

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Jun 23 2020**

APPEAL FROM YORK COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

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

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Appellate Case No. 2019-002074

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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.

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**BRIEF OF PETITIONER**

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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

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**STATEMENT OF ISSUES ON APPEAL**

- A. DID THE COURT OF APPEALS ERR IN FINDING TEMPORARY MAINTENANCE WORK WITHIN A CITY-OWNED STREET MAY BE SUFFICIENT TO SUPPORT A CLAIM FOR INVERSE CONDEMNATION BY THE OWNER OF A PRIVATE DRAINAGE LINE WHERE THE WORK DID NOT ALTER THE PRE-EXISTING FLOW OF WATER OR OTHERWISE CAUSE ANY DAMAGES TO THE OWNER?
  
- B. DID THE COURT OF APPEALS ERR IN REVERSING THE LOWER COURT'S FINDING THAT THE RECORD LACKS ANY EVIDENCE OF AN AFFIRMATIVE, POSITIVE, AGGRESSIVE ACT BY THE CITY TO SUPPORT RAY'S INVERSE CONDEMNATION CLAIM?

**STATEMENT OF THE CASE**

Plaintiff Lucille H. Ray ("Ray") initiated this lawsuit against the City of Rock Hill ("City") and the South Carolina Department of Transportation ("SCDOT") on November 6, 2012. Ray filed an amended complaint asserting four causes of action against the City: trespass, inverse condemnation, injunction, and statutory attorneys' fees. The City answered asserting a qualified denial and affirmative defenses.

On May 19, 2014, the City filed a motion for summary Judgment. 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.<sup>1</sup> In the Summary Judgment Order, the lower court dismissed Ray's claims for inverse condemnation,

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<sup>1</sup> A motion for summary judgment filed by the South Carolina Department of Transportation was granted in full in a separate order by the lower court. All causes of action asserted against the SCDOT were dismissed (trespass, inverse condemnation, attorneys fees and injunctive relief).

injunctive relief, and statutory attorneys' fees. (Summary Judgment Order, R. p. 9.) The lower court further ruled that the statute of limitations began to run on all of Ray's claims no later than 2008, with the exception of a potential claim for continuing trespass. (Id., R. p. 8.) Thus, all of Ray's claims were dismissed except for Ray's claim for continuing trespass, and the trespass claim was limited to damages occurring on or after November 6, 2009. (Id., R. pp. 8-9.) The City and Ray filed motions for reconsideration which were denied on April 21, 2015.

Trial was scheduled to begin on September 12, 2016. The City moved to exclude certain opinion testimony. The Honorable D. Garrison Hill granted the City's motion *in limine* in part, and Ray moved to have judgment entered against her on the grounds that Ray 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.) On September 13, 2016, the trial court entered an order directing verdict in favor of the City. On October 12, 2016, Ray served and filed a notice of appeal.

On September 11, 2019, a split Court of Appeals issued an opinion affirming the lower courts' orders except as to the award of summary judgment on Ray's inverse condemnation claim. The Majority Opinion decided 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....” and remanded the case as to the claim for inverse condemnation. (Majority Opinion, App. pp. 76, 80.)

The dissenting opinion agreed with the majority in the affirmance of the lower court’s orders regarding exclusion of expert testimony and dismissal of the claims for trespass and injunctive relief. (Dissenting Opinion, App. p. 80.) However, the Dissenting Opinion disagreed with the reversal on inverse condemnation finding that, under Hawkins, the City’s maintenance of City pipes in the middle of a City street is not the basis for a claim for inverse condemnation. (Id.)

On September 26, 2019, both parties timely filed petitions for rehearing. On November 22, 2019, the petitions for rehearing were denied.

On January 13, 2020, the City timely filed its Petition for Writ of Certiorari. On May 22, 2020, this Court granted certiorari to review the issues set forth in the City’s Petition.

#### **STATEMENT OF FACTS**

Ray’s claims against the City in this action relate to a 24-inch terra cotta pipe (the “Pipe”) located on her property at 330 College Avenue in Rock Hill, South Carolina (the “Property”). The Court of Appeals found that “[t]he Pipe

begins at a City maintained catch basin on College Avenue in front of the Property and channels storm water underneath Rays' home and through the Property." (Majority Opinion, App. p. 72.) The Pipe has been located on the Property and channeling storm water through the Property for over 90 years. (Amended Complaint, ¶¶ 15-17, R.pp. 39-40, ¶ 30, R.p. 41.) Further, it is not contested that "[t]he Property and the Pipe are located at the topographical low point of a watershed comprising approximately 29 acres." (Id.; Bagley Aff., Exhibit A, R.p. 882; Summary Judgment Order, R. pp. 6; Appellant Brief, App. p. 7.)

