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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

Appellate 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,
Of which City of Rock Hill is Respondent.

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SC Court of Appeals

PETITION FOR REHEARING

Respondent City of Rock Hill ("City") by and through its undersigned counsel, hereby submits this Petition for Rehearing pursuant to Rules 221(a) and 240, SCACR, respectfully requesting that the Court rehear and reconsider the portion of its Opinion No. 5684 filed September 11, 2019 (the "Opinion") reversing the lower court's grant of summary judgment as to Plaintiff's claim for inverse condemnation.

I. Brief Statement of Pertinent Facts

Plaintiff's claims in this action relate to a 24-inch storm water pipe located on her property at 330 College Avenue ("Property"). It is not disputed that this 24-inch pipe is made of terra cotta and begins at a junction box¹ near the Property's border with College Avenue and extends to a manhole behind the back of the structure constructed on the Property (the "Ray Pipe"). The Property and the Ray Pipe are located at the topographical low point of a watershed comprising approximately 29 acres. The Ray Pipe was installed on the Property at some point prior to the construction of a dwelling on the Property in the 1920's.

The record in this case contains no evidence that the City installed the Ray Pipe on the Property or that the City was involved in the development of the Property. The record contains no evidence that the City made any improvements in College Avenue or otherwise upstream from the Property to increase the volume or rate of flow of water traveling to the Property.

II. Statement of Purpose

In the Opinion, the Court reversed the lower court's grant of summary judgment as to Plaintiff's claim for inverse condemnation finding a "genuine issue of material fact exists as to whether the City engaged in an affirmative, positive, and aggressive act in

¹ This junction box is located entirely within College Avenue.

reconnecting City pipes to the Ray Pipe after the City admitted it did not have an easement and [Plaintiff] told the City not to reconnect." In relation to this finding the Court further found that "questions of fact exist as to which pipes were damaged and in need of repair." The City respectfully submits that the Court has overlooked and misapprehended material facts and law and that the lower court's ruling should have been affirmed.

III. Arguments

A.

In the Opinion, the Court found that "a genuine issue of material fact exists as to whether the City engaged in an affirmative, positive, and aggressive act *in reconnecting City pipes to the Pipe....*" (Opinion, p. 6 (emphasis added).)

The record contains no evidence that the City reconnected a City pipe to the Ray Pipe. In fact, there is no evidence in the record that a City pipe has ever been connected to the Ray Pipe. Rather, the Ray Pipe begins at a City junction box located in College Avenue ("Junction Box"). (Ray Dep., R.p. 692, line 9 - R.p. 693, line 5; Ray Dep., R.p. 715, lines 10-15; Plaintiff's Memorandum, R.p. 71.) This fact is noted in the statement of facts in the Opinion: "The [Ray] Pipe begins at a City maintained catch basin on College Avenue in front of the Property." (Opinion, p. 2 (emphasis added).)

As for City pipes, the record reveals in November 2012 that

the City had routine maintenance work performed on sanitary sewer lines located under College Avenue ("Sanitary Sewer Project"); that three City-owned pipes were temporarily severed to provide access to sanitary sewer lines underneath; and that the three pipes were repaired and restored as a part of the Sanitary Sewer Project. The record reveals that these severed City pipes were located entirely within College Avenue and on the other side of the Junction Box from the Ray Pipe. Thus, there is no evidence that the City ever reconnected any City pipe to the Ray Pipe or even that the City reconnected any City pipe to the Junction Box.

As to Plaintiff's claim for inverse condemnation, the following facts are material: water has been flowing from higher ground toward the Property and specifically through the Ray Pipe for over 90 years; there is no evidence that the City was involved in construction of the Ray Pipe or the construction of a residence over the Ray Pipe; in November 2012 three City-owned pipes were temporarily severed in College Avenue to provide access to sanitary sewer lines underneath as a part of the Sanitary Sewer Project; the three lines were repaired as a part of the Sanitary Sewer Project; all work relating to the Sanitary Sewer Project was performed within College Avenue; all work relating to the Sanitary Sewer Project involved, touched, and made contact with City infrastructure only; Plaintiff's property was not damaged in any way by the Sanitary Sewer Project (Ray Dep., R. p. 714-15); and

there is no evidence that the water flow through the Ray Pipe after the conclusion of the Sanitary Sewer Project was any different in volume or rate of flow than before the commencement of the Sanitary Sewer Project.²

As noted below, maintenance work on the City's infrastructure within the City's property that did not damage or make contact with any of Plaintiff's property and did not change the before and after condition of storm water flow through a pipe that the City did not construct and for which the City is not otherwise responsible cannot provide the factual predicate for an affirmative, positive, and aggressive act for an inverse condemnation claim as a matter of law.

B.

