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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-002074

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.

APPENDIX

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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

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'S FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

Appellant Lucille H. Ray ("Appellant" or "Ray") respectfully appeals the Order Granting Partial Summary Judgment to the City of Rock Hill of the Honorable S. Jackson Kimball, entered on August 12, 2014, the Order Denying Plaintiff's and Defendant's Motions for Reconsideration of the Honorable S. Jackson Kimball, entered on April 21, 2015, and the Order Granting Defendant's Motion *in Limine* and Directed Verdict against Plaintiff of the Honorable D. Garrison Hill, entered on September 13, 2016. Ray raises the following issues on appeal:

- I. Did the trial court err in its summary judgment order by dismissing Ray's claims for inverse condemnation and injunctive relief, and by failing to reconsider and alter its summary judgment order?
- II. Did the trial court err in excluding the testimony of Ray's expert witness, Michael Leonard, regarding abatability which resulted in a directed verdict on Ray's trespass claim?

STATEMENT OF THE CASE

Ray filed this action against the City of Rock Hill, South Carolina ("Respondent" or the "City") and the South Carolina Department of Transportation ("SCDOT") on November 6, 2012, asserting claims for trespass and inverse condemnation. The Complaint was later amended to assert claims for trespass, inverse condemnation, injunctive relief, and attorneys' fees against the City. The gravamen of the complaint is as follows. The case centers around a stormwater pipe which flows directly under the house that Ray has lived in for 30 years. The Amended Complaint asserts that the City built and maintains the stormwater pipe and continues to direct surface water runoff through the pipe, and that as a result Ray's residence has experienced structural damage.

The City answered the Amended Complaint on December 27, 2012, denying all liability. SCDOT answered the Amended Complaint on March 15, 2013, also denying all liability. On March 24, 2014, SCDOT filed a motion for summary judgment on each of Ray's claims. The Court granted SCDOT's motion on August 1, 2014, and SCDOT was dismissed from the case.

The City filed for summary judgment on May 19, 2014, arguing in part that the statute of limitations barred all claims. On August 12, 2014, the Honorable S. Jackson Kimball entered an Order Granting Partial Summary Judgment to the City of Rock Hill ("Summary Judgment Order"), granting partial summary judgment on Ray's claims for inverse condemnation, injunctive relief, and attorney's fees, but permitting Ray's claims for trespass to proceed. The City filed a motion to alter or amend the Summary Judgment Order, while Ray filed her own motion for reconsideration focusing on issues separate from those raised by the City. Judge Kimball reaffirmed his prior ruling and denied both motions by entry of an Order Denying Plaintiff's and Defendant's Motions for Reconsideration on April 21, 2015 (the "Reconsideration Order"). The City filed an additional motion for summary judgment on August 5, 2015, which was denied by order entered September 23, 2015.

On the day of trial, September 12, 2016, the City brought a motion *in limine* seeking to exclude the testimony of Ray's expert, Michael Leonard ("Leonard"), as to abatability, causation and damages. The motion was heard by the presiding trial judge, the Honorable D. Garrison Hill, who granted the motion and excluded Leonard's expert testimony on abatability. Accordingly, the City moved in open court for a directed verdict against Ray, which Ray acknowledged was appropriate in light of Judge Hill's

determination on the motion *in limine*. Judge Hill then granted the City's motion for directed verdict. The Order Granting Defendant's Motion *in Limine* and Directed Verdict was entered by the Court on September 13, 2016 ("Directed Verdict Order"). Ray timely appealed the Summary Judgment Order, Reconsideration Order, and the Directed Verdict Order by serving its Notice of Appeal on October 12, 2016.

STATEMENT OF FACTS

Ray lives at 330 College Avenue in Rock Hill (the "Property"). She purchased the house and lot in 1985. There is a storm water pipe which runs beneath her house. The pipe receives stormwater from a roughly 29 acre watershed area. That area is managed through a system of pipes, including pipes on College and Strait Street over which the City acknowledges dominion. They flow into the disputed pipe.

Ray received a survey as part of the real estate closing on the property which showed those easements encumbering her property which were of record. There was no easement shown for the stormwater pipe. (R. p. 802, ¶ 4). She granted an easement to the City in 1999 so the City could construct improvements to its sewer pipe system. (R. pp. 727-728). The line was not discovered at that point, either. Further excavation occurred when she had an addition constructed in 2001-2002. (R. p. 726). There was still no evidence of the pipe.

The house did show evidence of settlement over the years. Ray did not worry, at least not initially. She made repairs, and was told that the settlement she was witnessing was not unusual. (R. p. 803, ¶ 7). New, more substantial manifestations of damage have appeared in the last few years, particularly since 2011. (R. p. 883, ¶ 6). Ray knew there was a stormdrain in front of her house, and began to wonder if it had an impact on what

was happening in her home. (R. pp. 747-748). She had contact with City officials, and was told many different things about the pipe. (R. pp. 719-724; R. p. 803, ¶ 8). For example, she was told specifically in April 2011 that there was, in fact, a pipe on her property, but it did not run under her house. The City took a video of the pipe, but would not disclose its results. She was then told that a pipe ran under her house, but that the City would “never” move it. (R. pp. 719-724; R. p. 803, ¶¶ 8-9). She knew that the pipe ran under her house, then, as of June 3, 2011, and that the City claimed to control it, at least to the extent that it stated that it would never be moved. (R. p. 724).

A number of maps produced in discovery reveal that the location of the pipe has been known to the City since at least 1941. (R. p. 841, ¶ 16). The direction of the water flow was in fact altered in 1941, over to pipes located beneath Lucas Street. (R. p. 804, ¶ 12). There is a manhole cover located at approximately the point where the pipe hits another junction point and the water is channeled to Lucas Street. (R. pp. 688-691; R. p. 841, ¶ 16). The manhole also appears on City maps since 1941.

Ray hired Mike Leonard in early 2012 to help her determine what was happening with the advancing damage to her house, and specifically to determine its cause. (R. pp. 802-803, ¶ 5; R. p. 840, ¶ 7). Mr. Leonard asked for stormwater maps from the City in order to further his analysis. The City at first refused to provide anything. (R. p. 803, ¶ 10). A map was eventually provided, but turned out to be inaccurate. (R. pp. 744-745). Mr. Leonard was able to learn a good deal about the physical condition of the stormwater pipe at issue in late 2012. The City was doing some work on the sanitary sewer system on College Avenue. (R. p. 804, ¶ 11). In the process, several sections of pipe were disconnected from the pipe section running under Ray's house. (R. p. 841, ¶ 9). The

pipe was revealed to be old, made of terra cotta, 24" in diameter, and, without question, actively channeling water under Ray's house. (R. pp. 692-700; R. p. 841, ¶ 10). The visual evidence confirmed what Leonard suspected: the area in front of Ms. Ray's house serves as a junction which receives water from a number of sources, including a pipe which runs down Strait Street, which in turn collects and channels stormwater from Oakland Avenue, a state maintained road. (R. pp. 840-841, ¶¶ 9, 14; R. pp. 866-875; R. p. 811). The City maintains Strait Street and College Avenue. Id. It appears from documents produced in discovery that the total watershed is approximately 29 acres. (R. p. 841, ¶ 13).

Mr. Leonard ultimately concluded that the pipe is no longer adequately sized to perform the function it must now perform. The pipe is also significantly damaged. Water is leaking from it into the soils surrounding it, impacting their stability. (R. p. 841, ¶ 9; R. p. 922, ¶ 3). A video was shot of the pipe which shows the degree of damage that existed in April, 2014. (R. pp. 924-978). That is, in turn, causing physical damage to the house. Leonard Dep. Tr. pp. 78-87; R. p. 922, ¶¶ 3-5). The damage is in a number of locations, but is concentrated along the location of the pipe. (R. pp. 729-743). Ray's evidence shows that it will cost approximately \$190,000 to block the pipe and repair the resulting damage to her property. This is independent of the cost that will be associated with changing the flow of the water so it no longer is channeled beneath Ray's house. (R. pp. 876-877). This could be accomplished in a number of ways, including by changing the flow of water away from Ray's house and down Lucas, instead of beneath the structure. (R. p. 841, ¶ 17; R. p. 922, ¶ 7). There is evidence that the City considered such a fix. (R. p. 922, ¶ 7).

This change in how the water is managed should have taken place in November 2012, when the City disconnected the pipes on College Street from the disputed pipe. Ray told the City in November 2012 that it could not reconnect to the pipe on her property. (R. pp. 803-804, ¶¶ 10, 13). The City did so anyway, water continues to flow through the pipe beneath Ray's house, and the resulting damage to the house was increased in magnitude.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF.

Appellate courts review "questions of law de novo." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Similarly, review of an order granting summary judgment is de novo, as appellate courts apply the same standard governing the trial court under Rule 56(c), SCRCP: "summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Appellate courts must take "all ambiguities, conclusions, and inferences . . . in a light most favorable to the nonmoving party below." Id. The nonmoving party is only required to "submit a mere scintilla of evidence to withstand a summary judgment motion" Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Because genuine issues of material exist with respect to whether the City is committing a continuing trespass entitling Plaintiff to injunctive relief, and whether the City committed an affirmative act sufficient to constitute an inverse condemnation, the

trial court improperly entered the Summary Judgment Order in the City's favor, as well as the Reconsideration Order upholding that ruling. Both the Summary Judgment Order and the Reconsideration Order should be reversed with respect to Plaintiff's claims for injunctive relief and inverse condemnation.

A. There Is a Genuine Issue of Material Fact as to Whether the City Is Committing a Continuing Trespass Entitling Plaintiff to Injunctive Relief.

South Carolina courts have long recognized that where a trespass is continuing and repeated, permanent injunction is the appropriate remedy. *E.g.*, McClellan v. Taylor, 54 S.C. 430, 437, 32 S.E. 527, 529-530 (S.C. 1899); Little v. Little, 223 S.C. 332, 341, 75 S.E.2d 871, 875 (S.C. 1953); Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (S.C. Ct. App. 1991). Injunctive relief is necessary to "protect the landowner's property rights from hurt or destruction" caused by "permanent and recurring . . . injury, which cannot otherwise be prevented." Mack, 306 S.C. at 437, 412 S.E.2d at 434. Moreover, injunctive relief is necessary to avoid a multiplicity of actions for each individual and repeated trespass. McClellan, 54 S.C. at 437, 32 S.E. at 529. "[A]lthough each of these acts taken by itself may not be destructive, and the legal remedy may, therefore, be adequate for each single act, if it stood alone, then, also, the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." Id. Courts will enjoin continuing trespass "because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages." Id. In other words, where the trespass is continuous and repeated, there exists no adequate remedy at law to address the entirety of the wrong. Id. The Court of Appeals has previously held that injunctive relief is appropriate where the

trespass is in the form of water flowing onto another's land. Mack, 306 S.C. at 437, 412 S.E.2d at 434.