The upstream portion of this 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 the Pipe are the natural downstream collection point for surface waters within this watershed. (Summary Judgment Order, R. p. 6; Bunnell Report, R. p. 355.)

"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." (Majority

Opinion, App. p. 72; see Ray Dep., R. p. 752, lines 5-10, R. p. 753, lines 8-20; Cummings Dep., R. p. 790, lines 9-16; Leonard Dep., R. p. 767, lines 13-21.)

It is not contested that the record contains no evidence that the City owns the Pipe or was involved in the design, construction, or installation of the Pipe. (Ray Dep., R. p. 746, lines 11-22, R. p. 754, line 24-p. 755, line 7, R. p. 756, lines 9-17; Cummings Dep., R. p. 792, lines 4-7; Leonard Dep., R. p. 767, lines 9-21.) The lower court held that the record lacked any evidence of the City's ownership or involvement with the Pipe. (Summary Judgment Order, R. p. 7.) The Majority Opinion concurred finding that "[t]he record contains no evidence of who originally installed the Pipe [or] who owns the Pipe...." (Majority Opinion, App. p. 72.) This finding of fact is the law of the case.

Moreover, it is not contested that one of Ray's predecessor-in-title was aware of the Pipe and connected a drainage line into the Pipe. (Majority Opinion, App. p. 72; Bagley Aff., ¶ 9, R. p. 880; Ray Dep., R. p. 757, lines 1-24.)

Ray acquired the Property in May 1985. (Complaint, ¶ 3, R. p. 22; Amended Complaint, ¶ 4, R. p. 38.) Ray constructed an addition to the dwelling in 2001. (Ray Dep., R. p. 687, lines 6-14, R. p. 725, line 3-p. 726, line 23.) Ray

acknowledges a history of sinkholes and cave-ins on the Subject Property since the time of her acquisition. (Majority Opinion, App. p. 72; Ray Dep., R. p. 717, line 25-p. 718, line 22.) In 1992, Ray observed as her gardener fell waist deep into a sinkhole located approximately 10 feet from the back end of her house. (Majority Opinion, App. p. 72; Ray Dep., R. p. 708, line 8-p. 711, line 20.) Ray testified that she was aware of bending and movement in the roof frame of the dwelling on the Property on at least two separate occasions, once in 1995 and again in 2007. (Majority Opinion, App. p. 72; Ray Dep., R. p. 703, line 13-p. 706, line 5, R. p. 706, line 23-p. 707, line 10.) Ray retained a contractor to fix the structural damage on both occasions. (Id.)

"By 2008, Ray was aware of the existence of the Pipe and was concerned that water leaking from the Pipe may be damaging her home." (Majority Opinion, App. p. 72; see Ray Dep., R. p. 751, lines 19-24.) "Ray noticed that the front steps of her home appeared to be sinking and requested the City investigate the Pipe." (Majority Opinion, App. p. 72; see Complaint, ¶ 4, R. p. 22.) "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." (Majority Opinion, App. p. 72; see Ray Dep., R. p. 751, lines 5-13.)

Ray 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.) Cummings testified that the sole cause of any damages to the dwelling was the improper placement and compaction of fill soils over the 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, Ray 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 Pipe was leaking. (Trial Trans., R. p. 670, line 9-p. 671, line 2.)

During discovery, Ray 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 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 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 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.) Leonard and Cummings were the only experts designated by Ray.

In November 2012, three City-owned storm water pipes were temporarily severed in College Avenue to provide access to sanitary sewer lines located underneath the storm water pipes as a part of a sanitary sewer project (the "Sanitary Sewer Project"). (Ray Dep., R. p. 692, line 5-p. 693, line 19, R. p. 694, line 5-p. 696, line 21.) The three storm water pipes were repaired as a part of the Sanitary Sewer Project. All work relating to the Sanitary Sewer Project was performed within College Avenue. (See Ray Dep., R. p. 713, line 9-p. 716, line 3; Cummings Dep., R. p. 792, lines 16-18; Cummings Report, R. pp. 904-905; Cummings Drawing, R. p. 907; Leonard Aff., May 30, 2014, R. p. 841, ¶¶ 13-14; Ray Dep., R. p. 692, line 5-p. 693, line 19.) All work relating to the Sanitary Sewer Project involved, touched, and made contact with City infrastructure only. (Id.) Ray's property was not damaged in

any way by the Sanitary Sewer Project (Ray Dep., R. p. 714-15). There is no evidence that the water flow through the Pipe after the completion of the Sanitary Sewer Project was any different in water volume or rate of flow than before the commencement of the Sanitary Sewer Project.

