the Subject Pipe. (Trial Trans., R. p. 670, lines 1-9.) However, these tests

did not reveal any evidence that the Subject Pipe was leaking. (Trial Trans., R. p. 670, line 9-p. 671, line 4.)

On the issue of whether the flow of water through the Subject Pipe may be reasonably and practically abated, Ray offered only the testimony of Leonard. However, Leonard testified that to render a qualified opinion on the abatability of the flow of water to and through the Subject Pipe would require a thorough engineering study. (Leonard Dep., R. p. 782, lines 6-19.) Leonard testified that he has not performed a hydrology study or studied the flow of water to or through the Pipe. (Leonard Dep., R. p. 765, line 4-p. 766, line 4.) Leonard testified that he has not analyzed whether an alternative drainage line could be placed in any particular location to divert water flow; he has not analyzed whether any alternatives would conflict with other existing infrastructure (utilities or otherwise); he has not analyzed the topography of the watershed area to know if and how an alternative line could reroute the water flow; and he has not studied or analyzed the feasability or cost of any alternatives to routing water flow (Leonard Dep., R. p. 779, line 7-p. 781, line 5.) Leonard testified that he never performed a hydrology study of the storm basin or watershed; never studied the sources and amount of water flowing to and through the Subject Pipe; never studied the rate or intensity

of flow; and never analyzed the flow downstream from the Property. (Leonard Dep., R. p. 765, line 4-p. 766, line 4, R. p. 768, lines 2-9.) Leonard admitted that he was unable to testify to a reasonable degree of engineering certainty that the flow of water can be reasonably routed around the Property. (Leonard Dep., R. p. 783, lines 6-11.)

As to damages, Leonard admitted that he is unable to identify which damages within the home are attributable to the limited scope of the trespass at issue in this action, as opposed to other causal factors for which the City is not liable (i.e. improper compaction of fill soil at time of construction) (Leonard Dep., R. p. 787, line 12-p. 788, line 20.) Moreover, Leonard testified that he cannot identify which damages have occurred since November 6, 2009, as distinguished from those occurring earlier. (Leonard Dep., R. p. 785, line 11-p. 787, line 22.)

## ARGUMENTS

### I. SUMMARY JUDGMENT WAS PROPER AS TO PLAINTIFF'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF

#### A. Standard of Review

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976). "An appellate court reviews the granting of summary judgment under

the same standard applied by the trial court pursuant to Rule 56(c), SCRCP: summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); see also Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "'In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court.'" Wells, 331 S.C. at 301, 501 S.E.2d at 749 (quoting 5 Am.Jur.2d *Appellate Review* § 700 (1995)).

**B. Summary Judgment was Proper with Respect to Inverse Condemnation**

The lower court correctly ruled that Plaintiff's claim for inverse condemnation fails as a matter of law for lack of an affirmative, positive, aggressive act on the part of the City. (Summary Judgment Order, R. pp. 7-8.)

"To establish an 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 (Ct. App. 2004).

"The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency." See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1993); Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct. App. 2004). An allegation of a municipality's failure to act is insufficient to establish inverse condemnation. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563.

Plaintiff failed to establish any evidence of an affirmative act by the City to support inverse condemnation. The Subject Pipe or waters flowing within the Subject Pipe cannot serve as the affirmative act because there is no evidence that the City installed the Subject Pipe. The record contains no evidence of any new construction or upstream improvements by the City resulting in an increase in the magnitude of water or an increase rate of flow of water toward the Property. The only evidence in the record is the City has some drainage pipes and related infrastructure within this drainage basin.

However, the mere ownership of drainage infrastructure in the basin does not constitute an affirmative act as a matter

of law. With respect to the drainage of surface waters, South Carolina follows the "Virginia Rule" which provides that "where no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system." Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986). The record contains no evidence that the City has directed greater surface water drainage than would naturally result from reasonable development of the City's property. Further, the record contains no evidence of any increase that would be attributable to the City as opposed to any of the other upstream property owners.

In the Summary Judgment Order, the lower court aptly cited the holding and analysis in Hawkins as being dispositive as to Plaintiff's inverse condemnation claim. (Summary Judgment Order, R. p. 8.) The lower court cited the following passage from Hawkins:

> Hawkins has failed to allege any affirmative acts by the City which damaged the [plaintiff's] property or otherwise diminished his rights in the property. Most of the City's "act" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are

> uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient.

