

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

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Appellate Case No. 2016-002118

SC Court of Appeals

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.

RETURN TO APPELLANT'S
PETITION FOR REHEARING

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ATTORNEYS FOR RESPONDENT

TABLE OF AUTHORITIESCases

<u>Fields v. Reg'l Med. Ctr. Orangeburg,</u> 363 S.C. 19, 609 S.E.2d 506 (2005)	6,8
<u>Graves v. CAS Med. Sys., Inc.,</u> 401 S.C. 63, 735 S.E.2d 650 (2012)	5,6
<u>Kennedy v. S.C. Ret. Sys.,</u> 349 S.C. 531, 564 S.E.2d 322 (2001)	3,4
<u>Samples v. Mitchell,</u> 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)	8
<u>Watson v. Ford Motor Co.,</u> 389 S.C. 434, 699 S.E.2d 169 (2010)	5

Other Authorities

Rule 221(a), SCACR	3
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Respondent City of Rock Hill ("City") by and through its undersigned counsel, hereby submits this Return to Appellant's Petition for Rehearing ("Appellant's Petition") pursuant to Rules 221(a) and 240, SCACR, regarding the portion of this Court's Opinion No. 5684 filed September 11, 2019 (the "Opinion") affirming the lower court's exclusion of expert witness testimony and directed verdict in favor of the City.

In Appellant's Petition, Appellant seeks a rehearing regarding the Court's Opinion affirming the trial court's exclusion of certain opinion testimony offered by Appellant's expert, Michael H. Leonard ("Leonard"). As grounds for Appellant's Petition, Appellant argues that the Court's Opinion is based on an inaccurate assessment of Leonard's testimony and an incorrect view of Appellant's burden to produce evidence regarding the reasonableness of the steps necessary to abate a continuing trespass. Appellant's arguments are without merit.

I.

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); Rule 221(a), SCACR. "The 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." Id. at 532, 564 S.E.2d at 322 (internal citations omitted). The Court's Opinion affirming the trial court's exclusion of Leonard's testimony on the issue of abatability was correct.

II.

In the Opinion, this Court correctly concluded that Leonard was unable to testify to a reasonable degree of engineering certainty that the flow of water to the Subject Pipe could be rerouted. (Opinion, p. 9.) The applicable excerpts from the deposition of Leonard include the following:

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 is no, sir, but I have thought about it. (Leonard Dep., R.p. 780, lines 20-25.)

. . . .

Q. All right. So my question to you is [do] you believe you can testify to a reasonable degree of engineering certainty that this water could be reasonably routed around Ms. Ray's house based on what you know right now?

A. No, sir. I'm not testifying to that.

Q. So you would testify that based on what you know right now you could not testify, you don't have sufficient information to testify to an engineering certainty to what it would take to route the water around this house?

A. No, but I believe it can be done, and I believe there is a solution to it. (Leonard Dep., R.p. 783, lines 6-18.)

This testimony by Leonard is sufficient to deny Appellant's Petition.

Neither party to this appeal contests that any opinion on the issue of abatability must satisfy the 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). However, Leonard flatly admitted that he had not performed any engineering work to study the issue (Leonard Dep., R.p. 780, lines 20-25) and that he could not testify to a reasonable degree of engineering certainty that the water flow could be rerouted. (Leonard Dep., R.p. 783, lines 6-18.) For this reason alone the Court's Order affirming the exclusion of Leonard's testimony was proper.

II.

This Court properly affirmed the lower court's exclusion of Leonard's testimony because the lower court, in its capacity as gatekeeper of the admission of expert testimony, properly ruled that Leonard's testimony was not reliable. "The trial court serves as the gatekeeper in the admission of all evidence presented at trial. . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). "Qualification of an expert and the admission or exclusion of

his testimony is a matter within the sound discretion of the trial court. . . . [T]he trial court's decision will not be disturbed on appeal absent an abuse of discretion." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

The trial court excluded Leonard's opinion testimony regarding abatement of the City's alleged trespass on the grounds that Leonard's testimony was unreliable. (Order of September 13, 2016, R.p. 17.) The trial court's evidentiary ruling is well-supported by the record. As discussed above, Leonard testified that he was incapable of offering an opinion on the issue of abatability, either in his capacity as an engineer or to a reasonable degree of engineering certainty. Leonard's opinion was in fact nothing more than a mere belief. Further, the record readily reveals that Leonard's belief on the issue of abatability was not grounded on facts or data as required to establish any degree of reliability. See Graves, 401 S.C. at 74, 735 S.E.2d at 655 (setting forth the factors for assessing reliability of expert testimony).

Leonard testified that he had not done any study as to the cost of rerouting water flowing to the Subject Pipe. (Leonard Dep., R.p. 780, lines 5-11.) Leonard testified that he had not studied any specific alternative route for water flowing to the Subject Pipe. (Leonard Dep., R.p. 780, lines

12-19.) Leonard testified that he had not analyzed feasibility or cost of rerouting water flowing to the Subject Pipe. (Leonard Dep., R.p. 781, lines 1-5.) Leonard testified that he had not analyzed the system or conflicts in the area of the Subject Pipe, admitting that "all those things have to be studied." (Leonard Dep., R.p. 782, lines 2-8.) Leonard testified that he had not performed a hydrology study of the watershed area, had not calculated sources of water flows, and had not studied the magnitude or rates of water flow to the Subject Pipe. (Leonard Dep., R.p. 765, line 4 - R.p. 766, line 13.) Leonard testified that he had not studied water flow dynamics within the watershed area either upstream or downstream from the Subject Pipe. (Leonard Dep., R.p. 768, lines 2-9.)

The trial court's exclusion of Leonard's testimony was not an abuse of discretion, was not based on an error of law, and was supported by the facts in the record. This Court properly affirmed the trial court's exclusion of Leonard's testimony on the issue of abatability.

III.

Finally, as set forth in the City's Final Brief in this matter, Appellant failed to preserve the issues on appeal regarding the exclusion of Leonard's testimony and grant of directed verdict in favor of the City. The Court's ruling on

the inadmissibility of Leonard's testimony was a ruling on a motion *in limine* by the City regarding a narrow category of opinions sought to be offered by Leonard.

It is well-established that a ruling on a motion *in limine* relating to the exclusion of evidence is not a final determination by the trial court as required for preservation of issues on appeal. Samples v. Mitchell, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997). Further, "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant 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, 26, 609 S.E.2d 506, 509 (2005).

The trial court's ruling did not proscribe Appellant from seeking to offer Leonard's testimony on the issue of abatability during trial or from offering other evidence on the issue of abatability during trial. However, Appellant prematurely requested that the trial court grant a directed verdict in favor of the City. In doing so, Appellant waived the opportunity to offer evidence and preserve the issues identified in Appellant's Petition.

WHEREFORE, the undersigned counsel for Respondent respectfully requests this Court deny Appellant's Petition.

Respectfully submitted,

October 17, 2019

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PROOF OF SERVICE

I certify that I have served the foregoing Return to Appellant's Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on October 17, 2019, addressed to counsel for Appellant as follows:

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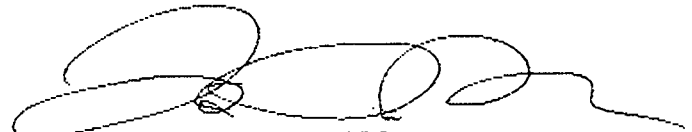
Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the City of Rock Hill's Return to Appellant'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