

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
RETURN TO RESPONDENT'S PETITION FOR REHEARING

Appellant Lucille H. Ray ("Ms. Ray") submits the following Return to Respondent City
of Rock Hill's (the "City") Petition for Rehearing.

ARGUMENT

The law with respect to such petitions is set out most clearly in Herron v. Century BMW,
395 S.C. 461, 719 S.E.2d 640 (2011), and Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d
322 (2001). Essentially, "[t]he purpose of a petition for rehearing is not to present points which
lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the
petition for rehearing to have the case tried in the appellate court a second time." Kennedy, 349
S.C. at 532, 564 S.E.2d at 322. In petitioning for rehearing, the City's arguments remain the

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same ones they have raised throughout this case. The City presents no justification for hearing them again. Its petition should be denied.

Ms. Ray will attempt to deal with each of Petitioner's arguments in order.

The City's primary arguments are based on a characterization of the record which, respectfully, ignore its contents. This is most prevalent in the City's repeated statements about the 2012 pipe repairs that are fundamental to the Court's opinion 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). The Petition includes a description by the City's counsel of the repairs to various pipes, (Petition, pp. 4-5), but without any record citation or references to the portion of the record the City believes were ignored. "Arguments made by counsel are not evidence." South Carolina Dept. of Transp. V. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (2003). The actual deposition and affidavit testimony in the record at describing what happened clearly state that three pipes were disconnected, and then reconnected, to the Pipe running beneath Ms. Ray's house. (R. pp. 692-700, 715-717, 840-842). The City may believe that testimony to be incorrect, but that does not establish its entitlement to summary judgment, or the need to rehear these issues. The City makes much of the fact that the pipes were connected through a catch basin on College Avenue (although there is nothing in the record to support the uncited assurance that the catch basin is located entirely within College Avenue). This does not change the fundamental truth that the City reconnected its stormwater system to the Pipe running beneath Ms. Ray's house.

Mr. Leonard's testimony in his Affidavit is the most clear:

10. The pipe is old, and is made out of Terra Cotta. It is about twenty four inches (24") in diameter. A number of videos have been taken of the pipe, and reveal significant problems with it.

11. I tried to get records for the stormwater system, but was unable to, at least initially. I was eventually provided with a Rock Hill City Stormwater map which has turned out to be incorrect. This is attached to my affidavit as Exhibit 2.

12. I learned a lot about the physical condition of the pipe at issue in late 2012. The City was doing some work on the sanitary sewer system on College Avenue. In the process, several sections of pipe were disconnected from the pipe section running under Ms. Ray's house.

13. The catch basin on College is part of an upstream network that serves a watershed area of twenty-nine (29) acres.

14. When the street was excavated for sanitary sewer work, we found the storm water pipes I have described to be old and badly deteriorated. They indeed channeled water that had been collected from other locations through the pipe which runs under Ms. Ray's house. I generated a supplemental report during these repairs. It is attached to my affidavit as Exhibit 3.

15. The city was told by Ms. Ray not to reconnect those lines. It did so anyway.

(R p. 841, ¶¶ 10-15). Ms. Ray presented enough evidence to survive summary judgment, and this Court correctly so held.

The City's Petition also focuses substantially on its interpretation of Hawkins v. City of

Greenville, 358 S.C. 280, 594 S.E.2d 557 (2004). That case, and the City's view of it, has been argued at every step in the litigation process. It was briefed prior to the hearing in this Court. Both the majority and dissenting opinion discuss its applicability to these facts. (Opinion, pp. 5-6, 10). Nothing was missed below. The fact that there was a dissent does not indicate anything to the contrary. It merely reinforces the reality that this case has been dealt with.

The holding in Hawkins is simple: "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 Servicemaster property, we are compelled to affirm the trial court's grant of summary judgment on Hawkins' inverse condemnation claim." 358 S.C. at 291-292, 594 S.E.2d at 563.