Hawkins, 358 S.C. at 291, 594 S.E.2d at 562-63.

In Plaintiff's Brief, Plaintiff argues that the City's maintenance of a drainage pipe situated in the middle of a City street upstream from the Subject Property in November 2012 constituted an affirmative, positive, aggressive act necessary to establish a claim for inverse condemnation. Plaintiff's argument is unavailing. Plaintiff fashions this argument in an ambiguous manner which clouds the location and nature of the work, which the lower court was readily able to identify. The work at issue was to a drainage pipe situated in the middle of College Avenue. The work at issue was not to the Subject Pipe or even to a pipe connected directly to the Subject Pipe. Rather, the work at issue was routine maintenance to restore a drainage pipe that had been severed during work on a unrelated sanitary sewer line. (Ray Dep., R. p. 715, line 10-p. 716, line 3). As noted by the trial court, the City's maintenance of existing stormwater infrastructure upstream from the Subject Pipe is not a positive, aggressive act for purposes of inverse condemnation. (Summary Judgment Order, R. pp. 7-8.) Moreover, Plaintiff testified that the repair work at issue did not result in any

damages to Plaintiff or the Property. (Ray Dep., R. p. 713, line 13-p. 715, line 9.)

Plaintiff cites a group of cases to support her position; however, these cases expose the fundamental flaw in her legal theory. In each of the cases cited by Plaintiff the claimant was able to identify a specific act by a governmental entity which then resulted in a taking of property. See WRB L.P. v. County of Lexington, 369 S.C. 30, 32-33, 630 S.E.2d 479, 481 (2006)(capping of landfill resulting in the channeling of methane gas to plaintiff's property); Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967)(improvements to public street resulting in gas explosion); Berry's on Main, Inc. v. City of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981)(removal of public sidewalks in downtown development project resulting in flooding of plaintiff's property); Newsome v. Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989)(raising street by 17 inches resulting in washout of plaintiff's property). In this case Plaintiff has identified a condition (water channeling through the Subject Pipe) but she has been unable to produce any evidence to attribute this condition to any action by the City. As such, the granting of summary judgment was appropriate.

### C. Summary Judgment was Proper with Respect to Injunctive Relief

The trial court correctly ruled that Plaintiff's claim for injunctive relief fails as a matter of law because Plaintiff's claims for monetary damages provided an adequate remedy at law. (Summary Judgment Order, R. p. 9.)

"Actions for injunctive relief are equitable in nature. In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Denman v. City of Columbia, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). "An injunction may be granted where some irreparable injury is threatened for which the parties have no adequate remedy at law." HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 639, 699 S.E.2d 699, 707 (Ct. App. 2010). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011).

The trial court correctly found that Plaintiff's claims for monetary damages provide an adequate remedy at law. The damages sought by Plaintiff in this case relate to alleged structural damages to her residence. In discovery Plaintiff identified a specific sum of money which would resolve the claimed damage and make Plaintiff whole. (Responses to Int., No. 6, R. p. 996.) Further, Plaintiff designated a structural engineer who submitted a cost estimate for remediation of the alleged structural damage. (Leonard Report, Sept. 5, R. p. 1004.) There is no evidence in the Record that these claimed monetary damages were incomplete or otherwise insufficient. Plaintiff claims entitlement to injunctive relief because of the ongoing flow of water through the Subject Pipe. As set forth above, Plaintiff failed to produce any evidence that the City installed the Subject Pipe. Accordingly, summary judgment was appropriate on this cause of action.

## II. LOWER COURT'S UNAPPEALED RULING ON THE TRIGGER DATE FOR THE STATUTE OF LIMITATIONS IS AN ADDITIONAL GROUND FOR DISMISSAL OF THE INVERSE CONDEMNATION CAUSE OF ACTION

The lower court's unappealed rulings become the law of the case and must be assumed correct as a matter of law. Continental Ins. Co. v. Shives, 328 S.C. 470, 475, 492 S.E.2d 808, 810 (Ct.App.1997). Moreover, "issues not argued in the appellate briefs are deemed abandoned." Abraham v. Palmetto

Unified School Dist. No. 1, 343 S.C. 36, 45, 538 S.E.2d 656, 666 n.3 (Ct. App. 2000)(internal citations omitted).

