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 LUCILLE H. RAY'S PETITION FOR REHEARING

Dated: September 26, 2019

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INTRODUCTION

Appellant Lucille H. Ray ("Ray" or "Appellant") respectfully petitions the Court of Appeals for a rehearing from its Opinion filed in this matter on September 11, 2019 (Opinion Number 5684), pursuant to Rule 221 of the South Carolina Appellate Rules. In that Opinion, this Court reversed the lower court's grant of summary judgment as to Appellant's inverse condemnation claim. This Petition is not addressed to that portion of the Court's decision. It also affirmed, however, the lower court's exclusion of witness testimony regarding abatability and its grant of a directed verdict as to Appellant's claim for trespass. Although this Court agreed with Appellant that the lower court erred in granting summary judgment on Appellant's claim for injunctive relief in favor of Respondent City of Rock Hill ("City" or "Appellee"), this issue was mooted by the Court's holding on the trespass claim. Appellant submits that this was in error.

ARGUMENTS

Respectfully, this Court's opinion is based on an inaccurate assessment of the testimony of Appellant's expert, Michael H. Leonard ("Leonard"). It is also based on incorrect view of Appellant's burden to produce evidence regarding the reasonableness of the steps that would need to be taken in order to abate a continuing trespass under South Carolina law. This case should be remanded for trial not only on the claim for inverse condemnation, but also on the claims for trespass and injunctive relief.

The Court's Opinion states twice that "Leonard further testified that to render a qualified opinion on the abatability of the flow of water to and through the pipe would require a thorough engineering study." Appellant can find no such testimony in the Record. In the Record citations relied upon by Appellee at R. pp. 779-783, Leonard does not give any opinion about what it

would take to meet the legal showing necessary to establish abatability. He testifies frankly to the fact that he cannot offer testimony as to precisely how the stormwater would be rerouted, or how much it would cost, but this is not the same thing as stating that he was not qualified to offer any testimony as to whether the legal standards of abatability had been met. The issue of abatability is a question of law. The questions regarding Leonard's qualifications or the persuasiveness of his testimony do not justify its exclusion at trial, but instead go merely to the weight of his testimony. See Madden v. Cox, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (S.C. Ct. App. 1985) ("This Court cannot judge the credibility or weight of the testimony on appeal.").

Appellant offered sufficient evidence of abatability to allow her case to go forward on the trespass and injunction claims. Leonard testified that, based on his experience in stormwater design and installing storm drainage systems, the City could change the direction of a specific pipe to alter the flow of stormwater away from Ray's property. (R. p. 673, lines 1-23; R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶7). The City itself appears to have considered that very same plan, as evidenced by a map depicting a rerouted stormwater system which further supports Leonard's testimony that abating the flow water by reduction was achievable. (R. p. 673, line 24-p. 674, line 8; R. p. 300). Leonard's testimony is grounded in his professional experience designing and installing stormwater systems, and is therefore reliable. (R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶7). Leonard also testified that he believed rerouting the water "can be done" and that there "is a solution," based on his "[s]ite observations and general practice" and "a study that did that exact thing" which was produced by the City. (R. p. 783, lines 12-24). Accordingly Leonard was "reasonably certain that it can be rerouted." (R. p. 781, lines 22-p. 782, line 3). The City had the opportunity to reroute in November 2012, but chose to reconnect to the disputed pipe despite being told not to. (R. pp. 803-804, ¶¶10, 13) This evidence clearly satisfies the concerns of the

Court of Appeals in Glenn v. Sch. Dist. No. 5 of Anderson Cty., 294 S.C. 530, 536, 366 S.E.2d 47, 50 (S.C. Ct. App. 1988), where the Court held that testimony to the effect that the school could "quit putting water in that ditch," without more, was not sufficient evidence that stormwater runoff through the drainage system could be abated.

The Court's Opinion appears to be based on the City's characterization of Plaintiff's evidence in its brief, rather than the actual evidence in the Record on Appeal. This was in error. At trial, the City would be able to present evidence regarding the feasibility of the cost or construction logistics of redesigning a portion of the stormwater system. Those arguments do not defeat Leonard's testimony showing that it was absolutely possible for the City to abate its trespass, much less necessitate the exclusion of Leonard's testimony. This Court's opinion improperly conflates the issues of reasonableness and abatability and was in error in so doing.

CONCLUSION

For the foregoing reasons, Appellant Lucille Ray respectfully requests that the Court of Appeals grant a rehearing on the issues as set forth herein.

Dated: September 26, 2019
Charlotte, North Carolina

JAMES, McELROY & DIEHL, P.A.

By: _____

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PROOF OF SERVICE

I certify that I have this day served Appellant Lucy H. Ray's Petition for Rehearing by hand delivery, on September 26, 2019, addressed to its attorney of record, W. Mark White, Spencer & Spencer, P.A., 226 East Main Street, Suite 200, Rock Hill, SC 29731.

Dated: September 26, 2019

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September 26, 2019

VIA HAND DELIVERY
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Lucille Ray v. City of Rock Hill
Appellate Case No. 2016-002118

Dear Clerk:

Enclosed is an original and six copies of Appellant Lucille H. Ray's Petition for Rehearing and our firm's check in the amount of $50 representing the filing fee. Please file the Petition and return filed copies to me

Sincerely,

Sabrina Williams

Sabrina Y. Williams
Paralegal to Richard B. Fennell

Enclosures

cc: Mark White