In the Summary Judgment Order, (R. pp. 7-8), the trial court recognized that genuine issues of fact existed as to whether the City had trespassed onto Ray's property, given the City's acknowledgment that it discharges stormwater into the pipe going under Ray's house. Yet the trial court went on to opine that Ray's claim for injunctive relief failed because she had an adequate remedy at law for the City's trespass by way of money damages. The City's trespass on Ray's property is clearly continuing in nature, however, as it reoccurs with every storm and passing rainfall. The City continually collects stormwater underneath City streets and directs that water through the pipe flowing under Ray's house. Indeed, the trial court also found genuine issues of fact as to whether the trespass was abatable, such that "each new invasion of plaintiff's property" began a new statute of limitations period. (R. p. 9). In so doing, the trial court recognized the continuing nature of the City's trespass. Its ruling granting summary judgment to the City on Ray's injunction claim is entirely inconsistent with that finding. Simply repairing the damage, while permitting the City to continue channeling water through the damaged pipe beneath Ray's home, guarantees further litigation between the parties. The Summary Judgment Order and Reconsideration Order should accordingly be reversed, and Ray's claim for injunctive relief permitted to proceed to trial.

B. *There Is a Genuine Issue of Material Fact as to Whether the City Has Committed an Inverse Condemnation.*

In order to establish a claim for 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 (S.C. Ct. App. 2004). The requirement of an affirmative act is met where a city “was widening and improving a public street when a gas line was breached causing an explosion and fire on the neighboring property,” “excavating a public street” which then “flooded during heavy rain damaging the property owner’s store,” or capped a landfill as part of a permanent public project. WRB L.P. v. County of Lexington, 369 S.C. 30, 32-33, 630 S.E.2d 479, 481 (S.C. 2006) (citing Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (S.C. 1967), and Berry’s On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (S.C. 1981)). Where the government alters the roadways and topography of the land in such a way as to redirect the flow of surface water, it also engages in sufficient “overt or positive action” necessary to establish inverse condemnation. Newsome v. Surfside Beach, 300 S.C. 14, 16, 386 S.E.2d 274, 275 (S.C. Ct. App. 1989).

Ray submitted evidence that in November 2012, the City disconnected several pipes as part of a construction project on College Avenue, including the pipe running beneath Ray’s house. (R. p. 804, ¶ 11). Only days later, and over Ray’s express objection, the City then reconnected the pipe running under her property to the City’s stormwater system. Id. The City reconnected the pipes after specifically being instructed not to do so in a letter from Charles Bradford, Ray’s attorney. (R. pp. 837-838). This

positive, aggressive act has continued to damage her property and benefit the City ever since.

Though Ray specifically discussed the City affirmatively reconnecting the pipes in her briefs both on summary judgment, the Summary Judgment Order made no mention of the fact. Ray filed her motion to reconsider the Summary Judgment Order, in part, to request that the trial court re-review those facts and the letter drafted by Charles Bradford. In the April 15, 2015 hearing on the cross-motions to reconsider, Judge Kimball opined that he did “not find that it represents a positive, aggressive act within the meaning of the case.” (R. p. 601, lines 21-24 15). Specifically, Judge Kimball stated that cases finding affirmative acts were cases in which “the punitive [sic] condemnor did something different to change the flow of water, for example, reconstructing the roads to create a different pattern of drainage, things like that.” (R. p. 602, lines 1-7).

Respectfully, Judge Kimball misinterpreted the appellate courts’ guidance in WRB, Kline, Berry’s On Main, and Newsome. Those cases stand for the proposition that an inverse condemnation claim requires a local government take an affirmative, independent act – to *do something* of its own initiative – rather than merely fail to take some step or negligently attempt to address some problem. Here, the City, of its own accord, dug up College Avenue, broke apart a number of pipes, and then voluntarily repaired and reconnected those pipes to its stormwater system. For a number of days, the City’s stormwater system did not flow under Ray’s house. As part of the City’s infrastructure project, however, the City then reconnected the pipes and redirected water back onto Ray’s property, knowing that Ray disputed the City’s ability to do so and had warned the City not to. There are no allegations that the City negligently reconnected the

pipes and by that negligence caused Ray's property to suffer damage. Nor is Ray relying on the City's failure to properly design and construct a stormwater system that could handle the volume of water flowing down College Avenue. Rather, Ray's inverse condemnation claim is based upon the City having undertaken a permanent public project to modernize its infrastructure along College Avenue, and as a result, taking positive steps to direct its stormwater system to flow directly under Ray's house. Accordingly, Ray has established, at the very least, a genuine issue of material fact as to whether the City engaged in an affirmative, positive, and aggressive act sufficient to give rise to a claim for inverse condemnation, and summary judgment was improper.

The Summary Judgment Order and Reconsideration Order should therefore be reversed with respect to Ray's inverse condemnation claim, and this claim be permitted to proceed to trial.

II. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE FROM PLAINTIFF'S EXPERT WITNESS AND ENTERING A DIRECTED VERDICT AGAINST PLAINTIFF.

The trial court erred in granting the County's motion *in limine* to exclude Michael Leonard's testimony and in awarding judgment to the City, such that the Directed Verdict Order should be reversed.

The purpose of a motion *in limine* is to "narrow the evidentiary issues for trial." Tompkins v. Eckerd, 2012 U.S. Dist. LEXIS 46718, 4-5 (D.S.C. April 3, 2012). Other courts have routinely recognized the dangers of converting a motion *in limine* to a dispositive motion or directed verdict and have accordingly refused to allow non-evidentiary matters to be raised *in limine*. See, e.g., Louzon v. Ford Motor Co., 718 F.3d 556, 561-562 (6th Cir. 2013); Mid-America Tablewares v. Mogi Trading Co., 100 F.3d

1353, 1363 (7th Cir. 1996). Though the “admission or exclusion of evidence is left to the sound discretion of the trial judge,” a ruling on a motion *in limine* will be reversed if the ruling constituted an abuse of discretion. State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when “the decision is controlled by an error of law or is based on unsupported factual conclusions.” Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 642, 760 S.E.2d 399, 410 (S.C. 2014).

Though South Carolina has not adopted the federal Daubert standard, trial courts are nonetheless required to exercise a gatekeeper function and find that an expert’s testimony “will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable” before it is admissible. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (S.C. 1999). In determining the reliability of scientific testimony, trial courts must consider several factors: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” Watson v. Ford Motor Co., 389 S.C. 434, 450, 699 S.E.2d 169, 177 (S.C. 2010). However, these factors “serve no useful analytical purpose” for nonscientific evidence,” and in such cases the Supreme Court has declined to provide a list of specific factors to be utilized by trial courts. Graves v. CAS Med. Sys., 401 S.C. 63, 74, 735 S.E.2d 650, 655-656 (S.C. 2012).

As the Fourth Circuit has noted in applying the corollary Federal Rules of Civil Procedure, trial courts “should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence” and “need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct.”

Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999). Moreover, “[a]s with all other admissible evidence, expert testimony is subject to being tested by ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.’” Id. Thus, a trial court “has broad latitude to consider whatever factors bearing on validity that the court finds to be useful; the particular factors will depend upon the unique circumstances of the expert testimony involved.” Id.

On the day of trial, the City moved *in limine* to exclude the testimony of Ray’s expert Michael Leonard on the grounds that it was unreliable. Judge Hill granted that motion with respect to the issue of whether the City’s trespass was abatable, because Leonard “had not done any engineering work on this issue, and it would not meet criteria of being reliable or assist the jury.” (R. p. 682, lines 14-22). As the trial court recognized in the Directed Verdict Order, “[g]iven Judge Kimball’s ruling on summary judgment, only an abatable trespass remained as a viable cause of action.” (R. p. 17; see also R. p. 683, lines 6-16). Judge Hill then correctly acknowledged that “[b]ecause the court excluded Plaintiff expert Leonard’s opinion testimony as unreliable concerning abatement, the trespass cause of action became unviable” (R. p. 17). Accordingly, “with no genuine issue of material fact remaining, City was entitled to judgment as a matter of law.” Id. In sum, the exclusion of Leonard’s testimony through a motion *in limine* did not merely determine a particular evidentiary issue, but the outcome of Ray’s entire case.

The trial court erred in its application of the law and abused its discretion by excluding Leonard’s testimony. As explained during the hearing on the City’s motion *in limine*, Leonard’s opinion on abatability was based on his experience in stormwater

design and installing storm drainage systems. (R. p. 673, lines 1-23; R. p. 922, ¶ 7). Specifically, Leonard's proffered testimony is that, based on the available maps of the City's stormwater design, the City could change the direction of a specific pipe and thus alter the flow of stormwater away from Ray's property. (R. p. 673, lines 19-21; R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). The City actually produced a document showing the flow of stormwater being altered exactly as Leonard proposes, upon which Leonard would be entitled to rely as evidence of the feasibility of redirecting the flow of stormwater. (R. p. 973, line 24-p. 974, line 8; R. p. 300). Moreover, Leonard's testimony is grounded in his experience designing and installing stormwater systems. (R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). This extensive, professional experience is sufficient to confirm the reliability of Leonard's proposed testimony on the ability of altering the stormwater system to redirect the flow of water away from Ray's house. The trial court's determination of unreliability appeared to rest solely on the fact that Leonard had not performed a cost analysis or feasibility study for a proposed redesign of the stormwater system to direct water away from Ray's property. (R. p. 664, line 13-p. 665, line 3). While the City would certainly have been entitled to present its own evidence that the cost or construction logistics of redesigning a portion of the stormwater system might make any alteration unreasonable, those issues do not go to Leonard's testimony that it was absolutely possible for the City to abate its trespass. The City, and the trial court, improperly conflated the issues of reasonableness and abatability, excluding Leonard's testimony on the latter because it did not – and was not intended to – address the former.

The court in this case abused its discretion by granting the City's motion *in limine* and leaving no choice but to enter a directed verdict against Ray, pursuant to the Directed Verdict Order. The Directed Verdict Order should be reversed, and Leonard should be permitted to testify as to the abatability of the City's trespass.

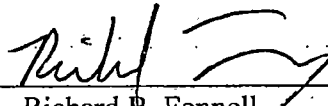
CONCLUSION

For the foregoing reasons, the Summary Judgment Order, Reconsideration Order, and Directed Verdict Order should be reversed, and Ray's claims for trespass, inverse condemnation, and injunctive relief be permitted to proceed to trial.

Dated: August 16, 2017
Charlotte, North Carolina

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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 Defendants,

Of which City of Rock Hill is Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF?

DID THE TRIAL COURT ERR IN EXCLUDING THE TESTIMONY OF MICHAEL LEONARD REGARDING ABATABILITY?

