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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

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.

REPLY BRIEF OF PETITIONER

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ARGUMENTS

I. **The lower court's unappealed rulings bar Ray's inverse condemnation claim**

Ray's inverse condemnation claim premised on the Sanitary Sewer Project constituting an inverse condemnation is pretextual; rather, Ray seeks to hold the City liable for damages arising from the existence of the Pipe and its purported condition.¹ However, two critical unappealed rulings of the lower court bar an inverse condemnation claim relating to or arising from the Pipe, its condition, or the fact that water flows through it. These rulings have not been appealed and constitute the law of this case.²

A. **No evidence in the record to hold City liable for the Pipe**

Based on the lack of evidence offered by Ray at summary judgment, the Court of Appeals (and the lower court) expressly found that the record contains no evidence of who originally

¹ Ray unabashedly admits: "It is of course true that the City's utility project by itself did not damage Ms. Ray's house. . . . Breaking the pipes did not damage her house. Stormwater flowing through and leaking out of the Pipe did." (Respondent Brief, pp. 8, 9.)

² 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).

installed the Pipe or who owns the Pipe.³ This finding was not appealed to the Court of Appeals and is the law of the case.

The lower court specifically 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.) Because the party responsible for establishing the flow of water through the Pipe over 90 years ago is unknown, the Court of Appeals erred when it, as almost as an aside and without explanation, held 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 after the City admitted it did not have an easement and Ray told the City not to reconnect." (App., p. 76).

Perhaps the Majority Opinion would make sense if the Court of Appeals misunderstood the facts and believed the City entered upon Ray's Property and physically touched or altered the Pipe within her Property. However, as discussed in Petitioner's Brief, there is no disputed issue of material fact in the Record relating to any of the following facts: All work performed during the Sanitary Sewer Project was

³ Under Rule 56, SCRCP, Ray had a duty to produce facts sufficient to withstand summary judgment.

performed exclusively within College Avenue, a City street; All work performed during the Sanitary Sewer Project involved, touched, and made contact with City infrastructure only; and The Sanitary Sewer Project did not change, alter, or modify the flow of water to the Pipe. After completion of the Sanitary Sewer Project, water flowed without change, modification, or alteration as it had for over 90 years before the commencement of the project.

As a matter of law of this case, the City is not legally responsible for the fact that water flows from the City's junction box in College Avenue to the Pipe or that the Pipe's condition is (allegedly) causing damage to the structure located above it because at the hearing on the City's motion for summary judgment Ray failed to offer any evidence to implicate the City in creating these conditions. The Sanitary Sewer Project did not create this condition; the original installation of the Pipe created this condition.

Without any physical touching to Ray's property or to the Pipe under Ray's property, or some direct damage to Ray's property from the Sanitary Sewer Project, the only possible grounds to warrant the Majority Opinion would be that the City installed the Pipe and is responsible for the Pipe. No legal tenet has been articulated by Ray or provided in the Majority Opinion as to how or why the City can be responsible for the

flow of water through a pipe the City did not construct or install. The fact that water flowing to the City Junction Box then flows through the Pipe under Ray's property, without any evidence that this condition was caused by the City, cannot be attributed to the City in the form of potential liability. It is an impermissible leap without factual or legal foundation for the Majority Opinion to suggest 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.

B. Statute of limitations

The lower court's unappealed ruling regarding the running of the statute of limitations as to claims relating to the Pipe is equally dispositive as the law of this case.⁴ The lower court ruled as follows: "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 some time in 2008. .

⁴ Though these unappealed rulings directly relate to the issue presently on appeal, this Court may "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

. . This action was not commenced until November 6, 2012.”
(Order, R.p. 8.)

Ray incorrectly suggests that the lower court’s ruling regarding the statute of limitations has no bearing on her inverse condemnation claim. (Respondent Brief, p. 5.) If Ray’s inverse condemnation claim was actually based on damages arising from the Sanitary Sewer Project, Ray’s argument may have merit, but it is not and does not. Ray’s inverse condemnation claim is about damages relating to the existence of the Pipe and its (allegedly defective) condition.⁵

The lower court’s ruling regarding the trigger date of the statute of limitations is derived from Rays’ knowledge of the Pipe’s existence and thus applies equally to Ray’s inverse condemnation claim, which is premised on the Pipe’s existence. The lower court did not need to apply its findings regarding the statute of limitations to Ray’s inverse condemnation claim because the lower court had already resolved this claim on the elements (holding that the record contains no evidence of an affirmative, positive, aggressive act). (SJ Order, R. p. 8.) But the lower court’s findings nonetheless apply to bar any inverse condemnation claim based generally on the existence of

⁵ The damage referenced in Respondent’s Brief is solely related to purported leaks from the Pipe. (Respondent Brief, pp. 4, 7.)

the Pipe, the condition of the Pipe, and water flowing through the Pipe.

II. The Majority Opinion was based on misapprehension of facts.

As noted briefly above, a seeming basis for the Majority Opinion was the mistaken belief that the Record presents a question of fact as to whether the Sanitary Sewer Project involved a physical connection or interaction with the Pipe. Specifically, the Majority Opinion 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*⁶...." (Opinion, p. 6) (emphasis added.) Ray has not and does not contend that the Sanitary Sewer Project involved any physical connection to the Pipe. Ray adroitly obfuscates the fact so as to preserve a suggestion of physical connection while carefully avoiding any misrepresentation of fact to this Court. In Respondent's Brief, Ray describes the "affirmative act" which is the subject of her inverse condemnation claim as follows: "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." (Respondent Brief, pp. 2-3 (emphasis added).) No

⁶ The court of appeals defines "the Pipe" as "a 24-inch storm water pipe located under [Ray's] property." (Opinion, p. 2.)

parsing can change the fact that 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 the "Pipe" which is a 24-inch diameter pipe segment made of terra cotta which *begins* at a City junction box (the "Junction Box") located entirely in College Avenue,⁷ 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.⁸ Cummings further 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"

⁷ There is nothing in the Record to even suggest the Junction Box is not located entirely in College Avenue. The location of the Junction Box in relation to the Pipe and College Avenue is well-documented in the Record in this case. 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 in College Avenue. (See 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, R.p. 800, lines 15-18; Leonard Aff., R.p. 841, ¶ 13; Transcript of Hearing, R.p. 512, line 21-p. 513, line 10; Ray Dep., R.p. 715, lines 10-15, R.p. 720, lines 3-8, R.p. 722, line 24-p. 723, line 7.)