The lower court ruled that at some time in 2008 Plaintiff had sufficient knowledge of the facts pertaining to the Subject Pipe under her house such that she knew or should have known of a claim for damages. (Summary Judgment Order, R. p. 8.) Plaintiff did not file this action until November 6, 2012. The result of this ruling is that the statute of limitations bars Plaintiff's claims against the City, except to the extent she could prove a continuing trespass by the City. Plaintiff has not appealed this ruling and, accordingly, this ruling is the law of the case.

The lower court's unappealed ruling on the trigger date of the statute of limitations provides separate, independent grounds for this Court to affirm the dismissal Plaintiff's claim for inverse condemnation. The City raises this issue as an additional sustaining ground.

"A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing

in the record to affirm the lower court's judgment." Jones v. Lott, 387 S.C. 339, 346-47, 692 S.E.2d 900, 904 (2010).

In this action, the lower court dismissed Plaintiff's inverse condemnation claim for lack of evidence of an affirmative act necessary to establish a prima facie case of inverse condemnation against the City. (Summary Judgment Order, R. pp. 7-8.) Therefore, the lower court had no need to rule upon the City's statute of limitations argument as applied to Plaintiff's inverse condemnation claim.

"According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

In the Summary Judgment Order, the trial court found that Plaintiff knew or should have known of any claims relating to the Subject Pipe as of 2008. (Summary Judgment Order, R. pp. 8-9.) Therefore, the statute of limitations began to run no later than December 2008. All of Plaintiff's claims are subject to a three year statute of limitations. S.C. Code Ann. § 15-5-30; Webb v. Greenwood Cnty., 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956). Plaintiff's claims expired no

later than December 2011, but Plaintiff did not file this action until November 6, 2012. Accordingly, the statute of limitations bars Plaintiff's claim for inverse condemnation as well as any other claim by Plaintiff relating to the Subject Pipe arising prior to November 6, 2009.

## III. THE TRIAL COURT'S DIRECTED VERDICT AS TO PLAINTIFF'S CLAIM FOR TRESPASS WAS PROPER

### A. Standard for Directed Verdict

"When considering a motion for a directed verdict, the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 295, 504 S.E.2d 347, 350 (Ct. App. 1998). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Wright v. Craft, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). "In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." Collins at 296, 504 S.E.2d at 350.

### B. Permanent Trespass

In the Summary Judgment Order, the lower court granted summary judgment as to any permanent trespass and refused to

grant summary judgment as to any continuing trespass. The lower court ruled that Plaintiff might be able to establish a claim for continuing trespass to the extent Plaintiff can show intentional collection and discharge of water under Plaintiff's dwelling causing damage to Plaintiff's dwelling within the three-year limitations period. (Summary Judgment Order, R. p. 8.) As an additional sustaining ground, this Court should affirm because the trespass alleged by Plaintiff can only be classified as a permanent trespass as a matter of law.

The central issue in distinguishing a continuing trespass from a permanent trespass is whether abatement of the trespass is reasonably and practically possible. "A nuisance is continuing if abatement is reasonably and practically possible."[2] Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct. App. 2001).

The material distinction between a continuing trespass or inverse condemnation and a permanent one is aptly set forth in the Restatements as follows:

> A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land. Thus, if one, without a privilege to do so, enters land of which another is

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[2] Plaintiff conceded at trial and has not appealed the finding that Plaintiff has the burden of proof with respect to establishing a continuing trespass and damages arising within the applicable limitations period. (Trial Trans., R. p. 672, lines 8-20, R. p. 682, line 25-p. 683, line 5.)

> in possession and destroys or removes a structure standing upon the land, or digs a well or makes some other excavation, or removes earth or some other substance from the land, the fact that the harm thus occasioned on the land is a continuing harm does not subject the actor to liability for a continuing trespass. Since his conduct has once for all produced a permanent injury to the land, the possessor's right is to full redress in a single action for the trespass, and a subsequent transferee of the land, as such, acquires no cause of action for the alteration of the condition of the land.