DID THE TRIAL COURT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIM FOR TRESPASS?

STATEMENT OF THE CASE

Plaintiff Lucille H. Ray ("Plaintiff") filed this lawsuit against the City of Rock Hill ("City") and the South Carolina Department of Transportation ("SCDOT") on November 6, 2012. Plaintiff filed an Amended Complaint asserting four causes of action against the City: trespass, inverse condemnation, injunction, and statutory attorneys' fees. The City filed an Answer in accordance with Rule 12, SCRPC, asserting a qualified denial and affirmative defenses.

On May 19, 2014, the City filed a Motion for Summary Judgment ("Motion"). After a hearing on the City's Motion, the Honorable S. Jackson Kimball entered an Order Granting Partial Summary Judgment to the City of Rock Hill ("Summary Judgment Order") on August 12, 2014.¹ In the Summary Judgment Order, the lower court dismissed Plaintiff's claims for inverse condemnation, injunctive relief, and statutory

¹ The South Carolina Department of Transportation filed a Motion for Summary Judgment which was granted in full in a separate Order by the Court. All causes of action asserted against the SCDOT were dismissed (trespass, inverse condemnation, attorneys fees and injunctive relief).

attorneys' fees. (Summary Judgment Order, R. p. 9.) The lower court further ruled that the statute of limitations began to run on all of Plaintiff's claims no later than 2008, with the exception of a potential claim for continuing trespass. Thus, all of Plaintiff's claims were dismissed except for Plaintiff's claim for trespass, and the trespass claim was limited to damages occurring on or after November 6, 2009. (Summary Judgment Order, R. pp. 8-9.)

The City and Plaintiff each filed motions for reconsideration which were denied pursuant to the lower court's Order Denying Plaintiff's and Defendant's Motions for Reconsideration entered on April 21, 2015.

On August 5, 2015, after deposing Plaintiff's expert witnesses, the City filed a Motion for Summary Judgment based on new and additional grounds. By order dated September 23, 2015, the lower court denied the City's motion.

Trial was set to begin on September 12, 2016. On the first day of trial, the City moved to exclude certain categories of opinion testimony, including opinions expected to be offered by Michael Leonard ("Leonard") a structural engineer designated by Plaintiff in this action. This motion was heard by the Honorable D. Garrison Hill. The trial court granted the City's Motion in Limine, in part, excluding any opinion testimony regarding the issue of the Abatability of

the alleged trespass. Upon granting the Motion, Plaintiff moved to have judgment entered against her on the grounds that Plaintiff would not be able to satisfy the burden of proof for the continuing trespass claim. (Trial Trans., R. p. 682, line 23-p. 683, line 3.) The trial court did not address the other issues raised by the City in its Motion in Limine. On September 13, 2016, the trial court entered an order directing verdict in favor of the City.

STATEMENT OF FACTS

Plaintiff's claims against the City in this action relate to a 24-inch terra cotta pipe located on her property at 330 College Avenue in Rock Hill, South Carolina (the "Property"). The 24-inch terra cotta pipe begins on the Property's border with College Avenue and extends to a manhole behind the back of the structure constructed on the Property (the "Subject Pipe"). The Property and Subject Pipe are located at the topographical low point of a watershed comprising approximately 29 acres ("Watershed"). (Bagley Aff., Exhibit A, R. p. 882; Summary Judgment Order, R. p. 6; Appellant Initial Brief, p. 3.) The upstream portion of the Watershed includes residences, businesses, Winthrop University property, Rock Hill School District III property, SCDOT streets and City streets. (Bagley Aff., ¶¶ 4-5, R. pp. 879-80, Exhibit A, R. p. 882.) Within these properties are various ditches, pipes

and drainage infrastructure owned by various public entities and private landowners. (Id.) The Property and Subject Pipe are the natural downstream collection point for surface waters within the Watershed. (Summary Judgment Order, R. p. 6.)

Plaintiff's predecessors-in-title constructed a residential dwelling on the Property in the 1920's. (Ray Dep., R. p. 752, lines 5-10.) The Subject Pipe was installed on the Property prior to construction of the dwelling. (Ray Dep., R. p. 753, lines 8-20; Cummings Dep., R. p. 790, lines 9-16; Leonard Dep., R. p. 767, lines 13-21.) The dwelling was constructed over the Subject Pipe approximately 90 years prior to the filing of this action. (Ray Dep., R. p. 753, lines 8-17, R. p. 754, lines 16-20; Cummings Dep., R. p. 791, lines 11-21; Amended Complaint, ¶ 16, R. p. 39.)

Though Plaintiff alleged in her Complaint that the City installed the Subject Pipe, she produced no evidence to support that allegation. The record contains no evidence that the City was involved in the design, construction, or installation of the Subject Pipe. (Ray Dep. R. p. 746, lines 11-22, R. p. 754, line 24-p. 755, line 7, R. p. 756, lines 14-17; Cummings Dep., R. p. 792, lines 4-7; Leonard Dep., R. p. 767, lines 13-21.) Accordingly, the lower court concluded that the record lacked any evidence to support that allegation. (Summary Judgment Order, R. p. 7.)

Moreover, the record contains no evidence that the City was involved in the development of the Property or the construction of the dwelling on the Property. (Ray Dep., R. p. 753, lines 18-20, R. p. 754, lines 7-15.) However, the Record does reveal that one of Plaintiff's predecessor-in-title was aware of the Subject Pipe and connected a drainage line into the Subject Pipe. (Bagley Aff., ¶ 9, R. p. 880; Ray Dep., R. p. 757, lines 1-24.)

Plaintiff acquired the Property in May 1985. (Complaint, ¶ 3, R. p. 22.) Plaintiff constructed an addition to the dwelling in 2000 and 2001. (Ray Dep., R. p. 687, lines 11-14, R. p. 725, lines 3-7.) Plaintiff acknowledges a history of sinkholes and cave-ins on the Subject Property since the time of her acquisition. (Ray Dep., R. p. 717, line 25-p. 718, line 22.) In 1992, Plaintiff observed as her gardener fell waist deep into a sinkhole located approximately 10 feet from the back end of her house. (Ray Dep., R. p. 708, line 8-p. 711, line 20.) Plaintiff testified that she was aware of bending and movement in the roof frame of the structure on at least two separate occasions, once in 1995 and again in 2007. (Ray Dep., R. p. 704, line 18-p. 706, line 5, R. p. 706, line 23-p. 707, line 10.) She retained a contractor to fix the structural damage on both occasions.

By 2008, Plaintiff was aware of the Subject Pipe and was concerned that the Subject Pipe may be damaging the dwelling. (Ray Dep., R. p. 751, lines 19-24.) Plaintiff noticed that the front steps of her home appeared to be sinking and requested assistance from the City. (Complaint, ¶ 4, R. p. 22; Ray Dep., R. p. 702, line 23-p. 703, line 10.) Plaintiff requested the City to investigate the storm drain in College Avenue. (Ray Dep., R. p. 749, line 21-p. 750, line 21.) In 2008, City employees came to the Property at least twice and informed Plaintiff that a storm water pipe "ran toward the steps" of Plaintiff's house. (Ray Dep., R. p. 751, lines 10-11.)

During discovery, Plaintiff designated Michael Leonard ("Leonard") as an expert to testify in the field of structural engineering. (Plaintiff Responses to Int., No. 4, R. p. 995.) Leonard admitted that he is not an expert in geotechnical science (Leonard Dep., R. p. 759, line 19-p. 760, line 10), that he is not a geotechnical engineer (Leonard Dep., R. p. 784, lines 18-20), and that he is not an expert with respect to soils under the structure as it pertains to the subject matter of this action. (Leonard Dep., R. p. 762, line 13-p. 763, line 1.)

Plaintiff designated Edward Cummings ("Cummings"), a geotechnical engineer, to testify as to geotechnical matters

and soil mechanics. (Plaintiff Responses to Int., No. 4, R. p. 996.) With respect to geotechnical matters, Leonard testified that he relies upon and defers to Cummings to provide scientific analysis relating to soil mechanics and geotechnical issues. (Leonard Dep., R. p. 759, line 19-p. 760, line 10, R. p. 761, lines 7-17, R. p. 764, lines 21-24.)

However, Cummings' professional opinions failed to support Ray's causes of action against the City. Cummings testified that the sole cause of any damages to the dwelling was the improper placement and compaction of fill soils over the Subject Pipe installed at the time of construction. (Cummings Dep., R. p. 794, lines 2-17, R. p. 797, line 25-p. 799, line 5, R. p. 800, line 22-p. 801, line 10.) Cummings further testified that he did not encounter any evidence of saturated soils and did not encounter any evidence of washout or water erosion through the strata, the absence of which is inconsistent with a water leak. (Cummings Dep., R. p. 795, line 25-p. 796, line 11, R. p. 793, lines 3-5.)

In February 2016, Plaintiff hired another geotechnical engineer to perform non-destructive testing in hopes of finding evidence that water is leaking from the Subject Pipe. (Trial Trans., R. p. 670, lines 1-9.) However, these tests

did not reveal any evidence that the Subject Pipe was leaking.
(Trial Trans., R. p. 670, line 9-p. 671, line 4.)

On the issue of whether the flow of water through the Subject Pipe may be reasonably and practically abated, Ray offered only the testimony of Leonard. However, Leonard testified that to render a qualified opinion on the abatability of the flow of water to and through the Subject Pipe would require a thorough engineering study. (Leonard Dep., R. p. 782, lines 6-19.) Leonard testified that he has not performed a hydrology study or studied the flow of water to or through the Pipe. (Leonard Dep., R. p. 765, line 4-p. 766, line 4.) Leonard testified that he has not analyzed whether an alternative drainage line could be placed in any particular location to divert water flow; he has not analyzed whether any alternatives would conflict with other existing infrastructure (utilities or otherwise); he has not analyzed the topography of the watershed area to know if and how an alternative line could reroute the water flow; and he has not studied or analyzed the feasibility or cost of any alternatives to routing water flow (Leonard Dep., R. p. 779, line 7-p. 781, line 5.) Leonard testified that he never performed a hydrology study of the storm basin or watershed; never studied the sources and amount of water flowing to and through the Subject Pipe; never studied the rate or intensity

of flow; and never analyzed the flow downstream from the Property. (Leonard Dep., R. p. 765, line 4-p. 766, line 4, R. p. 768, lines 2-9.) Leonard admitted that he was unable to testify to a reasonable degree of engineering certainty that the flow of water can be reasonably routed around the Property. (Leonard Dep., R. p. 783, lines 6-11.)

