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S.C. SUPREME COURT

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

BRIEF OF RESPONDENT LUCILLE H. RAY

Dated: July 22, 2020

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RESPONSE TO THE CITY'S STATEMENT OF THE ISSUES PRESENTED

As set forth below, the Issues identified by Petitioner in its brief extend beyond those properly before the Court, even accounting for "subsidiary questions" pursuant to Rule 242(d)(2), S.C.A.C.R. The City also focuses a great deal on factual contentions that are not pertinent to the issue of whether the decision of the Court of Appeals should be reversed. The question before the Court is not whether the City believes it has enough evidence to prevail at trial. The question is whether the Court of Appeals was correct in holding that that trial should take place.

STATEMENT OF FACTS

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 receives storm water from a roughly 29 acre watershed area. (R. pp. 871, 882, 885-888). That area is managed through a system of underground pipes, including pipes beneath College and Strait Street. (R. p. 811). Both of those streets are maintained by the City. (R. p. 811). Those pipes, and the stormwater collected from those City-maintained streets, flow into the disputed Pipe. (Id; R. p. 871, 882).

The house showed 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, line 24 -748, line 16). She had contact with City officials, and was told many different things about the pipe. (R. pp. 719, line 5 – 724, line 7; 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, line 5 – 724, line 7; 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 had undertaken a construction project the sanitary sewer system on College Avenue. (R. p. 804, ¶ 11). In the process, several large sections of pipe were disconnected, so that storm water no longer flowed into the Pipe running under Ray's house. (R. p. 804, ¶ 11). 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, line 2 – 700, line 17; R. p. 841, ¶¶ 10, 14). 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. 841, ¶¶ 9, 14; R. pp. 866-875; R. p. 811). The City maintains the stormwater system under Strait Street and College Avenue and a catch basin on College in front of Ray's house (R. p. 6). Id. The City acknowledges discharging its collected stormwater into the Pipe (R. p. 7).

For a number of days, while construction continued, the City's stormwater system did not connect to the Pipe, or the junction box to which it is connected. Id. At that point, Ray notified the City that they did not have permission to reconnect their system to the Pipe. (R. p. 841, ¶ 15; R. p. 804, ¶ 11; R. pp. 837-838, R. p. 920-921). The City nonetheless reconnected its stormwater system so that the water it collected off of College and Strait would again flow under Ray's

house despite the fact that Ray had expressly forbidden them from doing so, and despite knowing that Ray believed its actions were damaging her house. Id. Additionally, and as pointed out in the Majority Opinion by the Court of Appeals (the "Opinion"), the City did so despite the fact that it did not have an easement across the Property. (Appendix p. 72)

The City focuses a great deal on its version of this construction project and how that version precludes Ray from moving forward with her claim. However, as the Opinion also acknowledged, there is evidence in the record that would support a conclusion that the City's version is not correct. (R. pp. 692, line 2 – 700, line 17, 715, line 19 – 716, line 25, 840-842). That, of course, led the majority below to conclude that Summary Judgment was inappropriate. (Appendix p. 75)

Mr. Leonard's testimony in his Affidavit of May 30, 2014 is the most clear. His specific testimony is set forth here:

> 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 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).

The City's focus on its belief that the severed pipes were connected through a catch basin or junction box it contends was entirely on College Avenue also does not lead to the conclusion that the Court of Appeals decision should be reversed. The fundamental truth is that the City disconnected its stormwater system such that the stormwater would no longer flow through the Pipe. Ray's attorney sent a letter to the City telling it not to reconnect the Pipe. The City did it anyway, and the stormwater flow then resumed. (R. p. 841, ¶¶ 10-15). Ray presented evidence showing that the Pipe was cracked and leaking. She also presented evidence that those leaks led to damage (R. p. 840-878). Ray presented enough evidence to survive summary judgment as to whether the City's actions amounted to inverse condemnation, and the Court of Appeals correctly so held in its Opinion reversing the trial court's grant of summary judgment and remanding the case for trial.

