

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

RECEIVED

Appellate Case No. 2016-002118 **OCT 28 2019**

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.

REPLY TO APPELLANT'S RETURN
TO RESPONDENT'S
PETITION FOR REHEARING

W. Mark White
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ATTORNEYS FOR RESPONDENT

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

I.

The Appellant's Return interjects many erroneous and misleading declarations regarding the subject matter of Respondent's Petition. As identified in the Petition, one of the significant factual issues overlooked or misapprehended by this Court is the inaccurate identification of the purported City act forming the basis for the Court's inverse condemnation analysis. 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 [Ray] Pipe....*" (Opinion, p. 6) (emphasis added.) However, no pipe was disconnected and then reconnected to the Ray Pipe.

Appellant seeks to inject confusion with two inaccurate statements regarding the content of the record. First, Appellant claims that "[t]he actual deposition and affidavit

testimony in the record at [sic] describing what happened clearly state that three pipes were disconnected, and then reconnected, to the Pipe running beneath Ms. Ray's house." (Appellant Return, p, 2.) Perhaps Appellant failed to understand the factual error raised in the Petition or perhaps Appellant tactically wishes to gloss over the error via loose semantics. Three pipe segments were severed as a part of a sanitary sewer project and then repaired, but the work to repair them never touched the Ray Pipe. In fact, the record firmly establishes that a City junction box ("Junction Box") located in College Avenue, a City street, is located between the three severed/repared pipes and the Ray Pipe.

These facts are not mere arguments of counsel but are the facts established in the record, including by Appellant's testimony and the work of her geotechnical engineer, Edward S. Cummings ("Cummings"). (See Report of Cummings, R.pp. 904-905.) The easiest way to confirm the orientation and location of the relevant pipes is to examine the sketch created by Mr. Cummings as part of his report. (Cummings Drawing, R.p. 907.) This drawing accurately depicts the location of the Junction Box - between the pipes located in College Avenue and the Ray Pipe. Id. The drawing by Cummings further reveals that these are different pipes with differing diameters. (Id.) In addition to the facts set forth by Appellant's expert witness,

Ms. Ray testified that three pipes were severed, that these pipes were located under College Avenue, and these pipes were directed toward the City's Junction Box. (See Ray Dep., R.p. 692, lines 5-25, R.p. 693, lines 9-19, R.p. 694, line 5 - R.p. 696, line 21.)

Second, Appellant seeks to inject confusion by making the inaccurate and misleading claim that "there is nothing in the record to support the uncited assurance that the catch basin is located entirely within College Avenue." (Appellant Return, p. 2.) In the Order Granting Partial Summary Judgment the lower court found that "[t]he pipe begins at a City maintained catch basin on College Avenue directly in front of Ms. Ray's property." (Order dated August 4, 2014, R.p. 6.) The Record reveals a multitude of references to the Junction Box being located in College Avenue. (See Plaintiff Memorandum in Opposition, R.pp. 71, 74, 75; Plaintiff Motion to Reconsider, R.p. 108, ¶ 1; Leonard Report, August 8, 2012, R.pp. 277, 278, 283; Leonard Report, February 1, 2016, R.pp. 347, 348; Cummings Dep., R.p. 792, lines 16-18, R.p. 800, lines 15-18; Leonard Aff., May 30, 2014, R.p. 841, ¶ 13; Transcript of Hearing, R.p. 512, line 21 - R.p. 513, line 10; Ray Dep., R.p. 715, lines 10-15, R.p. 720, lines 3-8, R.p. 722, line 24 - R.p. 723, line 7.) None of the many references to the Junction Box states, hints or suggests that the

Junction Box, or any portion of the Junction Box, is located anywhere other than within College Avenue.