Restatement (Second) of Torts § 162, comment e. Persuasive analysis may be derived from the Pennsylvania supreme court: "If a nuisance at the time of creation is a permanent one, the consequences of which in the normal course of things will continue indefinitely, there can be but a single action therefor to recover past and future damages and the statute of limitations runs against such cause of action from the time it first occurred, or at least from the date it should reasonably have been discovered." Sustrik v. Jones & Laughlin Steel Corp., 413 Pa. 324, 328, 197 A.2d 44, 46-47 (1964).

This Court has previously held that the components of a drainage system are permanent and subject to a single, set limitations period. See Glenn v. Sch. Dist. No. Five of Anderson Cnty., 294 S.C. 530, 536, 366 S.E.2d 47, 50 (Ct. App. 1988); Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 218, 525 S.E.2d 888, 894 (Ct. App. 1999).

In Glenn, a lower riparian property owner sued upstream property owners for property damage resulting from improvements to drainage infrastructure resulting in the diversion of surface water. Glenn's property was gradually and progressively eroded over time as a result of the upstream owners' actions. Id. at 532, 366 S.E.2d at 50. This Court upheld summary judgment in favor of the upstream owners and held that the improvements were "permanent" and created a "single cause of action to be asserted within the period of the statute of limitations." Id. at 536, 366 S.E.2d at 50. The Court further held that Glenn failed to establish the injury was reasonably abatable. The suggestion that the school district could route the water away from Glenn's property was insufficient to establish the injury was reasonably abatable. Id. at 536, 366 S.E.2d at 50-51.

The facts and holding in Glenn are instructive in the case *sub judice*. The improvements implemented by the school district triggered a single cause of action for progressive damages suffered by a downstream landowner. Similar to Plaintiff's argument in this case, the Glenn plaintiff argued that because the flooding occurred during separate and distinct rain events, the statute of limitations should run from each flooding event and plaintiff could recover for damages suffered during the new statutory period. Id. at 50,

366 S.E.2d at 535. But as the court explained, the fundamental flaw in plaintiff's reasoning is that it focused on the continuity of the flooding rather than on the underlying act of the school district and the singularity of the damages suffered by the plaintiff. The school district's improvements constitute a single act leading to separate and distinct flood events which culminated in a single indivisible injury: the gradual and progressive erosion of the plaintiff's land. This is the touchstone for distinguishing a permanent trespass from a continuing trespass.

In the present action, Plaintiff's claim for trespass would have ripened, if at all, when the Subject Pipe was constructed. Plaintiff's focus on the separate and distinct episodes of water flowing through the Subject Pipe is akin to the Glenn plaintiff's misdirected focus on the separate and distinct flooding events. Plaintiff is not claiming separate and independent injuries each time water enters the Subject Pipe but rather one indivisible injury to the structure of the house arising from the existence of the pipe under the house and the natural aging and degradation thereof over time. Therefore, this Court should affirm the trial court's directed verdict on the ground that any trespass as alleged by Plaintiff is a permanent trespass as a matter of law and,

under the law of case doctrine, is barred by the statute of limitations.

**C. Virginia Rule**

As an additional sustaining ground, this Court should affirm the trial court because the mere existence of upstream drainage infrastructure is insufficient as a matter of law to render the City liable for a continuing trespass.

The record contains no evidence that the City installed the Subject Pipe. Plaintiff's continuous trespass claim is grounded entirely on the unsupported allegation that the City has channeled surface water under the Subject Property. The record shows that surface waters are channeled through the Subject Property through the Subject Pipe. Thus, whoever installed the Subject Pipe is responsible, but Plaintiff's case ignores this fact. Plaintiff brazenly suggests that the surface water that reaches the Subject Property is "the City's water." Plaintiff's position that surface water is a common enemy to all, except for the City, is a clear misstatement of the law on the common enemy doctrine. "[W]here no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system." Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986). In adopting

the "Virginia Rule" the Supreme Court of South Carolina expressly rejected an alternative "New Jersey Rule" which would have imposed strict liability on an upper landowner for any modification of water flow. Irwin, 288 S.C. at 225, 341 S.E.2d at 784-85.

