

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

RECEIVED

Donald B. Hocker, Circuit Court Judge

AUG 11 2017

Appellate Case No. 2016-001773

SC Court of Appeals

West/Hobby, LLC, Respondent,

v.

County of Newberry, Appellant.

REPLY BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AND OBJECTIVE APPLICATION OF THE DISCOVERY RULE WHEN EVIDENCE INDICATED THAT BILLYE WEST AND WEST/HOBBY SHOULD HAVE DISCOVERED ITS CLAIM IN 2000, WHEN BILLYE WEST PURCHASED THE PROPERTY, OR IN 2006, WHEN WEST/HOBBY WAS GIVEN NOTICE OF POTENTIAL LANDFILL GAS MIGRATION, HAD EITHER OF THEM EXERCISED REASONABLE DILLIGENCE?

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT WEST/HOBBY'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, WHEN THE EVIDENCE INDICATED THAT BILLYE WEST AND WEST/HOBBY PURCHASED THE PROPERTY KNOWING IT WAS LOCATED ADJACENT TO A CLOSED MUNICIPAL SOLID WASTE LANDFILL, YET MADE THE PURCHASE WITHOUT FIRST GETTING AN ENVIRONMENTAL SITE ASSESSMENT?

III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT NEWBERRY COUNTY'S PLACING OF THE CLAY CAP ON THE WASTE MASS OF THE CLOSED LANDFILL IN 1994 WAS THE POSITIVE, AFFIRMATIVE, AGGRESSIVE ACT TRIGGERING IN A TAKING OF WEST/HOBBY'S PROPERTY, WHEN EVIDENCE INDICATED THAT THERE WAS NO METHANE OR LANDFILL GAS READINGS DETECTED UNTIL DECEMBER, 2003, SOME 9 YEARS AFTER THE CLAY CAP WAS INSTALLED, AND THE GRAVAMEN OF WEST/HOBBY'S CLAIM WAS ACTUALLY BASED UPON AN ALLEGED FAILURE BY NEWBERRY COUNTY TO TIMELY IMPLEMENT AN ACTIVE REMEDIATION PLAN, RATHER THAN UPON A POSITIVE, AFFIRMATIVE, AGGRESSIVE ACT?

ARGUMENT

I. EVEN ASSUMING THERE WAS NO INJURY IN 2000, WHEN WEST/HOBBY PURCHASED THE PROPERTY, IT SHOULD HAVE DISCOVERED ITS CLAIM IN 2006, WHEN IT WAS GIVEN NOTICE OF POTENTIAL LANDFILL GAS MIGRATION; AND THE TRIAL COURT ERRED IN FINDING THAT WEST/HOBBY WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AND OBJECTIVE APPLICATION OF THE DISCOVERY RULE.

West/Hobby argues that it should not have been barred by the statute of limitations in 2000 because there was no injury then. *See*, Respondent's Brief, pp. 7-8. Even assuming, for argument's sake, that West/Hobby is correct that there was no "injury" in 2000, when Billye West and Ray Hobby purchased the property for investment purposes— notwithstanding the fact that the clay cap which West/Hobby maintains was the positive, aggressive act that triggered the claimed taking was firmly in place at that time—by 2006, when Billye West and West/Hobby received correspondence from the County, making reference to DHEC inquiries and requesting permission for the County to conduct testing on the West/Hobby property subject of this action, West and his LLC had notice of a potential problem or threat to the West/Hobby property. *See*, Plaintiff's Exhibits 5 and 8. West testified that, while he "presumed" that the B.P. Barber Off-Site Investigation Report from April, 2006, indicating a methane presence on the West/Hobby property, was public record and available at Newberry County or DHEC, he could probably not have found the information contained in document because of "[I]ack of interest." R. p. 116, line 10 to p.

117, line 2. He further admitted that, if the B.P. Barber document was at Newberry County, he could have read it back in April, 2006. *Id.*, p. 117, line 19 to p. 118, line 2.

Billye West and West/Hobby had the opportunity in 2006, after being asked not one time, but *two times* by the County to conduct testing on the 40.7 acre tract—to exercise reasonable diligence where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of theirs had been invaded or that some claim against another party might exist; but West and his LLC failed both times. It was not until West and his LLC sought advice of counsel and found an attorney who developed a fully-blown theory of recovery that West and his LLC acted. That was too late. *Cf., Wiggins v. Edwards*, 314 S.C. 126, ___, 442 S.E.2d 169, 170 (1994)(exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; the statute of limitations begins to run from this point, and not when advice of counsel is sought or a fully-blown theory of recovery is developed).

