

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. 2016-002118

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  
South Carolina Department of Transportation,  
an agency of the State of South Carolina,  
Of which City of Rock Hill is Petitioner.

---

**PETITIONER'S REPLY TO RESPONDENT'S RETURN  
TO PETITION FOR WRIT OF CERTIORARI**

---

W. Mark White  
Jeremy D. Melville  
SPENCER & SPENCER, P.A.  
226 East Main Street  
P.O. Box 790  
Rock Hill, SC 29731  
Tel: (803) 327-7191

ATTORNEYS FOR PETITIONER CITY  
OF ROCK HILL

RECEIVED  
MAR 02 2020  
S.C. SUPREME COURT

TABLE OF AUTHORITIES

Cases

Abraham v. Palmetto Unified School Dist. No. 1,  
343 S.C. 36, 538 S.E.2d 656, (Ct. App. 2000) . . . . . 7

Continental Ins. Co. v. Shives, 328 S.C. 470,  
492 S.E.2d 808 (Ct.App.1997) . . . . . 6

Hawkins v. City of Greenville, 358 S.C. 280,  
594 S.E.2d 557 (Ct. App. 2004) . . . . . 6, 11

Petitioner City of Rock Hill (the "City"), by and through its undersigned counsel, hereby submits this Reply to Respondent's Return to Petition for Writ of Certiorari (the "Return") pursuant to Rules 240 and 242, SCACR. As more fully set forth in the Petition for Writ of Certiorari (the "Petition"), the court of appeals erred in that portion of Opinion No. 5684 filed September 11, 2019 (the "Opinion") reversing the lower court's grant of summary judgment as to Respondent Lucille H. Ray's ("Ray") claim for inverse condemnation.

This Court should grant the Petition to consider the Dissenting Opinion and correct the errors in the Opinion. The Opinion hinges on errors as to the facts in the record and as to application of law. Furthermore, the Opinion alters South Carolina jurisprudence on the necessary elements of inverse condemnation.

I.

The court of appeals 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*<sup>1</sup>...." (Opinion, p. 6) (emphasis added.) In the Return, Ray tells this Court that the City "intentionally

---

<sup>1</sup> The court of appeals defines "the Pipe" as "a 24-inch storm water pipe located under [Ray's] property." (Opinion, p. 2.)

reconnected the Pipe<sup>2</sup> to the City's stormwater system over Ray's objections." (Ray Return, p. 2.) This is factual balderdash. The City's sanitary sewer project did not touch any part of "the Pipe."

According to the Record, the only pipe running under Ray's residence is a 24-inch diameter pipe segment made of terra cotta which *begins* at a City junction box (the "Junction Box") located in College Avenue,<sup>3</sup> a City street, and runs beneath Ray's property. Ray's geotechnical engineer, Edward S. Cummings ("Cummings"), described and sketched the Pipe and surrounding infrastructure. (See Report of Cummings, R.pp. 904-05, 907.) Cummings' report establishes that the Junction Box is located within College Avenue.<sup>4</sup> Cummings further

---

<sup>2</sup> The Return defines "the Pipe" as "a storm water pipe which runs beneath [Ray's] house." (Id. at 2.)

<sup>3</sup> The location of the Junction Box is not *ipse dixit*. In the summary judgment order, 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, R.p. 6.) Ray did not appeal or assign error to this finding. Moreover, the Record has multiple helpful references locating the Junction Box on College Avenue. (See Plaintiff Memorandum in Opposition, R.pp. 71, 74, 75; Plaintiff Motion to Reconsider, R.p. 108, ¶ 1; Leonard Report, R.pp. 277, 278, 283; Leonard Report, R.pp. 347, 348; Cummings Dep., R.pp. 792, lines 16-18, p. 800, lines 15-18; Leonard Aff., 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.)

<sup>4</sup> Cummings refers to the Junction Box as the "storm drain catch basin." (Id. at 904.)

explains that "a 24" terra cotta pipe was observed leaving the catch basin and heading toward the center of Ms. Rays house"; that "a 36" terra cotta pipe enters the catch basin from across College Avenue"; and finally, that "[a]n 18" reinforced concrete pipe enters the catch basin from the right." (Id. at 904-05.) Cummings helpfully provides a sketch of these structures in his report. (Id. at 907.)

In addition, Ray testified that three pipes appearing to be 36 inches in diameter were severed; that these pipes were located under College Avenue; and that these pipes were directed toward the 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.) Ray and her pictures establish that all of the sanitary sewer project work was entirely within the street and uphill from the Junction Box, to pipes of differing diameter to the Pipe.

Thus, according to this Record, the Pipe was connected to the Junction Box before, during and after the sanitary sewer project and the Pipe remained untouched by the City before, during and after the sanitary sewer project. Moreover, Ray has conceded that she "has never contended that the construction project itself damaged her." (Return, p. 9.) City repairs performed exclusively in a City street with respect to three City pipes which do not touch any property of

Ray cannot form the basis for an affirmative aggressive act under Hawkins without evidence that the flow of water from the previous 90 years was adversely changed by the City's sanitary sewer project, which evidence Ray has failed to provide. See Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). This Court should grant the Petition to sustain the lower court as articulated in the Dissenting Opinion.

## II.

The Court should consider a critical ruling of the lower court that, respectfully, the majority of the court of appeals fail to recognize and respect. This ruling is indisputable as the law of this case.

Under Rule 56, SCRPC, Ray had a duty to produce facts sufficient to withstand summary judgment. Based on the record before it, the lower court ruled that "[a]lthough Mrs. Ray alleged in her Complaint that the City installed the pipe under her house, no evidence supports that allegation." (Summary Judgment Order, R. p. 7.) This ruling is law of this case as Ray did not appeal this ruling or argue its error in her appellant's brief. A 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).