As to damages, Leonard admitted that he is unable to identify which damages within the home are attributable to the limited scope of the trespass at issue in this action, as opposed to other causal factors for which the City is not liable (i.e. improper compaction of fill soil at time of construction) (Leonard Dep., R. p. 787, line 12-p. 788, line 20.) Moreover, Leonard testified that he cannot identify which damages have occurred since November 6, 2009, as distinguished from those occurring earlier. (Leonard Dep., R. p. 785, line 11-p. 787, line 22.)

ARGUMENTS

I. SUMMARY JUDGMENT WAS PROPER AS TO PLAINTIFF'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF

A. Standard of Review

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976). "An appellate court reviews the granting of summary judgment under

the same standard applied by the trial court pursuant to Rule 56(c), SCRCP: summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); see also Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court." Wells, 331 S.C. at 301, 501 S.E.2d at 749 (quoting 5 Am.Jur.2d Appellate Review § 700 (1995)).

B. Summary Judgment was Proper with Respect to Inverse Condemnation

The lower court correctly ruled that Plaintiff's claim for inverse condemnation fails as a matter of law for lack of an affirmative, positive, aggressive act on the part of the City. (Summary Judgment Order, R. pp. 7-8.)

"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. App. 2004).

"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." See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1993); Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct. App. 2004). An allegation of a municipality's failure to act is insufficient to establish inverse condemnation. Hawkins, 358 S.C. at 291, 594 S.E.2d at 563.

Plaintiff failed to establish any evidence of an affirmative act by the City to support inverse condemnation. The Subject Pipe or waters flowing within the Subject Pipe cannot serve as the affirmative act because there is no evidence that the City installed the Subject Pipe. The record contains no evidence of any new construction or upstream improvements by the City resulting in an increase in the magnitude of water or an increase rate of flow of water toward the Property. The only evidence in the record is the City has some drainage pipes and related infrastructure within this drainage basin.

However, the mere ownership of drainage infrastructure in the basin does not constitute an affirmative act as a matter

of law. With respect to the drainage of surface waters, South Carolina follows the "Virginia Rule" which provides that "where no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system." Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986). The record contains no evidence that the City has directed greater surface water drainage than would naturally result from reasonable development of the City's property. Further, the record contains no evidence of any increase that would be attributable to the City as opposed to any of the other upstream property owners.

In the Summary Judgment Order, the lower court aptly cited the holding and analysis in Hawkins as being dispositive as to Plaintiff's inverse condemnation claim. (Summary Judgment Order, R. p. 8.) The lower court cited the following passage from Hawkins:

Hawkins has failed to allege any affirmative acts by the City which damaged the [plaintiff's] property or otherwise diminished his rights in the property. Most of the City's "act" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. 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 562-63.

In Plaintiff's Brief, Plaintiff argues that the City's maintenance of a drainage pipe situated in the middle of a City street upstream from the Subject Property in November 2012 constituted an affirmative, positive, aggressive act necessary to establish a claim for inverse condemnation. Plaintiff's argument is unavailing. Plaintiff fashions this argument in an ambiguous manner which clouds the location and nature of the work, which the lower court was readily able to identify. The work at issue was to a drainage pipe situated in the middle of College Avenue. The work at issue was not to the Subject Pipe or even to a pipe connected directly to the Subject Pipe. Rather, the work at issue was routine maintenance to restore a drainage pipe that had been severed during work on a unrelated sanitary sewer line. (Ray Dep., R. p. 715, line 10-p. 716, line 3). As noted by the trial court, the City's maintenance of existing stormwater infrastructure upstream from the Subject Pipe is not a positive, aggressive act for purposes of inverse condemnation. (Summary Judgment Order, R. pp. 7-8.) Moreover, Plaintiff testified that the repair work at issue did not result in any

damages to Plaintiff or the Property. (Ray Dep., R. p. 713, line 13-p. 715, line 9.)

Plaintiff cites a group of cases to support her position; however, these cases expose the fundamental flaw in her legal theory. In each of the cases cited by Plaintiff the claimant was able to identify a specific act by a governmental entity which then resulted in a taking of property. See WRB L.P. v. County of Lexington, 369 S.C. 30, 32-33, 630 S.E.2d 479, 481 (2006) (capping of landfill resulting in the channeling of methane gas to plaintiff's property); Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967) (improvements to public street resulting 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 resulting in flooding of plaintiff's property); Newsome v. Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989) (raising street by 17 inches resulting in washout of plaintiff's property). In this case Plaintiff has identified a condition (water channeling through the Subject Pipe) but she has been unable to produce any evidence to attribute this condition to any action by the City. As such, the granting of summary judgment was appropriate.

C. Summary Judgment was Proper with Respect to Injunctive Relief

The trial court correctly ruled that Plaintiff's claim for injunctive relief fails as a matter of law because Plaintiff's claims for monetary damages provided an adequate remedy at law. (Summary Judgment Order, R. p. 9.)

"Actions for injunctive relief are equitable in nature. In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Denman v. City of Columbia, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). "An injunction may be granted where some irreparable injury is threatened for which the parties have no adequate remedy at law." HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 639, 699 S.E.2d 699, 707 (Ct. App. 2010). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011).

The trial court correctly found that Plaintiff's claims for monetary damages provide an adequate remedy at law. The damages sought by Plaintiff in this case relate to alleged structural damages to her residence. In discovery Plaintiff identified a specific sum of money which would resolve the claimed damage and make Plaintiff whole. (Responses to Int., No. 6, R. p. 996.) Further, Plaintiff designated a structural engineer who submitted a cost estimate for remediation of the alleged structural damage. (Leonard Report, Sept. 5, R. p. 1004.) There is no evidence in the Record that these claimed monetary damages were incomplete or otherwise insufficient. Plaintiff claims entitlement to injunctive relief because of the ongoing flow of water through the Subject Pipe. As set forth above, Plaintiff failed to produce any evidence that the City installed the Subject Pipe. Accordingly, summary judgment was appropriate on this cause of action.

II. LOWER COURT'S UNAPPEALED RULING ON THE TRIGGER DATE FOR THE STATUTE OF LIMITATIONS IS AN ADDITIONAL GROUND FOR DISMISSAL OF THE INVERSE CONDEMNATION CAUSE OF ACTION

The lower court's unappealed rulings become the law of the case and must be assumed correct as a matter of law. Continental Ins. Co. v. Shives, 328 S.C. 470, 475, 492 S.E.2d 808, 810 (Ct.App.1997). Moreover, "issues not argued in the appellate briefs are deemed abandoned." Abraham v. Palmetto

Unified School Dist. No. 1, 343 S.C. 36, 45, 538 S.E.2d 656, 666 n.3 (Ct. App. 2000) (internal citations omitted).

The lower court ruled that at some time in 2008 Plaintiff had sufficient knowledge of the facts pertaining to the Subject Pipe under her house such that she knew or should have known of a claim for damages. (Summary Judgment Order, R. p. 8.) Plaintiff did not file this action until November 6, 2012. The result of this ruling is that the statute of limitations bars Plaintiff's claims against the City, except to the extent she could prove a continuing trespass by the City. Plaintiff has not appealed this ruling and, accordingly, this ruling is the law of the case.

The lower court's unappealed ruling on the trigger date of the statute of limitations provides separate, independent grounds for this Court to affirm the dismissal Plaintiff's claim for inverse condemnation. The City raises this issue as an additional sustaining ground.

"A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing

in the record to affirm the lower court's judgment." Jones v. Lott, 387 S.C. 339, 346-47, 692 S.E.2d 900, 904 (2010).

In this action, the lower court dismissed Plaintiff's inverse condemnation claim for lack of evidence of an affirmative act necessary to establish a prima facie case of inverse condemnation against the City. (Summary Judgment Order, R. pp. 7-8.) Therefore, the lower court had no need to rule upon the City's statute of limitations argument as applied to Plaintiff's inverse condemnation claim.

"According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

In the Summary Judgment Order, the trial court found that Plaintiff knew or should have known of any claims relating to the Subject Pipe as of 2008. (Summary Judgment Order, R. pp. 8-9.) Therefore, the statute of limitations began to run no later than December 2008. All of Plaintiff's claims are subject to a three year statute of limitations. S.C. Code Ann. § 15-5-30; Webb v. Greenwood Cnty., 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956). Plaintiff's claims expired no

later than December 2011, but Plaintiff did not file this action until November 6, 2012. Accordingly, the statute of limitations bars Plaintiff's claim for inverse condemnation as well as any other claim by Plaintiff relating to the Subject Pipe arising prior to November 6, 2009.

III. THE TRIAL COURT'S DIRECTED VERDICT AS TO PLAINTIFF'S CLAIM FOR TRESPASS WAS PROPER.

A. Standard for Directed Verdict

"When considering a motion for a directed verdict, the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 295, 504 S.E.2d 347, 350 (Ct. App. 1998). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Wright v. Craft, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). "In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." Collins at 296, 504 S.E.2d at 350.

B. Permanent Trespass

In the Summary Judgment Order, the lower court granted summary judgment as to any permanent trespass and refused to

grant summary judgment as to any continuing trespass. The lower court ruled that Plaintiff might be able to establish a claim for continuing trespass to the extent Plaintiff can show intentional collection and discharge of water under Plaintiff's dwelling causing damage to Plaintiff's dwelling within the three-year limitations period. (Summary Judgment Order, R. p. 8.) As an additional sustaining ground, this Court should affirm because the trespass alleged by Plaintiff can only be classified as a permanent trespass as a matter of law.

The central issue in distinguishing a continuing trespass from a permanent trespass is whether abatement of the trespass is reasonably and practically possible. "A nuisance is continuing if abatement is reasonably and practically possible."² Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct. App. 2001).

The material distinction between a continuing trespass or inverse condemnation and a permanent one is aptly set forth in the Restatements as follows:

A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land. Thus, if one, without a privilege to do so, enters land of which another is

² Plaintiff conceded at trial and has not appealed the finding that Plaintiff has the burden of proof with respect to establishing a continuing trespass and damages arising within the applicable limitations period. (Trial Trans., R. p. 672, lines 8-20, R. p. 682, line 25-p. 683, line 5.)

in possession and destroys or removes a structure standing upon the land, or digs a well or makes some other excavation, or removes earth or some other substance from the land, the fact that the harm thus occasioned on the land is a continuing harm does not subject the actor to liability for a continuing trespass. Since his conduct has once for all produced a permanent injury to the land, the possessor's right is to full redress in a single action for the trespass, and a subsequent transferee of the land, as such, acquires no cause of action for the alteration of the condition of the land.

Restatement (Second) of Torts § 162, comment e. Persuasive analysis may be derived from the Pennsylvania supreme court: "If a nuisance at the time of creation is a permanent one, the consequences of which in the normal course of things will continue indefinitely, there can be but a single action therefor to recover past and future damages and the statute of limitations runs against such cause of action from the time it first occurred, or at least from the date it should reasonably have been discovered." Sustrik v. Jones & Laughlin Steel Corp., 413 Pa. 324, 328, 197 A.2d 44, 46-47 (1964).