In the Opinion, the Court found that "a genuine issue of material fact exists as to whether the City engaged in an affirmative, positive, and aggressive act in reconnecting City pipes to the Pipe...." (Opinion, p. 6 (emphasis added).) "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.

² Plaintiff's expert witness testified expressly that he performed no hydrology studies. (Leonard Dep., R.pp. 62-64.)

App. 2004). Because Plaintiff has produced no facts to show the City installed the Ray Pipe and any resulting claim would be barred by the statute of limitations anyway, the only specific act claimed by Plaintiff is the City's 2012 severance and repair of three pipes as a part of the Sanitary Sewer Project. This argument fails for numerous reasons.

1.

The Dissent correctly concludes that the temporary severance of City pipes during the Sanitary Sewer Project is "not the basis for a claim for inverse condemnation," and that Plaintiff "has failed to allege an affirmative, positive, aggressive act on the City's part and Hawkins is controlling."

In Hawkins, the plaintiff identified significantly greater and more substantial acts by the City of Greenville in support of his claim for inverse condemnation than Plaintiff identifies in this case. Hawkins identified two specific affirmative acts (in addition to multiple failures to act) by the City of Greenville relating to storm water drainage of a creek allegedly resulting in or contributing to the flooding of his property. Hawkins identified the following: (1) the City of Greenville's replacement of a double-box culvert with a large arched pipe and (2) the City of Greenville's installation of riprap along the banks of the creek. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. This Court ruled that both arguments failed as a matter of law.

In Hawkins, this Court noted that the record failed to contain any evidence that either the replacement of the double-boxed culvert with a large arched pipe or the installation of riprap affected drainage across Hawkins' property, negatively or positively. This Court then held as follows: "Based on the lack of any evidence showing an affirmative, positive, aggressive act on the part of the City which would tend to prove the City's actions caused or precipitated the flooding of [the plaintiff's] property, we are compelled to affirm the trial court's grant of summary judgment on Hawkins' inverse condemnation claim." Hawkins v. City of Greenville, 358 S.C. at 291-92, 594 S.E.2d at 563. In Hawkins, this Court analyzed Greenville's completed work projects to determine if any evidence existed to show that the completed work projects had a negative effect on drainage. Finding no evidence, this Court ruled there was no affirmative, positive aggressive act and no inverse condemnation.

The record in this case squares directly with the record in Hawkins. Looking at the facts in a light most favorable to Plaintiff, the record in this case contains no evidence that the completion of the Sanitary Sewer Project resulted in damage to her Property³ or had any negative impact on storm water drainage to the Ray Pipe. The record contains no evidence that the flow rate or

³ Plaintiff testified that the work performed in College Avenue during the Sanitary Sewer Project did not cause damage to her Property. (Ray Dep., R.p. 715, lines 1-15.)

volume of storm water flowing to and through the Ray Pipe after completion of the Sanitary Sewer Project is any different than before the Sanitary Sewer Project.

Whether a random, accidental or intentional temporary blockage or severance occurs during a city project is not a valid basis to distinguish Hawkins under constitutional takings law. Storm water had been flowing through the Ray Pipe for over 90 years prior to the commencement of the Sanitary Sewer Project. Under Hawkins, a temporary severance and restoration of a storm water line during construction or repair work without any evidence of a resulting change in volume or rates of flow from the previous 90 years cannot be construed as an affirmative, positive, aggressive act sufficient to sustain a claim for inverse condemnation as a matter of law.

The case law requires the state action be "affirmative, positive and aggressive." The interjection of the Opinion into precedent will open a new flood gate of claims of inverse condemnation whenever any condition arises that allegedly could have interrupted the flow of storm water, however brief or temporary, including any of the following common occurrences: road repairs or road widening projects that include the relocation of existing storm water pipes; blockage of water flow through storm water pipes caused by infiltration of debris or other matter; damage to storm water pipes caused by natural events or conditions or acts of third-parties; or blockage or failure of storm water

pipes resulting from aging, faulty workmanship or defective materials.

2.

The record contains no evidence of any damage resulting from the alleged affirmative act identified by Plaintiff. In Hawkins, this Court determined that in order to satisfy the affirmative act requirement of an inverse condemnation claim, a property owner must not only identify a specific affirmative, aggressive act by a governmental entity, the property owner must also show that the specific act resulted in the damages claimed by a plaintiff.