Although West/Hobby argues that “the County chose to conceal that information,” Respondent’s Brief, p. 11, there is no evidence supporting that claim, and the B.P. Barber report was public record. R. p. 116, line 10 to p. 117, line 2. Had Mr. West possessed sufficient interest in the matter and exercised the due diligence reasonably required of him, he could have read the B.P. Barber report back in April, 2006. *Id.*, p. 117, line 19 to p. 118, line 2.

Notwithstanding the West/Hobby argument in its Brief, the Trial Court erred in ruling that the statute of limitations did not bar the West/Hobby claim. For these reasons and the reasons argued in Newberry County's Brief of Appellant, the Order should be reversed.

II. —THE DOCTRINE OF ASSUMPTION OF THE RISK DOES APPLY TO WEST/HOBBY'S INVERSE CONDEMNATION CLAIM, AS EVIDENCE INDICATED THAT BILLYE WEST AND WEST/HOBBY PURCHASED THE PROPERTY KNOWING IT WAS LOCATED ADJACENT TO A CLOSED MUNICIPAL SOLID WASTE LANDFILL, YET MADE THE PURCHASE WITHOUT FIRST GETTING AN ENVIRONMENTAL SITE ASSESSMENT, THEREBY ASSUMING THE RISK THAT THE PROPERTY MAY BE CONTAMINATED THEN OR IN THE FUTURE.

West/Hobby argues that the doctrine of assumption of the risk does not apply to inverse condemnation cases despite there being no case-law expressly stating the defense is not applicable to inverse condemnation, and despite *Cutchin v. South Carolina Department of Highways and Public Transportation*, 301 S.C. 35, 38-39, 389 S.E.2d 646, 648 (1990), citing with approval *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958) for the proposition that the defense of assumption of the risk is established when the plaintiff freely and voluntarily enters into a known danger and is subsequently injured. The Court in *Cutchin* held that there was no evidence supporting the defense that the Plaintiffs, claiming a taking by virtue of flooding, had knowingly purchased their home in a flood plain, but in even discussing and considering the substance of the defense, the Court implicitly accepted its applicability.

As argued in the County's Appellant's Brief, at the time West purchased the property, he knew the tract was across the road from a closed landfill. R. p. 101, lines 7-17, p. 101, line 24 to p. 102, line 2. West testified that he was "very large in property in Newberry County," invested regularly in properties, and had been investing in real estate since 1988, in addition to running a successful electrical contracting business. *Id.*, p. 88,

lines 12-20. West testified that his plan in purchasing the 40.7 acres was to sell it and make something more than the purchase price, for it to be a future industrial site, and that he planned on making a sound business decision in buying the property. *Id.*, p. 102, lines 11-22.

West further testified that, despite his understanding of the concept of exercising due diligence in adequately investigating property prior to purchasing it, the only due diligence he exercised prior to purchasing the tract was relying on his own prior knowledge of how the adjoining property had been used as a landfill. *Id.*, p. 102, line 23 to p. 103, line 4, lines 16-20. West further testified that he thought he knew what he was purchasing when he bought the property in 2000, but then admitted that he did not know that the adjoining property, which had been a landfill, had a clay cap installed, and that the clay cap might cause landfill gases to migrate horizontally. *Id.*, p. 103, lines 8-15. He testified that he never considered getting a Phase I environmental site assessment on the tract before the purchase, although he had gotten “several” on “different types of property ... not farmland.” *Id.*, p. 104, lines 10-17. He testified that he and Hobby did not get an environmental site assessment on the property, but apparently sufficiently appreciated the risks inherent in purchasing land adjacent to a closed landfill because he testified that he felt comfortable that the State and the County were monitoring the landfill. *Id.*, p. 104, line 25 to p. 105, line 4. *See also, id.*, p. 127, lines 13-24, p. 128, line 14 to p. 129, line 4 (West responding to questions from the Court indicating that prior to the purchase he knew the State or the County were monitoring the landfill, and responding to re-cross examination that he made one call to SCDHEC, did not get a response, and never called again).

Despite his claimed comfort level due to his knowledge that the State and County were monitoring the landfill adjacent to the property he was about the purchase, West testified he never checked with the County for any records relating to the closed landfill before purchasing the tract, never checked with the State beyond one phone call that he never followed up on, and conceded that, had he hired a company like S&ME, which Kiswire had hired for a Phase I, or like Terracon, which West/Hobby had hired as experts in prosecuting this lawsuit, he would have known back before he bought the property exactly what he knew at trial about clay caps and what problems he now was claiming with the 40.7 acre tract that he and his LLC attributed to the closed landfill. *Id.*, p. 104, line 22 to p. 106, line 7.