ARGUMENT

I. The City's Argument Goes Beyond the Issue of Whether Summary Judgment was Properly Granted

The decision of the 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 after the City admitted it did not have an easement and Ray told the City not to reconnect." (Appendix, p 76). 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.

The City's efforts to challenge the Opinion begin with an effort to rewrite it. That effort starts with the issues it presents for review:

1. 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?
2. 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?

The Court did not hold what is stated in the first issue, and that basic fact is critical to a review of its arguments. The City's challenge must be to the opinion as written, not as recast in the City's Brief.

The City contends that certain "undisputed facts" require the reversal of the Court of Appeals, none of which are actually relevant. Judge Kimball's Order in the trial court (the "Order") did not dismiss the inverse condemnation claim based on the statute of limitations or make any findings to that effect. The Order did find that Ray was on notice of the existence of the Pipe in 2008. That finding was not appealed. The order is plain that the statute of limitations ruling applies to Judge Kimball's ruling on the trespass claim. (R. p. 8). The finding regarding the existence of the Pipe is not relevant, to the claim the Court of Appeals actually sent back for trial. Neither is the timing of the construction of the Pipe or the City's involvement with it. Finally, the City's contention that Ray's home is located at a "topographical low point of a watershed" also is not

relevant to the decision of the Court of Appeals. The natural flow of water in Ray's neighborhood is not at issue here. The issue is collected stormwater that the City is using Ray's property to help manage. That stormwater includes stormwater from City-maintained streets and City-maintained pipes. The Court of Appeals held that Ray has a claim based on the fact that the water flowing through the Pipe is collected in a stormwater system that directs its flow beneath Ray's home. That fact is and has been the basis for Ray's inverse condemnation claim. That claim should be tried by a jury, and not in appellate briefs.

II. The Opinion of the Court of Appeals is Consistent with Prior Case Law.

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 WRB L.P. v. County of Lexington, 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.

This case fits plainly and easily into the analysis set out in these three opinions. The Court of Appeals did not rule that the utility project, by itself, is an affirmative, positive, aggressive act forming the basis for the inverse condemnation claim. Rather, the utility project ultimately concluded 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. Ray also presented that the Pipe was leaking and those leaks were damaging her house (R. pp. 840-878). The fact that there was evidence to the contrary creates an issue of fact. To the extent the City relies upon evidence that was not presented at the summary judgment hearing, Ray would also point to the evidence presented on pages 922-979 of the Record as further support for the fact that the pipe leaks, and those leaks are damaging the house. That is enough, under current South Carolina law, for her case to go to trial.

III. 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). 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."[1]

The City 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's utility project by 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.

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.

[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.

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.

(R. p. 713, line 13 -715, line 5).

This exchange does not have anything to do with whether Ray was damaged when the City resumed channeling stormwater/beneath her home and through the Pipe. Breaking the pipes did not damage her house. Stormwater flowing through and leaking out of the Pipe did.

Finally, the City's argument that Ray's claim is based on a failure to act is 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.

IV. <u>There Are No Unintended Consequences From This Decision That Will Impact S.C. Law</u>.

The list of "unintended consequences" identified by the City as potentially resulting from the Court of Appeals' ruling does not change this analysis. This isn't a case resurrecting an otherwise non-existent claim arising 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 flows through the Pipe and under Ray's house every time it rains. That stopped during the City's construction project, when it disconnected the Pipe from its stormwater system. Again, the City refused Ray's demand at that time that it stop using a Pipe the City has consistently said it doesn't own or maintain. It believes that gravity

and history gave it the right to continue using her Property. It is difficult to imagine a more positive, aggressive act than an outright refusal to comply with such a demand from a landowner regarding the City's use of her property even if the City believes it was justified. Ray should be permitted to seek compensation for that. The fact that complying with Ray's demand may have been costly explains the City's rationale for ignoring it, but it does not defeat her right to a trial.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed. Ray respectfully requests Oral Argument in this matter. The record is dense, and Ray has tried to anticipate what portions may seem relevant. Oral arguments would give her and the City a chance to discuss other parts of the Record that this Court may deem important.

Respectfully submitted,

Dated: July 22, 2020
Charlotte, North Carolina

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