#### ARGUMENT

**I. The Majority Opinion's holding with respect to Ray's inverse condemnation claim is incompatible with the unchallenged law of this case.**

The Majority Opinion latches onto the Sanitary Sewer Project in 2012 as a potential trigger for an inverse condemnation claim even though the record lacks any evidence that the conditions after the Sanitary Sewer Project were any different than the conditions before the Sanitary Sewer Project. The Majority Opinion errs because the mere existence of the Pipe and the flow of storm water through the Pipe in the after condition cannot form the basis for an inverse condemnation claim given the Record and the uncontested facts of this case.

As a matter of the law of this case, Ray had no viable claim for inverse condemnation on account of storm water flowing through the Property via the Pipe before the Sanitary Sewer Project in 2012. Ray has not appealed the following facts and conclusions of law, thus rendering the following the

law of this case.<sup>2</sup> The City did not install the Pipe on the Property or cause water to flow through the Property via the Pipe. The City is not the owner of the Pipe. All claims arising from or relating to the Pipe's existence or storm water flowing through the Pipe are barred by the statute of limitations.<sup>3</sup>

Moreover, the mere existence of the Pipe and the flow of storm water through the Pipe cannot be an affirmative, positive and aggressive act in 2012 because storm water flowed through the Pipe for 90 years prior to the Sanitary Sewer Project. Before the Sanitary Sewer Project, the Pipe was on the Property and storm water flowed through it. After the Sanitary Sewer Project, the Pipe is on the Property and storm water flows through it. The record contains no evidence

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<sup>2</sup> Issues not raised in a petition for rehearing to the Court of Appeals and issues not raised in a petition for writ of certiorari are not preserved for review. See Rule 226 (d)(2), SCACR; Sloan v. Dep't of Transp., 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005); McCray v. State, 317 S.C. 557, 559, 455 S.E.2d 686, 687, n. 1 (1995); Southerland v. State, 337 S.C. 610, 612, 524 S.E.2d 833, 834, n. 2 (1999).

<sup>3</sup> The lower court and the Court of Appeals ruled that Ray's knowledge in 2008 triggered the running of the statute of limitations as to the existence of the Pipe and Ray has not appealed these rulings to this Court. Furthermore, even if not triggered by Ray's own knowledge, Ray's claims as to the Pipe and water flowing through the pipe would be barred by virtue of the knowledge of Ray's predecessors-in-interest who were aware of and tapped into the Pipe. See Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 183, 185, 427 S.E.2d 920, 923, 925 (Ct. App. 1993).

that the volume of water or rate of water flow is different after the completion of the Sanitary Sewer Project than before commencement of the Sanitary Sewer Project. Given that the City is not liable for the existence of the Pipe or that storm water traverses the Property through the Pipe as a matter of law in this case, the Sanitary Sewer Project, which did not change these conditions that existed for over 90 years, is not an affirmative, positive and aggressive act for purposes of inverse condemnation law.

**II. The Court of Appeals' ruling conflicts with South Carolina Supreme Court case law**

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

In Kline, Berry's on Main, and WRB Ltd. Partnership, this Court developed a reliable framework for determining when governmental action rises to the level of an affirmative, positive, aggressive act capable of supporting a claim for inverse condemnation. All three of these cases "involved public improvements that allegedly damaged private property." WRB Ltd. Partnership v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006). In all three cases, the record

presented a question of fact as to *whether the governmental improvement identified by the plaintiff caused or precipitated the damages claimed by the plaintiff*. See Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967) (improvements to public street resulted in gas explosion, damaging plaintiff's property); Berry's on Main, Inc. v. City of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981) (removal of public sidewalks in downtown development project resulted in flood, damaging plaintiff's property); WRB Ltd. Partnership, 369 S.C. at 30, 630 S.E.2d at 481 (capping of landfill resulted in the lateral migration of methane gas, damaging plaintiff's property).

The Majority Opinion in this case marks a dramatic departure from this Court's inverse condemnation framework. The Majority Opinion remands an inverse condemnation claim without any evidence that the City's actions damaged the Property. Before the Sanitary Sewer Project, storm water traversed the Property through the Pipe; after the Sanitary Sewer Project, storm water traverses the Property through the Pipe. Significantly, the record contains no evidence that the volume of water or the rate of flow was any greater after the completion of the Sanitary Sewer Project than before the commencement of the Sanitary Sewer Project. In fact, the record contains no evidence that the Sanitary Sewer Project

had any impact at all as to the flow of water, the Pipe, or the Property. The City is not liable to Ray in inverse condemnation because the record presents no question of fact as to whether the alleged governmental improvement (the Sanitary Sewer Project) caused any damages as mandated by this Court's precedent in Kline, Berry's on Main, and WRB Ltd. Partnership. The gravamen of Ray's claims is that storm water has traversed the Property via the Pipe for over 90 years, yet the record contains no evidence that this condition was created by the City or exacerbated by the City by the Sanitary Sewer Project or otherwise.