This Court has previously held that the components of a drainage system are permanent and subject to a single, set limitations period. See Glenn v. Sch. Dist. No. Five of Anderson Cnty., 294 S.C. 530, 536, 366 S.E.2d 47, 50 (Ct. App. 1988); Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 218, 525 S.E.2d 888, 894 (Ct. App. 1999).

In Glenn, a lower riparian property owner sued upstream property owners for property damage resulting from improvements to drainage infrastructure resulting in the diversion of surface water. Glenn's property was gradually and progressively eroded over time as a result of the upstream owners' actions. Id. at 532, 366 S.E.2d at 50. This Court upheld summary judgment in favor of the upstream owners and held that the improvements were "permanent" and created a "single cause of action to be asserted within the period of the statute of limitations." Id. at 536, 366 S.E.2d at 50. The Court further held that Glenn failed to establish the injury was reasonably abatable. The suggestion that the school district could route the water away from Glenn's property was insufficient to establish the injury was reasonably abatable. Id. at 536, 366 S.E.2d at 50-51.

The facts and holding in Glenn are instructive in the case *sub judice*. The improvements implemented by the school district triggered a single cause of action for progressive damages suffered by a downstream landowner. Similar to Plaintiff's argument in this case, the Glenn plaintiff argued that because the flooding occurred during separate and distinct rain events, the statute of limitations should run from each flooding event and plaintiff could recover for damages suffered during the new statutory period. Id. at 50,

366 S.E.2d at 535. But as the court explained, the fundamental flaw in plaintiff's reasoning is that it focused on the continuity of the flooding rather than on the underlying act of the school district and the singularity of the damages suffered by the plaintiff. The school district's improvements constitute a single act leading to separate and distinct flood events which culminated in a single indivisible injury: the gradual and progressive erosion of the plaintiff's land. This is the touchstone for distinguishing a permanent trespass from a continuing trespass.

In the present action, Plaintiff's claim for trespass would have ripened, if at all, when the Subject Pipe was constructed. Plaintiff's focus on the separate and distinct episodes of water flowing through the Subject Pipe is akin to the Glenn plaintiff's misdirected focus on the separate and distinct flooding events. Plaintiff is not claiming separate and independent injuries each time water enters the Subject Pipe but rather one indivisible injury to the structure of the house arising from the existence of the pipe under the house and the natural aging and degradation thereof over time. Therefore, this Court should affirm the trial court's directed verdict on the ground that any trespass as alleged by Plaintiff is a permanent trespass as a matter of law and,

under the law of case doctrine, is barred by the statute of limitations.

C. Virginia Rule

As an additional sustaining ground, this Court should affirm the trial court because the mere existence of upstream drainage infrastructure is insufficient as a matter of law to render the City liable for a continuing trespass.

The record contains no evidence that the City installed the Subject Pipe. Plaintiff's continuous trespass claim is grounded entirely on the unsupported allegation that the City has channeled surface water under the Subject Property. The record shows that surface waters are channeled through the Subject Property through the Subject Pipe. Thus, whoever installed the Subject Pipe is responsible, but Plaintiff's case ignores this fact. Plaintiff brazenly suggests that the surface water that reaches the Subject Property is "the City's water." Plaintiff's position that surface water is a common enemy to all, except for the City, is a clear misstatement of the law on the common enemy doctrine. "[W]here no greater surface water drainage occurs than would naturally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system." Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986). In adopting

the "Virginia Rule" the Supreme Court of South Carolina expressly rejected an alternative "New Jersey Rule" which would have imposed strict liability on an upper landowner for any modification of water flow. Irwin, 288 S.C. at 225, 341 S.E.2d at 784-85.

In order to make out a claim with respect to surface water Plaintiff must set forth evidence that the City has made some modification upstream so as to render it liable under the Common Enemy Rule, as clarified by the Virginia Rule. Plaintiff has failed to make this showing.

IV. THE TRIAL COURT CORRECTLY EXCLUDED THE EXPERT TESTIMONY OF MICHAEL LEONARD

A. Standard of Review

"Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court. Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court. In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. To warrant reversal based on the

admission or exclusion of evidence, the Plaintiff 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, 25-26, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

B. Rule 702, SCRE and Trial Court's Gatekeeper Role for Admission of Expert Testimony

"While Rule 702 was intended to liberalize the introduction of relevant expert evidence, courts must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001).

A trial court is required to make a "threshold determination" of the reliability of proposed expert testimony to determine if it is admissible. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009). "In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular

branch of the field. Finally, the substance of the testimony must be reliable. It is this final requirement of reliability which is the central feature of the inquiry." Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

"[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. *The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.*" State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (emphasis added).

In analyzing the reliability of proposed expert testimony the court is to consider the following factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

C. Opinion Testimony was properly excluded

A material issue of fact with respect to Plaintiff's claim for continuing trespass is whether the alleged trespass is abatable. (Summary Judgment Order, R. pp. 8-9.) As applied to the facts of this case, the issue is whether the flow of water downstream through a 29 acre water-shed area through a 24-inch pipe buried approximately six feet in the ground under a structure which was constructed over the pipe approximately 90 years prior to the commencement of this case is reasonably and practically abatable. (Summary Judgment Order, R. pp. 8-9.) It was not contested at trial and is not contested on appeal that rendering an opinion on this issue would require specialized skill and knowledge on a number of engineering and hydrological factors.³ Leonard testified that rendering a qualified opinion on the abatability of the flow of water would require a thorough engineering study. (Leonard Dep., R. p. 782, lines 6-19.) It was uncontested that opinion testimony on the issue of abatability must be

³ "Any engineering opinion as to whether the existing flow can be reasonably diverted from the Subject Pipe would first necessitate sufficient facts be developed by engineering studies, mapping, planning and analysis at a minimum as to the following: the amount of flow through the Subject Pipe; the type, material and specifications of the rerouted infrastructure; the path of the rerouted infrastructure, the existing ownership and cost to acquire any necessary private property through the rerouted path, conflict avoidance with existing infrastructure (e.g., College Avenue has extensive existing infrastructure at multiple depths); the location, depth and adequacy of downstream infrastructure." (Aff. of James G. Bagley, ¶ 10, R. pp. 880-81.)

presented by way of expert testimony, and therefore, must satisfy the threshold 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).

The Record amply demonstrates that the opinions of Plaintiff's designated expert witness on this issue, Leonard, fail to satisfy the minimum standard necessary to pass the gatekeeper. Leonard testified that he has not performed a hydrology study or studied the flow of water upstream, downstream or through the Subject Pipe. (Leonard Dep., R. p. 765, line 4-p. 766, line 4.) Leonard testified that he has not analyzed whether an alternative drainage line could be placed in any particular location to divert water flow; he has not analyzed whether any alternatives would conflict with other existing infrastructure (utilities or otherwise); he has not analyzed the topography of the watershed area to know if and how an alternative line could reroute the water flow; and he has not studied or analyzed the feasibility or cost of any alternatives to routing water flow (Leonard Dep., R. p. 779, line 7-p. 781, line 5.) Leonard testified that he never performed a hydrology study of the storm basin or Watershed; never studied the sources and amount of water flowing to and through the Subject Pipe; never studied the rate or intensity of flow; and never analyzed the flow downstream from the

Property. (Leonard Dep., R. p. 765, line 4-p. 766, line 4, R. p. 768, lines 2-9.)

Leonard admits that all these factors would have to be studied to properly render an opinion as to the issue of whether the flow of water through the Subject Pipe is reasonably and practically abatable. (Leonard Dep., R. p. 782, lines 6-19.) The following is a telling excerpt from Leonard's deposition:

- 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 was no, sir, but I have thought about it.
- Q: And in your thinking about it, have you analyzed feasibility at all?
- A: No.
- Q: Have you analyzed cost?
- A: No.

(Leonard Dep., R. p. 780, line 20-p. 781, line 5.) Finally, Leonard testified that he was unable to testify to a reasonable degree of engineering certainty that the flow of water can be reasonably routed around the Property. (Leonard Dep., R. p. 783, lines 6-11.)

As gatekeeper for expert testimony, the trial court properly excluded Leonard's opinions under the established standards.

D. Plaintiff's Argument is Unavailing

In Appellant's Brief, Plaintiff argues that exclusion of Leonard's testimony was improper. Plaintiff's argument consists of two fatally flawed lines of reasoning.

First, Plaintiff asserts that the City's motion in limine was actually a dispositive motion which the trial court improperly granted. (Appellant Initial Brief, pp. 11-12.) The assertion is patently false. The City's motion in limine sought a preliminary ruling on the admissibility of certain categories of opinion testimony expected to be offered by Leonard. The City's motion was not dispositive with respect to the case. The City's motion was not even dispositive on the issue of admissibility of the evidence. Plaintiff could have proceeded to prosecute her claim to the jury and obtained a ruling from the trial court at the appropriate time. See Samples v. Mitchell, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997) (stating law that a ruling on motion in limine is a preliminary ruling). Instead, Plaintiff voluntarily converted the motion in limine from a preliminary ruling on the admissibility of evidence into a directed verdict for the City. The trial court's exclusion of the opinion testimony is not preserved under these circumstances.

Second, Plaintiff argues that despite the lack of consideration of any facts found in the record and the lack of

utilization of any accepted scientific method, procedure or technique, Leonard should have been permitted to offer opinion testimony based on an inadmissible document (an annotated GIS map). Plaintiff is unable to provide any foundation or authentication for the document. Leonard was ignorant as to the document's origin and author. Leonard admitted that he lacked any knowledge or information regarding the source of the document, the person who prepared the document, or the purpose of the document. The Record lacks any information about the document except that the document was included in document production. (Leonard Dep., R. p. 779, line 7-p. 780, line 11.) Counsel for Plaintiff acknowledged the defects of Plaintiff's reliance on this document while proffering the proposed testimony of Michael Leonard during the hearing on the City's Motion in Limine:

And in all candor the Court all that we know about this document is that the City produced it. And it shows the water flow being changed in the way that Mr. Leonard describes where the water is collected in front of Miss Ray's house and then goes down Lucas and then down in the pipe. I can't tell you how much that would cost. Whether it's possible. I can only tell you at some point somebody in the City drew it up. That's the evidence of abatability.

(Trial Trans., R. p. 674, lines 1-10.) The trial court properly issued a preliminary ruling to exclude Leonard's opinion testimony on the issue of abatability.

V. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT IN FAVOR OF THE CITY AS TO PLAINTIFF'S CLAIM FOR CONTINUING TRESPASS

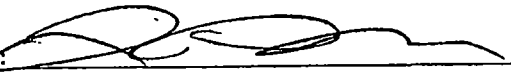
The trial court properly granted a directed verdict in favor of the City in light of the law applicable to this case. Plaintiff conceded to a directed verdict in light of the trial court's exclusion of opinion testimony from Michael Leonard on the issue of abatability. (Trial Trans., R. p. 682, line 25-p. 683, line 5.) Plaintiff did not offer any evidence on the issue of abatability other than the proposed testimony of Michael Leonard. Accordingly, because there was no issue of material fact regarding the critical element of continuing trespass, a directed verdict in favor of the City was proper.

CONCLUSION

For the reasons stated above, the Orders which are the subject of Plaintiff's appeal should be affirmed and this appeal dismissed with prejudice.

Respectfully submitted,

August 16, 2017

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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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final
Brief of Respondent complies with Rule 211(b), SCACR.

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AUG 23 2017

SC Court of Appeals

ATTORNEY FOR APPELLANT

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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.

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Appellant Lucille H. Ray respectfully submits this memorandum of law in reply to the Brief of Respondent City of Rock Hill, South Carolina.¹

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIMS FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF.

Because genuine issues of material exist with respect to whether the City is committing a continuing trespass entitling Ray to injunctive relief, and whether the City committed an affirmative act sufficient to constitute an inverse condemnation, the trial court improperly entered the Summary Judgment Order in the City's favor, as well as the Reconsideration Order upholding that ruling. Both the Summary Judgment Order and the Reconsideration Order should be reversed with respect to Ray's claims for injunctive relief and inverse condemnation.

A. *There Is a Genuine Issue of Material Fact as to Whether the City Is Committing a Continuing Trespass Entitling Plaintiff to Injunctive Relief.*

In its Brief, the City argues that the Summary Judgment Order properly dismissed Ray's claim for injunctive relief for trespass because "monetary damages provided an adequate remedy at law." Respondent's Brief, p. 14. According to the City, the sum identified by Ray and Leonard as necessary to remediate the structural damage to her property was sufficient to "make Plaintiff whole." Id. at p. 15.

However, both the City and the trial court failed to take into consideration the continuing nature of the City's trespass upon Ray's property. The South Carolina Supreme Court has recognized that though a legal remedy may be sufficient for each given act of trespass "if it stood alone," the repetition of a continuing trespass is only

¹ All capitalized terms have the same meaning provided for in Appellant's initial brief.

avoided and "the entire wrong . . . prevented or stopped by injunction . . ." McClellan v. Taylor, 54 S.C. 430, 437, 32 S.E. 527, 529 (S.C. 1899). A continuing trespass must be enjoined "because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages," and no adequate remedy at law exists. Id.; accord Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (S.C. Ct. App. 1991) (upholding injunctive relief for trespass in the form of flowing water).

The trial court incongruously recognized that genuine factual issues exist as to whether the City has created an abatable trespass onto Ray's property by discharging stormwater into the pipe, but failed to acknowledge that in order to be abatable the stormwater discharge has to be continuing in nature. (R. pp. 7-8). Indeed, Ray has proffered evidence that stormwater is continuously discharged into the pipe with every storm. (R. p. 701, lines 4-13). Her fundamental theory is that stormwater is escaping from that pipe, and degrading the soil beneath her home, leading to structural damage. The City would have Ray file a new action every time it rains, recover the damages caused by that particular rainfall event only, and await the next storm. That is simply not the law in South Carolina.

The City argues that a drainage system is "permanent and subject to a single, set limitations period," relying upon Glenn v. Sch. Dist. No. 5 of Anderson Cty., 294 S.C. 530, 366 S.E.2d 47 (S.C. Ct. App. 1988) and Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (S.C. Ct. App. 1999). Respondent's Brief, p. 21. Yet the Court in Glenn, acknowledged that if a trespass arising from a drainage system is "abatable [plaintiff] can recover damages sustained within the statutory period" even if the drainage system was constructed years earlier. 294 S.C. at 536, 366 S.E.2d at 50

(simply holding that plaintiff failed to provide evidence that the stormwater runoff through the drainage system could be abated where he testified only that the school could “quit putting water in that ditch”). Whitfield is completely inapposite, as the alleged trespass there was the actual construction of a drainage and sewer system without the landowners permission, *not* damage from stormwater flowing through a drainage system onto plaintiff’s property. 338 S.C. at 218, 525 S.E.2d at 894. The City makes no attempt to address the Court of Appeals’ holding in Mack that trespass in the form of water in a detention pond constructed years before a lawsuit nonetheless constituted a continuing and recurring trespass sufficient to support an injunction. 306 S.C. at 437, 412 S.E.2d at 433-434.

The City also contends that the Summary Judgment Order and Reconsideration Order should be affirmed on the grounds that Ray has not set forth evidence that the City made an upstream modification resulting in greater stormwater drainage than what would naturally result from the reasonable development of the City’s property. Respondent’s Brief, p. 23-24. Yet the City conveniently ignores the exceptions to this “common enemy rule” adopted by South Carolina: “an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land.” Lucas v. Rawl Family Ltd. P’ship, 359 S.C. 505, 509-510, 598 S.E.2d 712, 714 (S.C. 2004). That is precisely what the City has done here by collecting stormwater from the City streets surrounding Ray’s property, channeling that water through the City’s stormwater drainage system, and directing that concentrated stormwater flow off of City streets onto Ray’s property.

Because injunction is the proper remedy for a continuing trespass like the City's ongoing discharge of storm water into the pipe under Ray's house, the Summary Judgment Order and Reconsideration Order should be reversed and Ray's claim for injunctive relief permitted to proceed to trial.

B. There Is a Genuine Issue of Material Fact as to Whether the City Should Be Liable for Inverse Condemnation.

As Ray has presented evidence of affirmative acts sufficient to create a genuine issue of material fact as to whether the City committed an inverse condemnation of her property, the Summary Judgment Order's and Reconsideration Order's dismissal of that claim should be overruled.

1. Ray Has Provided Evidence of Affirmative Acts by the City.

The City incorrectly contends that Ray "failed to establish any evidence of an affirmative act by the City to support inverse condemnation." Respondent's Brief, p. 10. According to the City, because the City did not install the pipe initially or undertake new upstream construction or improvements which increased the stormwater runoff flowing into the pipe, the City has taken no affirmative action. Id. at p. 11. The City also asserts that its construction work on College Avenue in November 2012 was little more than passive, routine "maintenance" which does not constitute affirmative action. Id. at pp. 12-13.

In so arguing, the City completely mischaracterizes its actions in November 2012. First, the City misconstrues Ray's testimony to mean that only a single, unrelated pipe was severed when the City dug up College Avenue. Respondent's Brief, p. 13. In reality, the City broke apart a number of pipes in 2012 directly in front of Ray's house, *including* the problematic pipe flowing under Ray's house. (R. pp. 692-700, p.712, line

l-p. 716, line 2; R. p.804, ¶ 11; R. p. 841, ¶ 9-10). For a number of days, while construction continued, the City's stormwater system did not flow under the Property. Id. At that point, Ray notified the City that they did not have permission to reconnect the pipe leading under her house to the City's stormwater system. (R. p. 841, ¶ 17; R. p. 922, ¶ 7; R. pp. 837-838). Despite knowing of Ray's complaints that the pipe was damaging her house, and that Ray had specifically forbidden the City from reconnecting the pipe, the City nonetheless voluntarily reconnected that pipe to the City's stormwater system over Ray's objections. (R. p. 804, ¶ 11). Ray's inverse condemnation claim is based upon the City having undertaken a permanent public project to modernize its infrastructure along College Avenue, and as a result, taking positive steps to direct its stormwater system to flow directly under Ray's house. The Summary Judgment Order and Reconsideration Order failed to take this affirmative conduct by the City into account. Accordingly, Ray has established, at the very least, a genuine issue of material fact as to whether the City engaged in an affirmative, positive, and aggressive act sufficient to give rise to a claim for inverse condemnation, and summary judgment was improper.

2. The Trial Court's Ruling on the Statute of Limitations Does Not Justify Dismissal of the Inverse Condemnation Claim.

The City also points to the trial court's ruling on the statute of limitations as additional grounds to dismiss Ray's inverse condemnation claim on summary judgment, despite the trial court's failure to do the same. Respondent's Brief, p. 16. The City accurately recounts the Summary Judgment Order's conclusion that Ray's claims for trespass arising prior to November 6, 2009 are barred. Id. at pp. 17-18 (citing R. pp. 8-9). Though the trial court did not consider the statute of limitations with respect to Ray's

inverse condemnation claim, Ray does not dispute here that the trial court's same logic holds true for inverse condemnation. However, by extension, the trial court's conclusion that Ray's trespass claims arising after November 6, 2009 survive precisely because they may be abatable – i.e. continuing – likewise means that Ray's claim for inverse condemnation arising after that date also survives.

Moreover, as noted above, Ray has provided evidence that on November 13, 2012, her attorney sent a letter to the City instructing them not to reconnect the City's stormwater system to the pipe flowing under Ray's house. (R. pp. 837-838). This affirmative act constitutes an inverse condemnation in and of itself, and falls well within the applicable statute of limitations period. Accordingly, the statute of limitations does not offer additional grounds to dispose of Ray's inverse condemnation claim on summary judgment.

II. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE FROM PLAINTIFF'S EXPERT WITNESS AND ENTERING A DIRECTED VERDICT AGAINST PLAINTIFF.

The trial court likewise erred in granting the County's motion *in limine* to exclude Michael Leonard's testimony and in awarding judgment to the City, such that the Directed Verdict Order should be reversed.

The trial court specifically excluded Michael Leonard's proposed expert testimony as to the abatability of the City's trespass because it found that Leonard "had not done any engineering work on this issue, and it would not meet criteria of being reliable or assist the jury." (R. p. 682, lines 14-22). As the trial court recognized in the Directed Verdict Order, "[g]iven Judge Kimball's ruling on summary judgment, only an abatable trespass remained as a viable cause of action." (R. p. 17; see also R. p. 683,

lines 6-16). Judge Hill then correctly acknowledged that “[b]ecause the court excluded Plaintiff expert Leonard’s opinion testimony as unreliable concerning abatement, the trespass cause of action became unviable” (R. p. 17).

The trial court erred in its application of the law and abused its discretion by excluding Leonard’s testimony.² As explained during the hearing on the City’s motion *in limine*, Leonard’s opinion was that, based on his experience in stormwater design and installing storm drainage systems, the City could change the direction of a specific pipe to alter the flow of stormwater away from Ray’s property, thereby abating the trespass. (R. p. 673, lines 1-23; R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). The City itself appears to have considered that very same plan, as evidenced by a map depicting a rerouted stormwater system which further supports Leonard’s testimony that abating the flow of water by redirection was achievable. (R. p. 673, line 24-p. 674, line 8; R. p. 300). Leonard’s testimony is grounded in his professional experience designing and installing stormwater systems, and therefore reliable. (R. pp. 840-841, ¶¶ 6, 17; R. p. 922, ¶ 7). Leonard’s proffered testimony clearly satisfies the concerns of the Court of Appeals in Glenn v. Sch. Dist. No. 5 of Anderson Cty., 294 S.C. 530, 536, 366 S.E.2d 47, 50 (S.C. Ct. App. 1988), where the Court held that testimony to the effect that the school could “quit putting water in that ditch,” without more, was not sufficient evidence that stormwater runoff through the drainage system could be abated.