The Court in Hawkins did not in fact "analyze[] Greenville's completed work projects to determine if any evidence existed to show that the completed work projects had a negative effect on drainage," as argued by the City. (Petition, p. 7). Instead, the Court was focused on evidence of the cause of a particular flood and pointed out that there was no evidence that Greenville had done anything which could be connected to it.¹ There is no requirement, in Hawkins or otherwise, to show as a matter of law, either in this case or more generally, that the City's actions increased the flow rate or negatively impacted storm water drainage. 358 S.C. at 291, 594 S.E.2d at 563. At the hearing, the City admitted, to its credit, that it was receiving a significant benefit from being able to use the Pipe beneath Ms. Ray's house to manage stormwater drainage from its streets. The City did so, and continues to do so, while denying that it holds any easement or right of way, or has any duty to compensate Ms. Ray for that benefit. Ms. Ray told

¹ The plaintiff in Hawkins had previously sued Greenville on a similar claim, and his own expert testified that the city's work had either improved drainage or had no impact on it. It is not new or unusual to suggest that that may be the basis for an inverse condemnation claim.

the City to stop when the pipes were disconnected, and the City ignored her. This Court held, correctly, that the jury should be able to determine whether that establishes a claim for inverse condemnation.

The parade of horrors identified by the City as potentially resulting from the Court's ruling does not change this simple analysis. This isn't a case of a road widening, a temporary severance of a pipe, or a beach ball clogging the pipe, and this case will not have any impact on any such litigation. As stated, the City refused Ms. Ray's demand that it stop using her property, despite the City's contention that gravity and history gave it the right to do so. It is difficult to imagine a more positive, aggressive act than an outright refusal to comply with such a demand from a landowner. Ms. Ray should be permitted to seek compensation for that.

Finally, the statute of limitations arguments are not new but have already been thoroughly briefed. There is no justification in the City's Petition to review those issues again. The City does present one new argument in its Petition relating to damages and the inverse condemnation claim. (Petition, p. 9). The City now contends that nothing in the record evidences that its severance or repair of pipes on College Avenue resulted in damages to Ms. Ray, but failed to raise that argument in its brief on appeal. Nor was the argument ruled upon by the Court in its Opinion. The argument should not be considered as the basis for a potential rehearing on any issue. See Herron v. Century BMW, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644 (2011) (holding that argument first raised in rehearing petition was not preserved because "Appellants failed to present the issue to us," and rejecting "Appellant's attempt to recast the issues that were presented to us"). To respond briefly, it is of course true that the City project itself did not damage Ms. Ray's house. The conduct complained of is not the repairs to the City's infrastructure. Rather, it is the City's act of reconnecting the pipes in its stormwater system to

the Pipe running beneath Ms. Ray's house, thus causing stormwater to continue to flow beneath her property and resulting in structural damage to her house. A jury should be permitted to determine whether Ms. Ray should be compensated for that act.

CONCLUSION

For the foregoing reasons, the City's Petition should be denied and the Court should issue its remittitur to the lower court permitting this case to proceed to trial.

Respectfully submitted,

Dated: October 17, 2019
Charlotte, North Carolina

JAMES, McELROY & DIEHL, P.A.

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PROOF OF SERVICE

I certify that I have this day served APPELLANT LUCILLE H. RAY'S RETURN TO
RESPONDENT'S PETITION FOR REHEARING by facsimile and by depositing a copy in the
U.S. Mail, postage prepaid, addressed to its attorney of record, W. Mark White, Spencer &
Spencer, P.A., 226 East Main Street, Suite 200, Rock Hill, SC 29731, Fax: (803) 327-3868.

Dated: October 17, 2019

Richard B. Fennell / JWH
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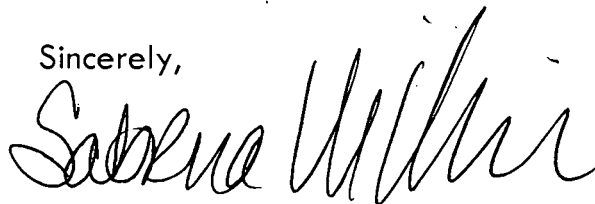
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

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

Dear Clerk:

Enclosed is an original and six copies of the Return to Petition for Rehearing.
Please file the Return and return filed copies to me

Sincerely,



Sabrina Y. Williams
Paralegal to Richard B. Fennell

Enclosures

cc: Mark White