The core of Appellant's argument relies on vagueness in her wording to create a false impression that the City's actions repairing City pipes in a City street which does not change the 90-year pattern of storm water flow can somehow be an affirmative act against Appellant's property. Hence, Appellant deploys the inaccurate exaggeration that the three pipes were *reconnected* to the Ray Pipe when in reality the Ray Pipe's sole connection is to the Junction Box which has been untouched and unchanged. Significantly, in Appellant's view the distance from the Ray Pipe on her property and repairs in a city street is not material; her argument would be the same if the three pipes were severed and repaired within Strait Street or even farther away within Union Avenue. Regardless, the City's repair in a City street of three City pipes which do not touch any property of Appellant cannot form the basis for an affirmative aggressive act under Hawkins without evidence that the flow of storm water from the previous 90 years was adversely changed by the City's sanitary sewer project, which Appellant failed to do.

II.

Appellant incorrectly argues the law of easements and Appellant's power to grant or withhold permission are relevant

to the issue of whether the severance and repair of City pipes within a City street, with no change in the 90-year storm water flow, can constitute an affirmative act and serve as the sole cornerstone of an inverse condemnation claim.

In the Petition, the City discusses Hawkins and the necessary elements of an inverse condemnation claim, which refutes Appellant's claim. However, the legal absurdity of Appellant's argument as articulated in the Return is herein highlighted: Appellant's argument would have this Court hold the City liable in inverse condemnation following completion of the sanitary sewer project which upon completion merely continued, without change, storm water conditions and circumstances existing for over 90 years prior to the commencement of the sanitary sewer project, even though the City was not liable to Appellant in inverse condemnation for the pre-existing conditions and circumstances. The Court should reconsider its Decision to avoid this legal incongruence.

The fundamental problem with this finding is highlighted in Appellant's Return as follows: "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 storm water system to the Pipe

running beneath Ms. Ray's house." (Appellant's Return, p. 6.) Appellant's argument is a logical fallacy. In this case, the record does not establish any affirmative act by the City or any inverse condemnation claim against the City for conditions and circumstances existing prior to the severance and repair of lines in College Avenue prior to November 2012. Further, the record does not contain any evidence that the severance and repair of lines in College Avenue in November 2012 had any impact, positive or negative, on the circumstances and conditions existing prior to the repairs and no impact on Appellant. Therefore, the City cannot be liable in inverse condemnation for repairs which, by Appellant's own admission and the overwhelming facts in the record, merely restored the conditions and circumstances in existence prior to the repairs.

III.

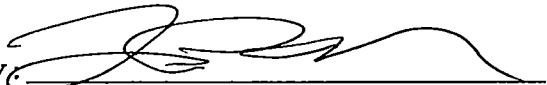
In the Return, Appellant again reveals her claim to be one of a failure to act as opposed to a claim based on an affirmative, aggressive act. The true nature of Appellant's claim is revealed and highlighted in her Return: "It is difficult to imagine a more positive, aggressive act than an outright *refusal to comply* with such a demand from a landowner." (Appellant's Return, p. 5.) (emphasis added.) Appellant's claim is simple: the City failed to reroute the

water in response to Appellant's demand to reroute the water "thus causing storm water to continue to flow beneath [Appellant's] property" (Appellant's Reply, p. 6.) It is sophomoric to characterize Appellant's demand in terms of whether a severed pipe is repaired or not; her demand necessarily required the flow of storm water be rerouted because the first could not be accomplished without the second. At its core, Appellant's complaint is the City failed to act to comply with her demand not to repair the City pipes and to reroute the flow of storm water from its path over the previous 90 years. Because Appellant's claim is based on a failure to act, the lower court's grant of summary judgment regarding inverse condemnation was proper.

Respectfully submitted,

October 24, 2019

By:



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PROOF OF SERVICE

I certify that I have served the foregoing Reply to Appellant's Return to Respondent's Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on October 24, 2019, addressed to counsel for Appellant as follows:

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October 24, 2019

Via U.S. Mail and Facsimile
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 Fax: (803) 734-1839

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 Respondent's Reply to Appellant's Return to Respondent'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

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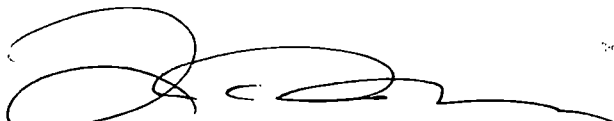
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