² In its Brief, the City makes much of what it characterizes as Michael Leonard’s lack of qualifications and reliance upon another expert’s contradictory opinion in determining the cause of the damage to Ray’s property. Respondent’s Brief, pp. 6-7. None of the City’s contentions are relevant to the issue of Leonard’s opinion that the City’s trespass was abatable, however.

The trial court's determination that Leonard's opinion was unreliable rested solely on the fact that Leonard had not performed a cost analysis or feasibility study for a proposed redesign of the stormwater system to direct water away from Ray's property. (R. p. 664, line 13-p. 665, line 3). Indeed, the City relies upon Leonard's testimony that he could not say "that the flow of water can be reasonably routed around the Property" as supporting the trial court's conclusion. Respondent's Brief, p. 8. Yet Leonard also testified that he believed "it can be done" and that there "is a solution," based on his "[s]ite observations and general practice" and "a study that did that exact thing" which was produced by the City. (R. p. 783, lines 12-24). Accordingly, Leonard was "reasonably certain that it can be rerouted." (R. p. 781, line 22-p. 782, line 3).

While the City could have presented evidence regarding the feasibility of the cost or construction logistics of redesigning a portion of the stormwater system, that does not go to Leonard's testimony that it was absolutely possible for the City to abate its trespass. The City, and the trial court, improperly conflated the issues of reasonableness and abatability, excluding Leonard's testimony on the latter because it did not – and was not intended to – address the former. As the City notes, it is undisputed that an opinion as to the abatability of the City's trespass would have to come from an expert witness. Respondent's Brief, p. 27. By excluding the testimony of Ray's designated expert on this issue, the trial court effectively prevented Ray from prosecuting her claim, dictating the directed verdict then entered against Ray.

The court in this case abused its discretion by granting the City's motion *in limine* which necessitated entry of a directed verdict against Ray, pursuant to the Directed

Verdict Order. The Directed Verdict Order should be reversed, and Leonard should be permitted to testify as to the abatability of the City's trespass.

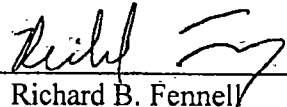
CONCLUSION

For the foregoing reasons, the Summary Judgment Order, Reconsideration Order, and Directed Verdict Order should be reversed, and Ray's claims for trespass, inverse condemnation, and injunctive relief be permitted to proceed to trial.

Dated: August 16, 2017
Charlotte, North Carolina

JAMES, McELROY & DIEHL, P.A.

By: _____


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**THE STATE OF SOUTH CAROLINA
In The 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,
Defendants,

Of which City of Rock Hill is the Respondent.

Appellate Case No. 2016-002118

Appeal From York County
D. Garrison Hill, Circuit Court Judge
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5684
Heard April 1, 2019 – Filed September 11, 2019

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Richard B. Fennell, of James, McElroy & Diehl, P.A., of
Charlotte, NC, and Charles S. Bradford, of Charles S.
Bradford, P.A., of York, for Appellant.

W. Mark White and Jeremy D. Melville, both of Spencer
& Spencer, P.A., of Rock Hill, for Respondent.

LOCKEMY, C.J.: In this action, Lucille Ray asserts the special circuit court judge erred in granting summary judgment to the City of Rock Hill (the City) as to her claims for inverse condemnation and injunctive relief. In addition, Ray argues the circuit court erred in (1) excluding witness testimony regarding abatability, and (2) granting a directed verdict to the City as to her claim for trespass. We affirm in part, reverse in part, and remand to the circuit court.

FACTS

Ray's claims against the City in this action relate to a 24-inch storm water pipe (the Pipe) located under her property at 330 College Avenue (the Property) in the City. The Pipe begins at a City maintained catch basin on College Avenue in front of the Property and channels storm water underneath Ray's home and through the Property. The Property and the Pipe are located at the topographical low point of a watershed comprising approximately 29 acres.

Ray's predecessors-in-title constructed a home on the Property in the 1920's. The Pipe was installed on the Property prior to the construction of the home. The record contains no evidence of who originally installed the Pipe, who owns the Pipe, or the existence of any easement for piping water across the Property. The record reveals one of Ray's predecessors-in-title was aware of the Pipe and connected a drainage pipe into the Pipe.

Ray acquired the Property in May 1985 and acknowledges a history of sinkholes and cave-ins on the Property since the time of her acquisition. In 1992, Ray observed as her gardener fell waist deep into a sinkhole behind her home. Ray was also aware of bending and movement in the roof frame of the home in 1995 and again in 2007. By 2008, Ray was aware of the existence of the Pipe and was concerned that water leaking from the Pipe might be damaging her home. Ray noticed the front steps of her home appeared to be sinking and requested the City investigate the Pipe. In 2008, City employees came to the Property at least twice and informed Ray that a storm water pipe "ran toward the steps" of Ray's house.

On November 6, 2012, Ray filed suit against the City and the South Carolina Department of Transportation (SCDOT). In her complaint, Ray asserted causes of action for trespass and inverse condemnation; she also sought injunctive relief and attorney's fees. Ray claimed her home incurred structural damage due to foundation movement as a result of water leaking from the Pipe.

On March 24, 2014, SCDOT filed a motion for summary judgment on each of Ray's claims. The circuit court granted the motion and all causes of action asserted against SCDOT were dismissed.

On May 19, 2014, the City filed a motion for summary judgment. Following a hearing, the special circuit court judge granted the City partial summary judgment, dismissing Ray's claims for inverse condemnation, injunctive relief, and attorney's fees. The judge further held the collection and discharge of water under Ray's home may be considered an affirmative, intentional act, thus leaving a genuine issue for trial as to Ray's trespass claim. The judge ruled the statute of limitations began to run on Ray's trespass claim no later than 2008. However, the judge found a genuine issue of fact existed as to whether the asserted trespass in this case was abatable. The judge noted that, pursuant to case law, where the offending conduct is abatable, the statute of limitations begins to run with each new invasion of a plaintiff's property. Therefore, since abatability is an issue of fact, the judge found Ray's remaining claim for trespass survived as to each new invasion for the three years prior to November 6, 2009. The City's and Ray's subsequent motions to reconsider were denied.

On September 12, 2016, the first day of trial, the City moved to exclude certain testimony, including opinions expected to be offered by Michael Leonard, a structural engineer and Ray's expert witness. In deposition testimony, Leonard opined that the structural damage to Ray's home was partially the result of the leaking Pipe. Leonard further testified that to render a qualified opinion on the abatability of the flow of water to and through the Pipe would require a thorough engineering study. Leonard testified he had not performed a hydrology study or studied the flow of water to or through the Pipe. Leonard testified he was unable to testify to a reasonable degree of engineering certainty that the flow of water could be reasonably routed around the Property.

The circuit court granted the City's motion, excluding Leonard's opinion testimony regarding the issue of the abatability of the alleged trespass. Thereafter, Ray acknowledged she could not meet her burden of proof in light of the court's ruling and stated "it would be appropriate to enter judgment against me." In a subsequent order, the circuit court held that given the special circuit court judge's prior ruling on summary judgment, only an abatable trespass remained as a viable cause of action. The court explained that because it had excluded Leonard's opinion testimony as unreliable concerning abatement, Ray's trespass cause of action was unviable. With no genuine issue of material fact remaining, the court found the City was entitled to judgment as a matter of law. This appeal followed.

LAW/ANALYSIS

I. Summary Judgment

Ray argues the special circuit court judge erred in granting summary judgment as to her claims for inverse condemnation and injunctive relief.

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCF." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. . . [who] is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt.*, 381 S.C. 326, 329-31, 673 S.E.2d 801, 802-03 (2009).

A. Inverse Condemnation

"An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain." *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "To prove 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." *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002).

The special circuit court judge determined Ray's claim that the City collected water into its storm water drainage system and channeled it under her home did not support her claim of inverse condemnation. The judge found no positive, aggressive acts were committed by the City. The judge noted Ray did not allege the construction of any new improvements causing water to flow through the Pipe under her Property, and Ray failed to cite any case law which would categorize maintenance of the storm water drainage system as a positive, aggressive act.

Ray contends the City's maintenance in November 2012 of drainage pipes situated under College Avenue in front of her Property constituted an affirmative act sufficient to give rise to a claim for inverse condemnation. She maintains the City, after repairing several broken pipes under College Avenue, reconnected the subject Pipe to the City's storm water drainage system against her wishes.¹ Ray asserts the City undertook a permanent public project to modernize its infrastructure along College Avenue, and, as a result, it took positive steps to direct its storm water system flow directly under her home.

The City asserts there is no evidence it installed or owned the subject Pipe or that any new construction or improvements upstream from the Pipe resulted in an increase in the amount or flow rate of water toward Ray's Property. The City contends its maintenance of the pipes under College Avenue in November 2012 was not to the subject Pipe or to a pipe directly connected to the Pipe. The City argues summary judgment was proper because Ray was unable to produce any evidence to attribute the flow of water through the Pipe to any action by the City.

Although the City asserts its repair work in 2012 only involved one pipe and did not affect the subject Pipe, we believe questions of fact exist as to which pipes were damaged and in need of repair. On November 13, 2012, Ray's attorney advised the City that three large pipes in front of Ray's Property were damaged during the City's work on College Avenue and specifically advised the City that Ray did not consent to the reconnection of the Pipe to any of the replacement pipes. Ray submitted photographs of the damaged pipes in front of her home into evidence. These photos appear to show three large severed pipes and the City's subsequent work to reconnect the pipes and resume the flow of storm water.

This court addressed inverse condemnation and municipal drainage systems in *Hawkins v. City of Greenville*. Hawkins filed suit against the City of Greenville asserting a cause of action for inverse condemnation and alleging the City's neglect in designing and maintaining its storm water drainage system led to flooding which damaged his property. *Hawkins*, 358 S.C. at 285-86, 594 S.E.2d at 560. This court found Hawkins failed to allege any affirmative, positive, and aggressive acts by the City which damaged his property. *Id.* at 291, 594 S.E.2d at 562. Specifically, the court found: (1) the acts Hawkins alleged were merely failures to act; and (2) the only affirmative act Hawkins cited as a basis for his inverse condemnation claim

¹ On November 13, 2012, Ray's attorney sent a letter to the City instructing them not to reconnect the City's storm water drainage system to the Pipe.

was the replacement of a culvert and the installation of material around a nearby creek. *Id.* at 291, 594 S.E.2d at 562-63. The court held there was no evidence in the record that either of these acts caused the flooding on Hawkins's property. *Id.* at 291, 594 S.E.2d at 563.