In order to make out a claim with respect to surface water Plaintiff must set forth evidence that the City has made some modification upstream so as to render it liable under the Common Enemy Rule, as clarified by the Virginia Rule. Plaintiff has failed to make this showing.

## IV. THE TRIAL COURT CORRECTLY EXCLUDED THE EXPERT TESTIMONY OF MICHAEL LEONARD

### A. Standard of Review

"Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court. Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court. In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. To warrant reversal based on the

admission or exclusion of evidence, the Plaintiff must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005)(internal citations omitted).

**B. Rule 702, SCRE and Trial Court's Gatekeeper Role for Admission of Expert Testimony**

"While Rule 702 was intended to liberalize the introduction of relevant expert evidence, courts must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001).

A trial court is required to make a "threshold determination" of the reliability of proposed expert testimony to determine if it is admissible. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009). "In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular

branch of the field. Finally, the substance of the testimony must be reliable. It is this final requirement of reliability which is the central feature of the inquiry." Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

"[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. *The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.*" State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009)(emphasis added).

In analyzing the reliability of proposed expert testimony the court is to consider the following 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." Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

### C. Opinion Testimony was properly excluded

A material issue of fact with respect to Plaintiff's claim for continuing trespass is whether the alleged trespass is abatable. (Summary Judgment Order, R. pp. 8-9.) As applied to the facts of this case, the issue is whether the flow of water downstream through a 29 acre water-shed area through a 24-inch pipe buried approximately six feet in the ground under a structure which was constructed over the pipe approximately 90 years prior to the commencement of this case is reasonably and practically abatable. (Summary Judgment Order, R. pp. 8-9.) It was not contested at trial and is not contested on appeal that rendering an opinion on this issue would require specialized skill and knowledge on a number of engineering and hydrological factors.[3] Leonard testified that rendering a qualified opinion on the abatability of the flow of water would require a thorough engineering study. (Leonard Dep., R. p. 782, lines 6-19.) It was uncontested that opinion testimony on the issue of abatability must be

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[3] "Any engineering opinion as to whether the existing flow can be reasonably diverted from the Subject Pipe would first necessitate sufficient facts be developed by engineering studies, mapping, planning and analysis at a minimum as to the following: the amount of flow through the Subject Pipe; the type, material and specifications of the rerouted infrastructure; the path of the rerouted infrastructure, the existing ownership and cost to acquire any necessary private property through the rerouted path, conflict avoidance with existing infrastructure (e.g., College Avenue has extensive existing infrastructure at multiple depths); the location, depth and adequacy of downstream infrastructure." (Aff. of James G. Bagley, ¶ 10, R. pp. 880-81.)

presented by way of expert testimony, and therefore, must satisfy the threshold requirements for expert testimony under South Carolina law. See Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 81, 735 S.E.2d 650, 659 (2012).

The Record amply demonstrates that the opinions of Plaintiff's designated expert witness on this issue, Leonard, fail to satisfy the minimum standard necessary to pass the gatekeeper. Leonard testified that he has not performed a hydrology study or studied the flow of water upstream, downstream or through the Subject Pipe. (Leonard Dep., R. p. 765, line 4-p. 766, line 4.) Leonard testified that he has not analyzed whether an alternative drainage line could be placed in any particular location to divert water flow; he has not analyzed whether any alternatives would conflict with other existing infrastructure (utilities or otherwise); he has not analyzed the topography of the watershed area to know if and how an alternative line could reroute the water flow; and he has not studied or analyzed the feasability or cost of any alternatives to routing water flow (Leonard Dep., R. p. 779, line 7-p. 781, line 5.) Leonard testified that he never performed a hydrology study of the storm basin or Watershed; never studied the sources and amount of water flowing to and through the Subject Pipe; never studied the rate or intensity of flow; and never analyzed the flow downstream from the

Property. (Leonard Dep., R. p. 765, line 4-p. 766, line 4, R. p. 768, lines 2-9.)

