

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2016-002118

Opinion No. 5684
(S.C. Ct. App. filed September 11, 2019)

Lucille H. Ray, Respondent-Petitioner,

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 Petitioner-Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on November 22, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that maintenance work temporarily affecting City storm water lines located within a City-owned street may constitute an affirmative, positive, aggressive act sufficient to support a claim for inverse condemnation by the owner of a private drainage line where the undisputed facts in the record establish that the work did not alter the pre-existing flow of water or cause any damages to the owner of the private drainage line?
2. Did the Court of Appeals err in reversing the trial court's finding that the record lacks any evidence of an affirmative, positive, aggressive act by the City to support Plaintiff's inverse condemnation claim?

STATEMENT OF THE CASE

This case revolves around a privately-owned, 24-inch terra cotta drainage pipe ("Ray Pipe") located on Plaintiff's property ("Property") which has served as an artificial vent for the drainage of water across the Property for over 90 years prior to the commencement of this action. Critically, the record contains no evidence that the City constructed, installed or made any connection to the Ray Pipe.

The Property is located at the topographical low-point of a watershed comprised of approximately 29 acres (the "Subject Watershed") and serves as the natural downstream collection point for the drainage of waters within the Subject Watershed.

(R.pp. 6, 882.) The Subject Watershed contains drainage

infrastructure owned by many different private landowners as well as multiple public bodies including Winthrop University, South Carolina Department of Transportation, and Rock Hill School District. (R.pp. 879-82.)

The Ray Pipe was privately installed on the Property more than 90 years prior to the filing of the lawsuit by Plaintiff. (R.p. 39, ¶ 16.) Although the record does not contain direct evidence of the purpose or motive for the construction of the Ray Pipe, the installation of the Ray Pipe allowed Plaintiff's predecessors-in-title to develop the Property and construct a dwelling (the "Dwelling") on the Property in the 1920s. (R.p. 752, lines 5-10.)

As the direct result of the decision to make the Property buildable (and more valuable) by installing the Ray Pipe, for over 90 years, water draining from the higher ground located within the Subject Watershed has followed its natural course to and through the Ray Pipe. (R.pp. 39, 41.) The record contains no evidence that the City installed the Ray Pipe or benefitted from the Ray Pipe. Plaintiff's inverse condemnation claim against the City is premised solely on the fact that the City's property is adjacent to the Property even though the City is merely one the many property owners located upstream from the Property.

In asserting her claim for inverse condemnation against the City, Plaintiff has not alleged and the record does not contain any evidence that the City created the condition complained of by Plaintiff: the drainage of water in the Subject Watershed through the Ray Pipe. Moreover, Plaintiff has not identified and the record does not contain any evidence that the City made any improvements or took any action upstream from the Property that altered or impacted the drainage of water in the Subject Watershed. Finally, Plaintiff has not identified any action by the City that caused any damage to Plaintiff, the Property or the Ray Pipe.

Plaintiff's inverse condemnation claim is based on routine maintenance work performed to sanitary sewer lines located under College Avenue, a City-owned street located upstream from both the Property and the Ray Pipe ("Sanitary Sewer Project"). The record indicates that, as part of the Sanitary Sewer Project, three City-owned pipes were temporarily severed to provide access necessary to work on the sanitary sewer lines located underneath and then repaired and restored. All work relating to the Sanitary Sewer Project was performed within College Avenue, and all work involved, touched, and made contact with City infrastructure only.

The following critical facts relating to the Sanitary Sewer Project are undisputed: (1) Plaintiff has not claimed

and the record does not contain any evidence that work performed as part of the Sanitary Sewer Project altered or impacted the flow or drainage of water in the Subject Watershed; (2) Plaintiff has admitted that she has not incurred any damages as a result of the Sanitary Sewer Project (R.pp. 714-15); and (3) the flow of water after the Sanitary Sewer Project was the same as the flow of water for over 90 years prior to the Sanitary Sewer Project.

By Order entered August 12, 2014, the trial court granted summary judgment in favor of the City as to Plaintiff's claim for inverse condemnation finding that the record lacked any evidence of an affirmative, positive, aggressive act by the City to support a claim for inverse condemnation. (R.pp. 7-8.)