Billye West's own testimony at trial established his assumption of the risk in that he 1) knew of the danger—the adjoining property being a closed landfill—2) appreciated the risk—in that he assumed the County and State would be monitoring the landfill—and 3) acquiesced therein, in that he not only did not check with the County and State with regard to the monitoring, but chose to forgo a Phase I Environmental Site Assessment prior to purchase, even though he testified that he had gotten several on different types of property. *Cf., Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 78, 508 S.E.2d 565, 569 (1998) (“[assumption of the risk] *applies to any case* ... where the facts proved show that the person against whom the doctrine of assumption of the risk is pleaded knew of the danger, appreciated it, and acquiesced therein.”[emphasis added]). *See also, Hoeffner v. The Citadel*, 311 S.C. 361, 367, 429 S.E.2d 190, 193 (1993)(The Plaintiff's conduct may imply assumption of the risk where it is shown that he understood

and appreciated a known danger created by the Defendant, and then freely and voluntarily exposed himself to it.).

As argued in the County's Appellant's Brief, Billye West was an astute business owner and owner of numerous tracts of commercial property, and he purchased this particular 40.7 acre tract as commercial property to develop or resell. He knew of the potential environmental risks inherent in purchasing the property without exercising due diligence, and now through his LLC, West/Hobby, he seeks redress for the very injury that he and his LLC could have averted had they not assumed that risk in forgoing the due diligence appropriate for purchasing land adjacent to a closed municipal solid waste landfill.

The Trial Judge erred in not ruling that West and his LLC, West/Hobby, assumed the risk, and that the West/Hobby claim should be barred. The lower court Order should be reversed.

III. THE WEST/HOBBY RELIANCE ON *WRB, LTD. PARTNERSHIP V. COUNTY OF LEXINGTON* FOR THE PROPOSITION THAT THE PLACING OF THE CLAY CAP AMOUNTED TO THE POSITIVE, AFFIRMATIVE, AGGRESSIVE ACT SUPPORTING ITS CLAIM IS MISPLACED, AND THE GRAVAMEN OF WEST/HOBBY'S CLAIM WAS ACTUALLY BASED UPON A PERCEIVED FAILURE BY NEWBERRY COUNTY TO TIMELY IMPLEMENT AN ACTIVE REMEDIATION PLAN.

West/Hobby argues in its Brief that the *WRB Ltd. P'ship v. Cty. of Lexington* establishes that the placing of a clay cap on a municipal solid waste landfill establishes the requisite positive, affirmative, aggressive act to establish its taking. Respondent's Brief, pp. 20-25. That reliance is misplaced, and attempts to shift the focus of the real gravamen of West/Hobby's claim from what it really was at trial—that Newberry County had failed to timely implement its active remediation system.

West/Hobby lauds *WRB Ltd.* as being “a case remarkably like the case at bar.” *Id.*, p. 20. That is a gross over simplification, as, while the opinion does involve an inverse condemnation suit by a property owner over a clay cap installed on a landfill, it is a page and a half in length, was a reversal of a summary judgment, did not go to trial, and has little in the way of facts set out. *See generally, WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 630 S.E.2d 479 (2006). The Court stated that, “[w]hether this action resulted in a taking is not before us. We simply find on the single element of an affirmative, aggressive, positive act that County's action meets this requirement and summary judgment should not have been granted.” *Id.* at ____, 630 S.E.2d at 481.

As was argued in the Appellant's Brief, evidence at trial established that the clay cap West/Hobby alleged was the affirmative, positive, aggressive act that amounted to a taking of its property was installed in 1994 pursuant to SCDHEC requirements, and that no methane gas was detected at the landfill boundaries until December, 2003, more than nine years after the installation. *Cf.*, R. p. 215, lines 10-18 (clay cap required by DHEC for closure of a landfill in mid-1990's); *id.*, p. 170, lines 9-17; p. 171, lines 10-12; Plaintiff's Exhibit 4, R. p. 313 (methane gas detected for the first time at the property boundaries of the landfill in December, 2003). West/Hobby's expert witness, Chuck Clymer, testified at length to the corrective measures recommended by B.P. Barber and the passive measures the County implemented in response to the December, 2003 methane detection, R. p. 172, line 6 to p. 175, line 7, and opined that "the most effective is an active system." *Id.*, p. 175, lines 8-11. The expert then testified to his understanding, with some apparent confusion, of the County's perceived failure to install geoprobes on the West/Hobby property, *id.*, p. 181, line 12 to p. 182, line 10, to how ineffective the interceptor trench was in eradicating the methane, *id.*, p. 182, line 11 to p. 183, line 8, and to the County only apparently installing 6 passive gas vents after getting DHEC approval for installation of 32. *Id.*, p. 183, lines 10-20, p. 184, line 19 to p. 185, line 5. All of those deficiencies Clymer testified to involved the *perceived failure* of the County to do something, to adequately or effectively implement a system to combat the methane, or to implement a sufficient number of authorized gas vents.