We note that while the dissent in the present case finds *Hawkins* controlling, we believe *Hawkins* is distinguishable from the present case. Here, we find 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 after the City admitted it did not have an easement and Ray told the City not to reconnect. Accordingly, we reverse the special circuit court judge's grant of summary judgment as to Ray's inverse condemnation claim.

B. Injunctive Relief

"Actions for injunctive relief are equitable in nature." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Id.* "To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Id.* "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004).

The special circuit court judge found Ray's claim for injunctive relief failed as a matter of law because her trespass claim provided an adequate remedy at law. The judge noted Ray "could be made whole by a damage award on the trespass claim."

Ray argues the City's trespass on the Property is continuing in nature as it recurs with each rainfall. She contends the judge's finding that a genuine issue of fact existed as to whether the trespass was abatable was inconsistent with its grant of summary judgment to the City as to her claim for injunctive relief. Ray asserts that repairing the damage caused by the flow of water through the Pipe beneath her home, while permitting the City to continue channeling water through the Pipe, guarantees further damage and litigation between the parties.

We agree with Ray that an injunction is the proper remedy for a continuing trespass. See *Mack v. Edens*, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) ("Injunction is a proper remedy for a continuous trespass to land. Because

of the permanent and recurring nature of the injury, which cannot otherwise be prevented, the courts should enjoin the continuous trespasser to protect the landowner's property rights from hurt or destruction."). However, as discussed below, we believe the circuit court properly granted a directed verdict in favor of the City as to Ray's trespass claim. Therefore, our finding below is dispositive of Ray's argument that the special circuit court judge erred in granting summary judgment as to her claim for injunctive relief for trespass.

II. Exclusion of Expert Testimony

Ray argues the circuit court erred in granting the City's motion to exclude Leonard's expert testimony. We disagree.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

"Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the [circuit] court." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). "[T]he trial court's decision [to admit or exclude expert testimony] will not be disturbed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* at 26, 609 S.E.2d at 509. "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* "To 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." *Id.*

"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). "In determining whether to admit expert testimony, the court must make three inquiries." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). "First, the [circuit] court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the

particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* It is this final requirement of reliability which is the central feature of the inquiry. *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In analyzing the reliability of proposed expert testimony the court must consider the following factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Graves*, 401 S.C. at 74, 735 S.E.2d at 655 (quoting *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)).

The circuit court ruled Ray may be able to establish a claim for continuing trespass to the extent she could show intentional collection and discharge of water under her home causing damage within the three-year limitations period. The central issue in distinguishing a continuing trespass from a permanent trespass is whether abatement of the trespass is reasonably and practically possible.

Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct. App. 2001). Thus, a material issue of fact with respect to Ray's claim for continuing trespass is whether the alleged trespass is abatable.

Prior to trial, the City moved to exclude Leonard's expert testimony on the grounds that it was unreliable. The circuit court granted the motion with respect to the issue of whether the City's alleged trespass was abatable because Leonard "had not done any engineering work on this issue, and it would not meet [the] criteria of being reliable or assist[ing] the jury." As the court noted in its subsequent order, given the prior ruling on summary judgment, only an abatable trespass remained as a viable cause of action. The court explained that because it had excluded Leonard's opinion testimony as unreliable concerning abatement, Ray's trespass cause of action was unviable.

We find the trial court did not abuse its discretion in granting the City's motion to exclude Leonard's testimony. Leonard testified that to render a qualified opinion on the abatability of the flow of water to and through the Pipe would require a thorough engineering study. Leonard testified he had not performed a hydrology study or studied the flow of water to or through the Pipe. Leonard testified he had not analyzed whether an alternative drainage line could be placed in any particular location to divert water flow; he had not analyzed whether any alternatives would conflict with other existing infrastructure; he had not analyzed the topography of the watershed area to know if and how an alternative line could reroute the water

flow; and he had not studied or analyzed the feasibility or cost of any alternatives to routing water flow. Leonard admitted that all of these factors would have to be studied to properly render an opinion as to the issue of whether the flow of water through the Pipe is reasonably and practically abatable. Finally, Leonard testified that although he believed the water flow could be rerouted around the Property, he was unable to testify to such with a reasonable degree of engineering certainty. As gatekeeper for expert testimony, the trial court properly excluded Leonard's opinions regarding abatability.

III. Directed Verdict

Ray argues the circuit court erred in granting a directed verdict on her trespass claim. We disagree.

When reviewing the circuit court's ruling on a directed verdict motion, this court must apply the same standard as the circuit court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). An appellate court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). "On the other hand, the [circuit] court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt." *Id.* "When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010).

After granting the City's motion to exclude Leonard's expert testimony, Ray conceded a directed verdict was proper in light of the circuit court's exclusion of Leonard's testimony on the issue of abatability. With no genuine issue of material fact remaining, the court found the City was entitled to judgment as a matter of law. We find the court did not err in granting a directed verdict. Ray did not offer any evidence on the issue of abatability other than the proposed testimony of Leonard. After the court excluded Leonard's testimony, there was no issue of material fact regarding the critical element of continuing trespass. Thus, a directed verdict in favor of the City was proper.

CONCLUSION

We reverse the special circuit court judge's grant of summary judgment as to Ray's inverse condemnation claim. Additionally, we affirm the circuit court's exclusion of witness testimony regarding abatability and its grant of a directed verdict to the City as to Ray's claim for trespass.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MCDONALD, J., concurs.

SHORT, J., concurring in part and dissenting in part: Respectfully, I concur in part and dissent in part. I agree with the majority to affirm the exclusion of expert testimony, the directed verdict on the trespass claim, and the injunctive relief. However, I would also affirm the trial court's grant of summary judgment on the inverse condemnation claim. "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. App. 2004) (quoting *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002)). I agree with the circuit court that Ray has failed to allege an affirmative, positive, aggressive act on the City's part and *Hawkins* is controlling. The evidence shows the pipes in the middle of College Avenue were broken during a City project, and the City repaired the pipes. I conclude this was maintenance to an existing system of pipes and not the basis for a claim for inverse condemnation. Thus, I would affirm.

90975

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

By: LA

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

SEP 26 2019

SC 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.

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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September 26, 2019

Via Hand-Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
SEP 26 2019
SC Court of Appeals

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

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

RECEIVED
OCT 17 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, 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

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.

By: Richard B. Fennell / JMH

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Attorneys for Appellant

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

RECEIVED
OCT 17 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, Defendants,

Of which City of Rock Hill is the Respondent.

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
Richard B. Fennell
S.C. Bar No. 10467
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Attorneys for Appellant

October 17, 2019

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OCT 17 2019

SC Court of Appeals

VIA HAND DELIVERY

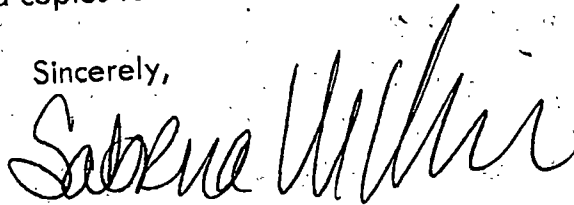
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

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

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
Jeremy D. Melville
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P.O. Box 790
Rock Hill, SC 29731
Tel: (803) 327-7191

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/repaired 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.

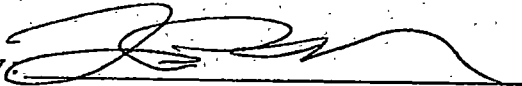
III.

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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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

OCT 28 2019

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

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.

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:

Richard B. Fennell
James, McElroy & Diehl, P.A.
525 N. Tryon Street, Suite 700
Charlotte, NC 28202

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By: 

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ATTORNEYS FOR RESPONDENT
CITY OF ROCK HILL

* * * Communication Result Report (Oct. 24. 2019 9:12PM) * * *

1}

Date/Time: Oct. 24. 2019 9:10PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
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October 24, 2019

Via U.S. Mail and Facsimile

The Honorable Jenny Abbott Kitchings
 Clerk of Court
 South Carolina Court of Appeals
 P.O. Box 11629
 Columbia, SC 29211
 Fax: (803) 734-1839

Re: Lucille H. Ray v. City of Rock Hill, et al.
 Appellate Case No. 2016-092118

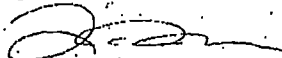
Dear Ms. Kitchings:

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

00177595.1

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October 24, 2019

Via U.S. Mail and Facsimile

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
Fax: (803) 734-1839

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OCT 28 2019

SC Court of Appeals

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

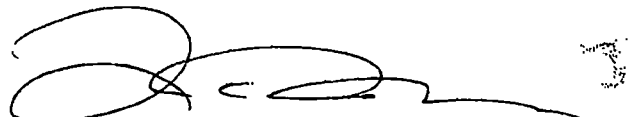
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Thank you for your assistance in this matter.

Sincerely,

Spencer & Spencer, P.A.



Jeremy D. Melville

cc: Rich Fennell

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OCT 28 2019

SC Court of Appeals

To: The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

The South Carolina Court of Appeals

Lucille H. Ray, Appellant,

v.

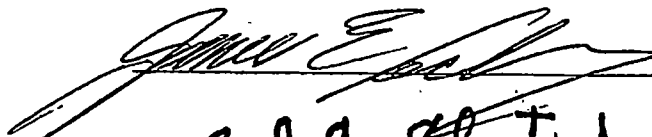
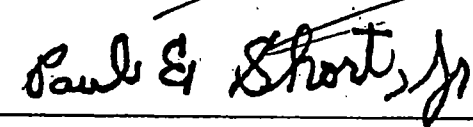
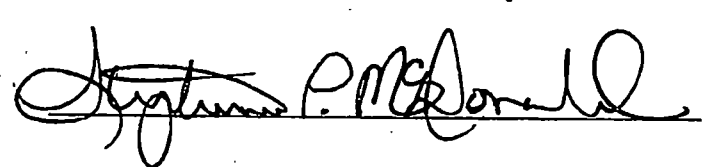
City of Rock Hill, South Carolina, a Municipal Corporation, and South Carolina Department of Transportation, an agency of the State of South Carolina, Defendants,

Of which City of Rock Hill is the Respondent.

Appellate Case No. 2016-002118

ORDER

After careful consideration of the Appellant's and Respondent's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

FILED

November 22, 2019

Richard B. Fennell, Esquire
Charles S. Bradford, Esquire
William Mark White, Esquire
Jeremy Daniel Melville, Esquire
The Honorable D. Garrison Hill
The Honorable S. Jackson Kimball, III