In the Court of Appeals' published Decision (the "Decision"), the majority (2-1) of the Court of Appeals reversed in part the trial court's order of summary judgment, ruling 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 after the City admitted it did not have an easement and [Plaintiff] told the City not to reconnect." Ray v. City of Rock Hill, 834 S.E.2d 464, 469 (S.C. Ct. App. 2019).

In a dissenting opinion, Judge Short asserted that the trial court's grant of summary judgment was proper, that the

Court of Appeal's decision in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), was dispositive, and that the City's "maintenance to an existing system of pipes" cannot be the basis for an inverse condemnation claim. Ray, 834 S.E.2d at 472.

ARGUMENT

The Court of Appeals erred in finding that maintenance work temporarily affecting City storm water lines may constitute an affirmative, positive, aggressive act sufficient to support Plaintiff's inverse condemnation claim absent any evidence that the work altered the flow of water or resulted in any damages to Plaintiff.

A. Considerations Governing Review

The published Decision issued by the Court of Appeals materially changes the established law governing inverse condemnation in South Carolina. First, the finding of the Court of Appeals directly conflicts with this Court's precedent defining the threshold of an affirmative, positive, aggressive act sufficient to support a claim for inverse condemnation. Second, as indicated by Judge Short in his dissenting opinion, the Decision marks a sharp departure from the precedent established by the Court of Appeals in Hawkins v. City of Greenville. Finally, the Court of Appeals' holding opens the floodgates to inverse condemnation claims which, prior to the Ray decision, would not have been actionable.

- B. The decision of the Court of Appeals conflicts with this Court's precedent in Kline, Berry's on Main, and WRB Ltd. Partnership.

It is axiomatic in inverse condemnation law that "a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

In Kline, Berry's on Main, and WRB Ltd. Partnership, this Court developed a reliable framework for determining when governmental action rises to the level of an affirmative, positive, aggressive act capable of supporting a claim for inverse condemnation. All three of these cases "involved public improvements that allegedly damaged private property." WRB Ltd. Partnership v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006). In all three cases, the record presented a question of fact as to whether the alleged governmental improvement caused or precipitated the damages claimed by the plaintiff. See Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967) (improvements to public street resulted in gas explosion); Berry's on Main, Inc. v. City of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981) (removal of public sidewalks in downtown development project resulted in flooding of plaintiff's property); WRB

Ltd. Partnership, 369 S.C. at 30, 630 S.E.2d at 481 (capping of landfill resulted in the lateral migration of methane gas, damaging plaintiff's property).

The Court of Appeals' Decision in this case marks a dramatic shift away from the framework established by this Court. The Court of Appeals' Decision is permitting an inverse condemnation claim to proceed based on an alleged "act" by the City which Plaintiff readily admits has resulted in no damage. Plaintiff has testified that the Sanitary Sewer Project did not result in any damages, and the record does not contain any evidence that the Sanitary Sewer Project altered or impacted water flow or drainage in any way.

The record indicates that the drainage of water within the Subject Watershed after the Sanitary Sewer Project was the same as it had existed for the 90 years prior to the Sanitary Sewer Project. In short, Plaintiff has identified an empty "act" with no link to the damages alleged by Plaintiff in a furtive attempt to hold the City liable for a condition (water flowing beneath her house in the Ray Pipe) which the City did not create or exacerbate, and for which the City would not otherwise be liable.

C. Hawkins is consistent with this Court's precedent and is controlling

As aptly noted by the lower court and Judge Short in his dissenting opinion, the Court of Appeals decision in Hawkins

v. Greenville is directly on point. 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). In Hawkins, the Court of Appeals analyzed and applied two fundamental principles of inverse condemnation law which are directly applicable to this case. First, the record must contain evidence that the alleged affirmative act by the City caused or precipitated the damage claimed by Plaintiff. Second, allegations of mere failure to act are insufficient to support a claim for inverse condemnation.