Leonard admits that all these factors would have to be studied to properly render an opinion as to the issue of whether the flow of water through the Subject Pipe is reasonably and practically abatable. (Leonard Dep., R. p. 782, lines 6-19.) The following is a telling excerpt from Leonard's deposition:

> Q: Have you done any engineering work such that you can testify as an engineer as to what it would take to send water not to the subject pipe?
> A: And my answer was no, sir, but I have thought about it.
> Q: And in your thinking about it, have you analyzed feasibility at all?
> A: No.
> Q: Have you analyzed cost?
> A. No.

(Leonard Dep., R. p. 780, line 20-p. 781, line 5.) Finally, Leonard testified that he was unable to testify to a reasonable degree of engineering certainty that the flow of water can be reasonably routed around the Property. (Leonard Dep., R. p. 783, lines 6-11.)

As gatekeeper for expert testimony, the trial court properly excluded Leonard's opinions under the established standards.

**D. Plaintiff's Argument is Unavailing**

In Appellant's Brief, Plaintiff argues that exclusion of Leonard's testimony was improper. Plaintiff's argument consists of two fatally flawed lines of reasoning.

First, Plaintiff asserts that the City's motion in limine was actually a dispositive motion which the trial court improperly granted. (Appellant Initial Brief, pp. 11-12.) The assertion is patently false. The City's motion in limine sought a preliminary ruling on the admissibility of certain categories of opinion testimony expected to be offered by Leonard. The City's motion was not dispositive with respect to the case. The City's motion was not even dispositive on the issue of admissibility of the evidence. Plaintiff could have proceeded to prosecute her claim to the jury and obtained a ruling from the trial court at the appropriate time. See Samples v. Mitchell, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997)(stating law that a ruling on motion in limine is a preliminary ruling). Instead, Plaintiff voluntarily converted the motion in limine from a preliminary ruling on the admissibility of evidence into a directed verdict for the City. The trial court's exclusion of the opinion testimony is not preserved under these circumstances.

Second, Plaintiff argues that despite the lack of consideration of any facts found in the record and the lack of

utilization of any accepted scientific method, procedure or technique, Leonard should have been permitted to offer opinion testimony based on an inadmissable document (an annotated GIS map). Plaintiff is unable to provide any foundation or authentication for the document. Leonard was ignorant as to the document's origin and author. Leonard admitted that he lacked any knowledge or information regarding the source of the document, the person who prepared the document, or the purpose of the document. The Record lacks any information about the document except than the document was included in document production. (Leonard Dep., R. p. 779, line 7-p. 780, line 11.) Counsel for Plaintiff acknowledged the defects of Plaintiff's reliance on this document while proffering the proposed testimony of Michael Leonard during the hearing on the City's Motion in Limine:

> And in all candor the Court all that we know about this document is that the City produced it. And it shows the water flow being changed in the way that Mr. Leonard describes where the water is collected in front of Miss Ray's house and then goes down Lucas and then down in the pipe. I can't tell you how much that would cost. Whether it's possible. I can only tell you at some point somebody in the City drew it up. That's the evidence of abatability.

(Trial Trans., R. p. 674, lines 1-10.) The trial court properly issued a preliminary ruling to exclude Leonard's opinion testimony on the issue of abatability.

## V. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIM FOR CONTINUING TRESPASS

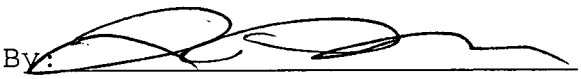
The trial court properly granted a directed verdict in favor of the City in light of the law applicable to this case. Plaintiff conceded to a directed verdict in light of the trial court's exclusion of opinion testimony from Michael Leonard on the issue of abatability. (Trial Trans., R. p. 682, line 25-p. 683, line 5.) Plaintiff did not offer any evidence on the issue of abatability other than the proposed testimony of Michael Leonard. Accordingly, because there was no issue of material fact regarding the critical element of continuing trespass, a directed verdict in favor of the City was proper.

## CONCLUSION

For the reasons stated above, the Orders which are the subject of Plaintiff's appeal should be affirmed and this appeal dismissed with prejudice.

Respectfully submitted,

August 16, 2017

By: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

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

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Appellate Case No. 2016-002118

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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,

Of which City of Rock Hill is . . . . . Respondent.

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**CERTIFICATE OF COUNSEL**

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The undersigned counsel hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

SPENCER & SPENCER, P.A.

August 16, 2017

By: _____

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