THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
IN THE COURT OF COMMON PLEAS
D. Garrison Hill, Circuit Court Judge
S. Jackson Kimball, III, Special Circuit Court Judge

Appellate Case No. 2019-002074

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

LUCILLE H. RAY, RESPONDENT,

v.

CITY OF ROCK HILL, SOUTH CAROLINA, A MUNICIPAL CORPORATION, AND THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, AN AGENCY OF THE STATE OF SOUTH CAROLINA. PETITIONER.

Of Which City of Rock Hill is Petitioner.

Appellate Case No. 2019-002074

RESPONDENT LUCILLE H. RAY'S
AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

Dated: February 21, 2020

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court Should Refuse to Issue a Writ of Certiorari when the petitioner has failed to show special and important reasons for further review of the issues presented to the Court of Appeals.

COUNTER STATEMENT OF THE CASE

The Petition filed by the City of Rock Hill (the "City") contains an expansive recitation of its view of the facts which requires response. Respondent Lucille H. Ray ("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"). The Pipe received stormwater from a roughly 29 acre watershed area. (R. pp. 885-888). That area is managed through a system of pipes, including pipes on College and Strait Street both of which are maintained by the City. They flow into the disputed pipe. (Id; R. p. 871).

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 began appearing in 2011. (R. p. 883, ¶ 6). Ray knew there was a storm drain 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).

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 was able to learn a good deal about the physical condition of the Pipe 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, and no longer flowed into 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 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 the stormwater system under 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).

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 intentionally reconnected that Pipe to the City's stormwater system over Ray's objections. (R. p. 804, ¶ 11).

The City's statement of the case is based on a treatment of the record which, respectfully, often ignores its contents. The City goes even further than that at one point, admittedly

speculating (Petition p.5) about who constructed the pipe and that the purpose in doing so was an effort to increase the value of the land.[1] This is most prevalent in the City's repeated mischaracterizations of Respondent's arguments about the 2012 pipe repairs that are fundamental to the Court of Appeals Opinion. The Petition also includes a description by the City's counsel of the repairs to various pipes (Petition, pp. 6), which is simply declared to be true without regard to the evidence in the record that would indicate that it is not accurate. "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).

Ms. Ray presented deposition and affidavit testimony in the record which clearly states that three pipes were disconnected, and then reconnected over her objection, in such a fashion that stormwater would again flow under Ms. Ray's house. (R. pp. 692-700, 715-717, 840-842).

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 form 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

[1] It appears to be an important part of the City's argument, but is of no logical or legal consequence to this case.

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.

The City may believe that testimony to be incorrect, but that does not establish its entitlement to summary judgment, or meet its burden to show why this Court should review this case. The City makes much of the fact that the pipes were connected through a catch basin it contends was entirely on College Avenue that did not extend under the Property (although this is again more *ipse dixit* than an accurate description of what is established by the record). This does not change the fundamental truth that the City disconnected its stormwater system to the Pipe running beneath Ms. Ray's house. The stormwater flow beneath her house stopped. Ms. Ray's lawyer wrote a letter to the City telling it not to reconnect the Pipe. The City did it anyway. The stormwater flow then resumed. (R p. 841, ¶¶ 10-15). Ms. Ray presented enough evidence to survive summary judgment as to whether this amounted to inverse condemnation and the Court of Appeals correctly so held.

ARGUMENT

I. The City Has Not Presented Any "Special and Important Reasons" That This Court Should Review the Court of Appeals Opinion In This Case

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b) S.C.A.C.R. It is an "extraordinary form of relief that generally is used only in the absence of other effective relief." Rowe v. City of West Columbia, 334 S.C. 400, 408,513 S.E.2d 379, 382 (Ct. App. 1999) (citing Ray v. State, 330 S.C. 184, 186, 498 S.E.2d 640 (1998)). The fact that there was a dissent below, or the possibility that others may come to a different conclusion than did the Court of

Appeals, is not dispositive of this threshold issue. The City has not, and cannot, establish "special and important reasons" for this Court to review the opinion of the Court of Appeals.

The decision of Court of Appeals is narrow, and non-controversial: "[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, p6). As stated, Ray told the City it could not reconnect the storm water infrastructure on College Street in such a fashion that the storm water from that street would resume flowing under her house. She claimed a right to do that because the City denied that it had any ownership interest in the Pipe. The City reconnected its stormwater system anyway, and the storm water drainage from College began to flow through the Pipe again. The Court of Appeals held that there was a triable issue based on those facts as to whether they gave rise to a claim for inverse condemnation. That was the extent of it. The Court's opinion does not change long established law, or create the potential for the torrent of litigation forecast by the City. It does not, in fact, establish any liability to the City. It simply states that enough evidence has been presented to create a claim that should be permitted to go to trial.

A. <u>The Decision of the Court of Appeals is Consistent with Prior Case Law</u>

Ray does not seek to overturn any Supreme Court precedent, and the Court of Appeals did not attempt to do so. The decision of the Court of Appeals in this case is consistent with prior case law and the three decisions cited by the City. In <u>WRB L.P. v. County of Lexington</u>, 369 S.C. 30, 630 S.E.2d 479 (2006), the Court dealt with a similar argument to that raised by the City here. The County capped a landfill, which landowner contended caused methane gas to migrate on to its property. The trial court granted summary judgment, holding that the capping was not "an affirmative, positive act, aggressive act" and did not support an action for inverse

condemnation. The Supreme Court reversed on that issue.