In this case the record contains no evidence that severance or repair of lines during the Sanitary Sewer project resulted in any damages to Plaintiff. All damages claimed by Plaintiff in this action resulted from storm water (allegedly) leaking from the Ray Pipe over many decades. The actions undertaken in the Sanitary Sewer Project are not the cause of any of Plaintiff's claimed damages. The temporary severance of three City pipes in a City street did not cause water to flow through the Ray Pipe for decades or cause water (if any) to leak from the Ray Pipe and damage the residence. Rather, these damages, if any, are the result of the election of some person or entity to install the Ray Pipe in the 1920s. As noted, the record contains no evidence to impose liability on the City for either installation or maintenance of the Ray Pipe. Thus, the Court should sustain the lower court because

Plaintiff failed to produce evidence at summary judgment to support the necessary component (damages resulting from the specific affirmative, aggressive act) of an inverse condemnation.

3.

"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 563 (emphasis added). Plaintiff hinges her inverse condemnation claim on the City's failure to heed her demand not to complete the Sanitary Sewer Project and reconnect the City pipes within College Avenue.

Plaintiff attempts to characterize the City's failure to comply as an affirmative, positive, aggressive act against the Property. However, Plaintiff's position is erroneous because her demand did not involve simply whether to fix three severed pipes. Her demand necessarily would have required the City to act to reroute storm water around the Ray Pipe, as the City could not leave the pipes severed and blithely walk away.

The Property and Ray Pipe are located at the topographical low point of the drainage watershed. The permanent severance of a storm water pipe above the Property and Ray Pipe would not alter the topography of the watershed or the fundamental physics of water flowing downhill. The storm water which had previously flowed

through the constraints of pipes would not simply vanish, but would then flow unrestrained along the path of least resistance, toward the Junction Box, Ray Pipe and the Property, potentially causing erosion, damage and unsafe conditions along the way.

Thus, Plaintiff's demand required more than the City leave the pipes severed; Plaintiff's demand required the City to reroute all storm water away from the path it has taken for over 90 years. Considering these factors and circumstances, Plaintiff was demanding that the City study, design and construct an alternative route for storm water thereby bypassing the Ray Pipe. As noted in the Opinion, Plaintiff's expert testified that in order to determine *whether* water can be rerouted around the Ray Pipe would require a thorough engineering study, a hydrology study, analysis of the potential location of an alternative drainage line, analysis of existing conflicts within College Avenue, and an analysis of the topography of the watershed within which the Property is located. (Opinion, pp. 8-9.) These are the actions required simply to make a determination of *whether* a reroute is possible.

Therefore, Plaintiff's demand required the City to take action to reroute the 90-year course of storm water in this basin. The City's failure to act cannot serve as the affirmative, positive, aggressive act to support a claim for inverse condemnation.

4.

The Court should sustain the lower court as to the inverse

condemnation claim because the record contains no evidence of a taking by the City of any property of Plaintiff and any taking would be barred by the statute of limitations. Accordingly, Plaintiff's claim fails the second element of the Hawkins test. As noted in the Opinion, the record lacks any evidence that the City installed the Ray Pipe or constructed the residence on top of the Ray Pipe. Even if Plaintiff could show that the City installed the Ray Pipe without an easement, Plaintiff's claim for inverse condemnation against the City would be barred by the statute of limitations because the trigger date occurred no later than 2008 per the lower court's order but, as a matter of law, the trigger date occurred much earlier through the actual knowledge of a predecessor-in-title as shown by the tap into the Ray Pipe. See Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 183, 427 S.E.2d 920, 923 (Ct. App. 1993).

The temporary severance of and subsequent repair to any City pipe does not create a constitutional taking. There is no precedent holding that a constitutional taking claim arises simply by virtue of a brief disruption of storm water flow. Storm water has drained through the Ray Pipe ever since the Ray Pipe was installed on the Property by someone other than the City in the 1920's or prior. Stated differently, storm water draining through the Ray Pipe has been the permanent condition on the Property since someone voluntarily chose to artificially channel surface water

through the Ray Pipe.

If an upstream pipe is hypothetically severed briefly disrupting the normal flow of surface water a constitutional taking does not occur merely by the City performing repairs, just as the City could not be liable in inverse condemnation, if the City were to dislodge a beach ball or some other object disrupting flow through one of its storm water pipes. In these examples the permanent condition is the flow of storm water and the disruption itself is the abnormal condition.

WHEREFORE, the undersigned counsel for Respondent respectfully requests this Court grant this Petition and affirm the lower court's grant of summary judgment in favor of the City as to Plaintiff's claim for inverse condemnation.

Respectfully submitted,

September 26, 2019

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City of Rock Hill, South Carolina,
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Of which City of Rock Hill is Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on September 26, 2019, addressed to counsel for Appellant as follows:

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


Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the City of Rock Hill's Petition for Rehearing and Proof of Service in the above referenced matter. Please file the originals with the records of your court and return a clocked copy in the enclosed envelope.

Thank you for your assistance in this matter.

Sincerely,

Spencer & Spencer, P.A.



Jeremy D. Melville

cc: Rich Fennell