### **III. The Court of Appeals' ruling conflicts with its own precedent**

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

The record in this case does not contain any evidence that the alleged City act identified by Ray caused or precipitated any damages claimed by Ray. In Hawkins, the plaintiff identified two specific actions (in addition to multiple failures to act) by the City of Greenville relating to storm water drainage which allegedly resulted in or contributed to the flooding of plaintiff's property. The plaintiff identified the following: (1) the City of Greenville's replacement of a double-box culvert with a large arched pipe and (2) the City of Greenville's installation of riprap along the banks of the creek. Id., 358 S.C. at 291, 594 S.E.2d at 563. The Court of Appeals ruled that neither action constituted an affirmative act sufficient to support a claim for inverse condemnation, noting that the record lacked any evidence that the actions by the City of Greenville had any impact on drainage across the plaintiff's property. The Court of Appeals held as follows:

Based on the lack of any evidence showing an affirmative, positive, aggressive act on the part of the City which would tend to prove the City's actions caused or precipitated the flooding of [the plaintiff's] property, we are compelled to affirm the trial court's grant of summary judgment on Hawkins' inverse condemnation claim.

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

The record in this case squares directly with the record in Hawkins. The "act" identified by Ray is the temporary

severance and subsequent repair of City storm water pipes within College Avenue performed as part of the Sanitary Sewer Project. The record lacks any evidence that the Sanitary Sewer Project caused any damage to the Property or the Pipe. Based on this reasoning alone, summary judgment in favor of the City was appropriate.

Equally applicable to this case is the second principle applied by the Court of Appeals in Hawkins: "Allegations of mere failures to act are insufficient." Hawkins, 358 S.C. at 291, 594 S.E.2d at 563. In this case Ray hinges her inverse condemnation claim on the City's failure to heed her demand that the City not repair the City pipes temporarily severed during the Sanitary Sewer Project. Ray attempts to characterize the City's failure to comply as an affirmative, positive, aggressive act. However, compliance with Ray's demand would have necessarily required more than leaving the City pipes severed; compliance would have required that the City affirmatively act to reroute the flow of water from the course that it had followed for over 90 years prior to the commencement of the Sanitary Sewer Project.

The permanent severance of the College Avenue storm water pipes uphill from the Property and the Pipe, with no further action by the City, would not have stopped water from draining towards the Pipe or the Property, which the Court of Appeals

noted is located at the topographical low point and collection point for waters draining in the watershed. If left severed, storm water which had previously flowed within the subject pipes would not simply vanish, but would flow unrestrained along the path of least resistance, toward the City's junction box in College Avenue, the Pipe and the Property, potentially causing erosion, damage and unsafe conditions along the way.

Considering these factors and circumstances, Ray was essentially demanding that the City study, design and construct an alternative route for the flow of water in the Subject Watershed. The City's failure to act in this regard cannot serve as the affirmative, positive and aggressive act to support a claim for inverse condemnation as a matter of law.

#### **IV. Unintended consequences of the Court of Appeals' published decision**

The published Decision of the Court of Appeals in this case will have significant consequences with respect to inverse condemnation law. Based on the Majority Opinion, a governmental body may be liable in inverse condemnation for an action that merely resumes a prior condition impacting a landowner even if the governmental body did not create or exacerbate the condition. According to the Decision, a governmental body may suddenly become liable for a pre-existing condition affecting a property owner merely by

remediating an event that caused a temporary interruption of the condition. Claims that were previously time-barred may suddenly become actionable as a result of such an event, or as in this case, claims that were previously non-existent will suddenly exist without any foundation in the basic principles of inverse condemnation law.

The following are some common scenarios which may be impacted by the Decision: road repairs or road widening projects that include the relocation of existing storm water pipes; blockage of water flow through storm water pipes caused by infiltration of debris or other matter; damage to storm water pipes caused by natural events or acts of third-parties; or blockage or failure of storm water pipes resulting from aging, faulty workmanship or defective materials. Before the Sanitary Sewer Project, Ray had no claim for inverse condemnation against the City, and the Court of Appeals erred by holding that a claim for inverse condemnation may "spring up" after completion of the Sanitary Sewer Project based solely and whimsically on the fact that three storm water lines were temporary severed and restored without any evidence of a change in the flow characteristics of water to the Property. The Decision creates a "springing" inverse condemnation claim, allowing a claim for inverse condemnation to spring up where previously no inverse condemnation existed

whenever there is a temporary cessation of a condition followed by a restoration back to the exact prior condition. The Majority Opinion will yield unintended consequences that will drastically alter governing condemnation and inverse condemnation precedent.

**CONCLUSION**

Based on the foregoing, the City respectfully requests that this Court reverse the Court of Appeals' decision and affirm the lower court's grant of summary judgment on the claim for inverse condemnation.

Respectfully submitted,

Date: June 22, 2020

By: /s/ Mark White  
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