Without any physical touching to Ray's property or to the Pipe under Ray's property, or some damage to Ray's property from the sanitary sewer project, the only grounds to warrant the court of appeals' decision would be that the City installed the Pipe and is responsible for the Pipe. During the sanitary sewer project, three storm water lines were severed for a few days and then restored. That water from the Junction Box flows through the Pipe under Ray's property is not the fault or liability of the City as the City did not install the Pipe as a matter of law. No legal tenant has been articulated by Ray or provided in the Opinion as to how or why the City is responsible for the flow of water through a pipe the City did not construct or install.

It is an impermissible leap without factual or legal foundation for the Opinion to allow that the City may be responsible for water flowing through an artificial vent which the law of this case holds was not installed, caused or created by the City. Accordingly, the court of appeals erred in finding that the City's repair of its storm water lines within its street could somehow be an affirmative, positive

and aggressive act against Ray's property. This Court should grant the Petition and reverse the Opinion as argued in the Dissenting Opinion.

### III.

This Court should grant the Petition because the court of appeals should have upheld the lower court as set forth in the Dissenting Opinion because the record contains no evidence that the City committed any affirmative, positive and aggressive act against Ray's property as a matter of law.

Prior to the installation of the Pipe, storm water flowed across Ray's property from the front of the property to a natural drainage feature at the back of the property. (Bunnell Report, R.p. 355.) The record contains no evidence that the volume of water flowing across Ray's property has increased since the installation of the Pipe or that the City has committed any acts to increase the historic volume of flow. As noted, installing a pipe without permission or right could be an affirmative, positive and aggressive act. A project causing water to flow across another's property in greater volumes than before the project could be an affirmative, positive and aggressive act. However, the Record contains no evidence that the City committed either of those actions.

Without the causal link of the Pipe's installation to the City, the City is not liable for directing water through Ray's property because it was not the City that initiated or caused the condition. Whoever installed the Pipe caused water to flow under Ray's property via the Pipe, but the law of this case bars the court of appeals from holding the City liable for this condition, either directly or indirectly. The court of appeals erred in its analysis when it considered the City's lack of any easement rights in determining an action for inverse condemnation may be viable.

In any event, Ray's claim for inverse condemnation is barred by the statute of limitations as set forth in Judge Kimball's order,<sup>5</sup> which ruling was not appealed and thus is the law of this case.

Due to the statute of limitations' bar, Ray seized on the irrelevant, mundane sanitary sewer project. Ray now claims the City committed an affirmative, positive and aggressive act in 2012 during the sanitary sewer project. Ray admits that she "does not argue that the City's utility project by itself

---

<sup>5</sup> Judge Kimball held "I find and conclude that in 2008, Mrs. Ray had sufficient knowledge or notice of the facts pertaining to the pipe under her house, and the City's use of it, such that she knew, or should have known, of the existence of a claim for her damages against the City. Thus, the three year statute of limitations began to run at some time in 2008. This action was not commenced until November 6, 2012." (Summary Judgment Order, R. p. 8.)

is an affirmative, positive, aggressive act forming the basis for the inverse condemnation claim. Her claim is based simply on the City's decision to take steps to resume use of the Pipe under Ray's house after it had been told not to." (Ray Return, p. 6.) As noted in the Dissent, this resumption of use (i.e. restoring three pipes that were severed two or three days) is not legally sufficient to be an affirmative, positive and aggressive act against Ray's property.

Ray's argument leads to an absurd result. The City would thus be liable in inverse condemnation for repair work performed entirely within the confines of a City street and 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 and could not be liable to Ray in inverse condemnation for the same exact conditions and circumstances prior to the project.

#### IV.

The gravamen of Ray's claim is one of a failure to act. The City did not take any affirmative, positive and aggressive act against Ray's property when it completed the sanitary sewer project, including reconnecting its storm water lines. Rather, the City refused to redirect the flow of storm water away from her property. In the discussion on abatement in her

Final Brief before the court of appeals, Ray expressly states that the City should have redirected the flow of water away from her property during the sanitary sewer project in November 2012. "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. . . . This change in how the water is managed should have taken place in November 2012 . . . ." (Appellants Brief, p. 6.)

This is what this case is about. Ray demanded the City to redirect the water away from her property. Her demand was not simply to leave the storm water lines disconnected. It would be sophomoric to claim otherwise. The water that flowed through those pipes would not simply vanish if the pipes were left severed. Instead, her demand was for the City to affirmatively manage the flow of water and reroute the flow of water away from her property. The City's refusal to undertake this affirmative action cannot form the basis of a claim for inverse condemnation. Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). This Court should grant the Petition to correct this clear, material error by the court of appeals.

Conclusion

The City respectfully requests that this Court grant the City's Petition.

March 2, 2020

Respectfully submitted,

By: hms

W. Mark White  
Jeremy D. Melville  
SPENCER & SPENCER, P.A.  
226 East Main Street  
P.O. Box 790  
Rock Hill, SC 29731  
Tel: (803) 327-7191

ATTORNEYS FOR PETITIONER CITY  
OF ROCK HILL

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

RECEIVED  
MAR 02 2020  
S.C. 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

---

Lucille H. Ray . . . . . Respondent,

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.

---

**PROOF OF SERVICE**

---

I certify that I have served the foregoing Reply to  
Return to Petition for Writ of Certiorari by depositing copies  
in the United States Mail, postage prepaid, on March 2, 2020,  
addressed to the following recipients:

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

SPENCER & SPENCER, P.A.

By: W. Mark White

W. Mark White  
226 East Main Street  
P.O. Box 790  
Rock Hill, SC 29731  
Tel: (803) 327-7191  
Fax: (803) 327-3868

ATTORNEYS FOR PETITIONER  
CITY OF ROCK HILL