⁸ Cummings refers to the Junction Box as the "storm drain catch basin." (Id. at 904.)

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-p. 696, line 21.) Ray and her pictures establish that all of the Sanitary Sewer Project work was entirely within College Avenue and uphill from the Junction Box and the work involved 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. 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). Because the Majority Opinion was based on a misapprehension of the facts in the Record, the Majority Opinion should be reversed with respect to its ruling on Ray's inverse condemnation claim.

III. Ray's analysis of applicable case law is misplaced

Ray's analysis regarding this Court's inverse condemnation case law ignores the consistent feature of these cases central to the issue presently before this Court. In Kline, Berry's on Main, and WRB Ltd. Partnership, the records presented a question of fact as to whether the governmental improvement identified by the plaintiff caused or precipitated the damage claimed by the plaintiff. See Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967); Berry's on Main, Inc. v. City of Columbia, 277 S.C. 14, 281 S.E.2d 796 (1981); WRB Ltd. Partnership, 369 S.C. at 30, 630 S.E.2d at 481. In the present case, the record contains no evidence that the Sanitary Storm Project caused or precipitated the damages claimed by Ray. Ray filed her complaint claiming damages before the completion of the project. Ray admits that the Sanitary Sewer Project did not directly cause her any damages. Rather, Ray seeks to be compensated because the project temporarily ceased the flow of

water.⁹ However, the undisputed facts in this record establish that water has been flowing through the Subject Pipe for 90 years prior to the Sanitary Sewer Project and the Sanitary Sewer Project did not cause or exacerbate this pre-existing condition. These critical facts differentiate Ray's inverse condemnation claim from the inverse condemnation claims at issue in Kline, Berry's on Main, and WRB Ltd. Partnership.

IV. Ray's inverse condemnation claim is based on a failure to act by the City.

Respondent's Brief provides further support that her inverse condemnation claim is a claim of a failure to act. The City did not take any affirmative, positive and aggressive act against Ray's property by completing the Sanitary Sewer Project. The real misdeed alleged being challenged by Ray in this case is the City's refusal to redirect the flow of storm water away from the artificial vent installed on her Property by some unknown person after Ray demanded the City not to repair its storm water pipes within College Avenue. 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

⁹ To hold that any temporary cessation of flow may give rise to a claim for inverse condemnation will lead to the unintended consequences set forth in the Petitioner's Brief.

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" (App. p. 6.)

Ray's claim is a quintessential claim of a failure to act. It is sophomoric to suggest otherwise. The water that flowed through the pipes within College Avenue would not simply vanish if the pipes were left severed. Instead, Ray's demand was for the City to affirmatively manage the flow of water and reroute the flow of water that had existed for over 90 years prior. 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).

V. Ray's argument is founded on misstatement of law

Ray's central justification for upholding the Majority Opinion is founded on a misstatement of the law governing the trial of inverse condemnation claims.

It is well established by the case law of this Court that "[i]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request." Cobb v. South Carolina Dept. of Transp., 365 S.C.

360, 365, 618 S.E.2d 299, 301 (2005); Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011).; see also Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 597 S.E.2d 814 (Ct.App.2004).

Ray ignores this well-established rule in her re-framing of the City's statement of the issues on appeal as follows: "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 a trial should take place." (Respondent Brief, p. 1.) Each of her arguments concludes with a refrain to the effect that the Majority Opinion was correct because the practical result is that her inverse condemnation will and should be tried by a jury. (Respondent Brief, pp. 6, 7, 9, 10.)

Contrary to Ray's argument, the practical effect of remanding Ray's inverse condemnation claim to the trial court is that a trial court judge would be tasked with determining whether Ray has established a claim for inverse condemnation, a determination already made by the Honorable S. Jackson Kimball, III in the Summary Judgment Order. Ray has not identified any disputed issues of material fact which were not already considered and ruled upon by the lower court. Therefore, the City's statement of the issues is correct in

seeking a determination from this Court that the lower court properly dismissed Ray's inverse claim for failure to establish a positive, affirmative, aggressive act necessary to support Ray's claim for inverse condemnation, as a matter of law.

CONCLUSION

Ray's inverse condemnation claim, premised on the Sanitary Sewer Project constituting an inverse condemnation, fails as a matter of law. At the time Ray filed the Complaint in this matter in November 2012, Ray's inverse condemnation claim arising from the existence of the Pipe was time barred among other defects. Thus, the City was not liable to Ray before the Sanitary Sewer Project. Ray understandably latches onto the Sanitary Sewer Project because it is the only state action that occurred within the statute of limitations. Ray admits that "[i]t is of course true that the City's utility project by itself did not damage Ms. Ray's house." (Respondent Brief, pp. 8, 9.) This admission should be the end of the inquiry. The Sanitary Sewer Project was temporary maintenance 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. The Dissenting Opinion was correct in

the following: "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."

Based on the foregoing and the arguments contained in Petitioner's Brief, 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: August 3, 2020

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