In Kline v. Columbia, 249 S.C. 532, 155 S.E.2d 597 (1967), landowners and a tenant sought damage arising from an explosion and fire allegedly caused by gas leak. The leak was caused by work performed during a road widening project, at least in part. The Court in that case recognized that the law in this state "has previously adopted and adhered to the broadest possible view of "what is a taking and has construed the least actual 'damage' to be taking[.]" Id. at 537 (citing Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956)).

Finally, Berry's on Main, Inc. v Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981) involved the removal of sidewalks as part of a downtown development project. The City failed to backfill the excavation, and a heavy rain occurred. The rain flooded the landowner's' basement. The trial court held that the complaint did not allege an "affirmative, positive aggressive act" and dismissed the action. This Court reversed that decision as well.

Ray does not argue that the City's utility project by itself is an affirmative, positive, aggressive act forming the basis for the inverse condemnation claim. Her claim is based simply in the City's decision to take steps to resume use of the Pipe under Ray's house after it had been told not to. This is enough, under South Carolina law as it stands for her case to go to trial.

B. The City's Argument Overstates the Holding of *Hawkins v. City of Greenville,*

The ruling of the Court of Appeals is consistent with Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (2004). The City's Petition focuses substantially on that case. That case, and the City's view of it, has forcefully been argued at every step in the litigation process.

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."

The Court in Hawkins did not in fact focus on any perceived need to show a generalized impact on drainage as argued by the City. (Petition, p. 12). The Court focused instead on evidence of the cause of a particular flood, and whether there was evidence that Greenville had done anything which could be connected to it.[2] There is no requirement in Hawkins to show, either in this case or more generally, that the City's actions increased the flow rate or negatively impacted storm water drainage. Here, at the hearing in front of the Court of Appeals, the City admitted, to its credit, that it was receiving a significant benefit from being able to use the Pipe 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 Ray for that benefit. Ray told the City to stop when the Pipe was no longer connected to the City's draining system, and the City ignored her. It is not new or unusual to suggest that may be the basis for an inverse condemnation claim, and this does not impact South Carolina law in a way that requires further review.

The City further contends that nothing in the record evidences that its severance or repair of pipes on College Avenue resulted in damages to Ms. Ray, and that the decision of the Court of Appeals is therefore contrary to Hawkins. It is of course true that the City project itself did not damage Ms. Ray's house. The deposition testimony from Ray cited by the City as an admission regarding this topic is set forth below:

Q. Do you believe or has somebody, not your lawyer, told you that the fact the pipe were broken and later reconnected has caused damage to your house?

A. I don't - - I don't know. You'll have to ask the engineer that.

[2] 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.

Q. I've read the engineer's report and it leaves me curious what, in your mind, the significance of the broken pipes during the construction in 2012 is.

A. They were showing three broken pipes coming into my house was the significance.

Q. Do you think that those pipes were broken during construction or before the construction began?

A. Oh, they were definitely broken during construction.

Q. Do you know whether or not they were repaired as the construction concluded and the road was - - I'll say the road was rebuilt?

A. They were prepared - - repaired.

Q. Do you believe that any damage occurred to your house or to your property as a result of the fact that some of these pipes were broken during construction?

A. No at the time of construction. I mean, that would not have been any part of it. Was just showing broken pipes.

Q. Is there some other time, other than at the time of construction, when the fact that these pipes were broken for a period cased damage to your property?

A. I don't think these pipes were broken before construction.

Q. I understand. Is the fact that during construction the pipes were broken something that you say damaged you?

A. What is your question?

Q. The pipes were broken during construction?

A. Correct.

Q. Did that damage your house?

A. No.

Record, p. 713-715.

This exchange does have anything to do with whether Ray was damaged when the City resumed channeling stormwater/beneath her home.

Again, Ray has never contended that the construction project itself damaged her. She contends that the harm resulted from the City reconnecting its stormwater system to the Pipe after being told not to. That fact, not the construction project, caused her harm.

Finally, the City's argument that Ray's arguments are based on a failure to act are hard to follow. Ignoring a landowner's instructions regarding the use of her property is not a "failure to act." The City acted definitively, in this case, and in a fashion that is inarguably "hostile." It may believe it had every right to do it, but a trial needs to be held to determine if that is correct.

C. There Are No Unintended Consequences That Will Impact S.C. Law From This Decision

The list of "unintended consequenses" identified by the City as potentially resulting from the Court's ruling does not change this simple analysis. This isn't a case resurrecting an otherwise non-existent claim arising from a specific harm resulting from road widening, a temporary severance of a pipe, or something clogging a pipe, and this case will not have any impact on any such litigation. The stormwater from College Avenue and Strait Street flow under Ray's house every time it rains. That stopped during the City's construction project. As stated, the City refused Ray's demand at that time that it stop using a Pipe it has consistently said it doesn't own or maintain, 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 regarding her property. Ray should be permitted to seek compensation for that. The fact that complying with her demand may have been costly explains the City's decision to ignore it, but it does not defeat her claim for inverse condemnation.

CONCLUSION

For the foregoing reasons, the City's Petition should be denied. It has failed to show sufficient grounds for the Court to review either question presented.

Respectfully submitted,

Dated: February 21, 2020
Charlotte, North Carolina

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CERTIFICATE OF SERVICE

I certify that I have this day served **RESPONDENT LUCILLE H. RAY'S AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI** 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.

Dated: February 21, 2020

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