Near the conclusion of his direct examination at trial, Clymer agreed with the leading question asked by West/Hobby's attorney that, since December, 2003, Newberry

County had been struggling with a methane gas or landfill gas problem with its landfill. R. p. 201, lines 17-21. He further testified that, while he thought that Newberry County had complied with all of DHEC's requirements concerning methane gas at its property boundaries "in a minimal sense," that the County had finally "got to the point now in 2015 where *they have an active system.*" *Id.*, p. 203, lines 13-20 (emphasis added). Clymer then rendered his opinion that, had Newberry County installed an active system to deal with the landfill gas in 2006, the West/Hobby property would not have been contaminated with landfill gas in 2011, qualifying his answer with the caveat that he couldn't "say without a shadow of a doubt" there would be nothing on the West/Hobby property, but that concentrations at the property boundary would have been reduced, "there would be no more coming across the property," and "the concentrations might be lower than action levels," concluding that "there wouldn't be a continuing source of material." *Id.*, p. 203, line 21 to p. 204, line 15. Again, Clymer was testifying that the County's *perceived failure* to implement the active system sooner resulted in the methane, and had the County sooner implemented the active system, perhaps the methane would not have been present. That testimony had nothing to do with the clay cap; it was an indictment of the County not installing the active system until May, 2015.

After having solicited that opinion from his expert—that, had Newberry County implemented its active system earlier in the process, the methane gas problem could have been averted—Counsel for West/Hobby then, "to sum up," recounted with his expert witness a litany of *perceived failures* by the County: the passive and alleged ineffectual failures of Newberry County to combat the landfill emanations: first detection of methane

in December, 2003, the B.P. Barber methane remediation plan proposal from 2005, the off-site testing in 2006, the passive gas-vent system, the trench, and the 2010 six passive methane-vent system, after all of which methane was still detected by the S&ME Limited Soil-Gas Assessment. *Id.*, p. 204, line 16 to p. 206, line 7. Counsel for West/Hobby then concluded that, “only after they installed the active remediation system five years later in May of 2015, did the gas levels come down; is that right?” *Id.*, p. 206, lines 8-10. West/Hobby’s expert agreed, with the exception of one monitoring point.

In the wrap up of West/Hobby’s presentation of its case, neither West/Hobby’s attorney nor the expert witness mentioned the clay cap installed pursuant to SCDHEC requirements in 1994, nine years before the first whiff of methane gas was detected. Instead, they focused on and attributed the continuing methane gas problem allegedly impacting the West/Hobby property to the County’s failure to implement an active remediation system sooner.

West/Hobby had forecast its intended focus of its case on the perceived failures of the County in the opening statement, stating that “[o]ur problem and our concern and the evidence will show is that they have known -- the county has known since 2004 that there was landfill gas in excess of the lower explosive limits at their property boundaries. They were given a plan. They eventually implemented the plan, but they were very slow to react. That is what we think our evidence will show.” R. p. 86, lines 19-25. That is the evidence that West/Hobby offered at trial to support its inverse condemnation claim, and that is what the Trial Court relied upon in determining that there was a taking—that the clay cap was installed six years before Billye West purchased his property and nine years

before any methane was detected at the landfill boundaries, and that the methane and landfill gas migration could have been averted by, and was the product of, the failure of the County to implement the active remediation system sooner than it did.

To establish an inverse condemnation, a Plaintiff must show 1) an affirmative, positive, aggressive act on the part of the governmental entity, 2) a taking, and 3) the taking is for public use. *See, e.g., Byrd v. City of Hartsville*, 365 S.C. 650, ___, 620 S.E.2d 76, 79 (2005). South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proven by affirmative, positive, aggressive acts by the governmental entity. *Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (2004). Allegation and proof of mere failure to act are insufficient. *Id.*, citing *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) and *Gray v. South Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App.1993).

Proof of the County's failure to act soon enough is insufficient to prove the affirmative, positive, aggressive act required to establish a taking, and it was error for the Trial Court to so rule. The lower court Order finding a taking should be reversed.

CONCLUSION.

For the foregoing arguments and arguments made in the Appellant's Brief, the Trial Court committed errors of law in misapplying the evidence at trial to the existing law, and the lower Court ruling finding a taking should be reversed.

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CERTIFICATE OF COUNSEL

I hereby certify that this Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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