The record in this case does not contain any evidence that the alleged City act identified by Plaintiff caused or precipitated any damages claimed by Plaintiff. In Hawkins, the plaintiff identified two specific actions (in addition to multiple failures to act) by the City of Greenville relating to storm water drainage which allegedly resulted in or contributed to the flooding of plaintiff's property. The plaintiff 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. Id., 358 S.C. at 291, 594 S.E.2d at 563. The Court of Appeals ruled that neither action constituted an affirmative act sufficient to support a claim for inverse condemnation, noting that the record lacked any evidence that the actions by the City of Greenville had

any impact on drainage across the plaintiff's property. The Court of Appeals 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.

Id. at 291-92, 594 S.E.2d at 563.

The record in this case squares directly with the record in Hawkins. The "act" identified by Plaintiff is the temporary severance and subsequent repair and restoration of City drainage lines within College Avenue performed as part of the Sanitary Sewer Project. The record lacks any evidence that the Sanitary Sewer Project caused any damage to Plaintiff or the Property. Further, the record lacks any evidence that the Sanitary Sewer Project had any impact on drainage to the Ray Pipe. Based on this reasoning alone, summary judgment in favor of the City was appropriate.

But equally applicable to this case is the second principle applied by the Court of Appeals in Hawkins: "Allegations of mere failures to act are insufficient." Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. In this case Plaintiff hinges her inverse condemnation claim on the City's failure to heed her demand that the City not repair and restore the City pipes temporarily severed during the Sanitary

Sewer Project. Plaintiff attempts to characterize the City's failure to comply as an affirmative, positive, aggressive act. However, compliance with Plaintiff's demand would have necessarily required more than leaving the City pipes severed; compliance would have required that the City affirmatively act to reroute the flow of water from the course that it had followed for over 90 years prior to the commencement of the Sanitary Sewer Project.

The permanent severance of a storm water pipe uphill from the Property and Ray Pipe, with no further action by the City, would not stop water from draining towards the Ray Pipe or the Property, which is located at the topographical low point and collection point for waters draining in the Subject Watershed. If left severed, water which had previously flowed through pipes would not simply vanish, but would flow unrestrained along the path of least resistance, toward the City's junction box in College Avenue, the Ray Pipe and the Property, potentially causing erosion, damage and unsafe conditions along the way.

Considering these factors and circumstances, Plaintiff was essentially demanding that the City study, design and construct an alternative route for the flow of water in the Subject Watershed. The City's failure to act in this regard

cannot serve as the affirmative, positive, aggressive act to support a claim for inverse condemnation as a matter of law.

D. Unintended consequences of the Court of Appeals' published decision

The published Decision of the Court of Appeals in this case will have significant consequences with respect to inverse condemnation law. Based on the Court of Appeals' Decision, a governmental body may be liable in inverse condemnation for an action that merely resumes a prior condition impacting a landowner even if the governmental body did not create or exacerbate the condition. According to the Decision, a governmental body may suddenly become liable for a pre-existing condition affecting a property owner merely by remediating an event that caused a temporary interruption of the condition. Claims that were previously time-barred may suddenly become actionable as a result of such an event, or as in this case, claims that were previously non-existent will suddenly exist without any foundation in the basic principles of inverse condemnation law.

The following are some common scenarios which may be impacted by the Decision: 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. Before the Sanitary Sewer Project, Plaintiff had no claim for inverse condemnation against the City, and the Court of Appeals erred by holding that a claim for inverse condemnation may "spring up" after completion of the Sanitary Sewer Project based solely and whimsically on the fact that three storm water lines were temporarily severed and restored without changing the flow of water to the Property. The Decision creates a "springing" inverse condemnation claim, allowing a claim for inverse condemnation to spring up where previously no inverse condemnation existed whenever there is a temporary cessation of a condition followed by a restoration back to the exact prior condition. The Court of Appeals' Decision will yield unintended consequences that will drastically alter governing condemnation and inverse condemnation precedent.

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court grant this Petition for Writ of Certiorari to allow this appeal to proceed on the merits.

Respectfully submitted,

Date: January 13, 2020

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PROOF OF SERVICE

I certify that I have served the foregoing Petition for
Writ of Certiorari by depositing copies in the United States
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