THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2013-000022
Case No. 2011-CP-36-00588

Danny Abrams and Frances Abrams, ...Appellants,

v.

City of Newberry, ...Respondent,

APPELLANTS' FINAL BRIEF

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ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE FACTS

The instant case is a property damage matter, which emanates from substantial damages sustained by Appellants Danny and Frances Abrams to their home on Calhoun Street in Newberry on March 4, 2008. Specifically, the Abramses arrived home on the afternoon of the date of loss to find their house filled with water from the sewer owned and operated by Respondent City of Newberry, which had apparently backed up into the structure during a heavy rainstorm. Needless to say, this was an unpleasant discovery. All tolled, Appellants incurred approximately $24,000 in damages.

A subsequent investigation by a plumbing vendor retained by Defendant to investigate the incident arguably revealed the existence of what Appellants assert was debris (i.e., a rootball or "rolling blockage") in the sewer line adjacent to their home,[1] which Appellants maintain was a proximate cause for their loss that Defendant either knew or should have known about prior to March 4, 2008.

Appellants were paying customers of Defendant's utility on March 4, 2008, and for many years before that time.[2] They maintain that virtue of this customer-provider relationship, they

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[1] See, e.g., the DVD video created by Johnson & Lide Systems, dated May 21, 2008, which reveals the existence of a substantial rootball in the sewer line south of Plaintiff's home.

Jim Liptak, Superintendent of the Department of Water and Wastewater for the City of Defendant, was familiar with the retention of Johnson & Lide Systems by the City, the existence of the video, and the existence of the rootball, which he characterized as a "rolling blockage." {R. p. 63, l.2 – p. 69, ll. 1-16}. Liptak also agreed to the possibility that this "rolling blockage" could have been higher up the line (i.e., closer to Plaintiffs' home) on March 4, 2008. {R. p. 69, ll. 2-11}.

[2] There is no dispute that Plaintiffs were **paying customers** of Defendant and that their monthly bill includes, inter alia, paying for maintenance of the sewer system:

Stegmaier: Now, the Abramses don't get their water for free, correct?

were owed a duty by Respondent to, inter alia, periodically inspect the sewer line servicing their home for evidence of defect or blockage. Appellants assert Respondent breached that duty and that due to this breach they sustained the damages relating to having several inches of sewer water in their home.

Liptak: That's correct.

Stegmaier: They pay to get their water? Do they pay taxes? Or do they pay a monthly bill?

Liptak: Utilities.

Stegmaier: Utility fees?

Liptak: Yes.

Stegmaier: And the same goes for sewer?

Liptak: Yes.

Stegmaier: Are [Appellants] considered, in the language of the City, to be customers?

Liptak: That's correct.

. . . .

Stegmaier: And what do the Abramses, as customers of the City of Newberry, get in return for their monthly payments for sewer and water?

Liptak: What do they get in return?

Stegmaier: You send them a bill, what are they paying for?

Liptak: Safe drinking water, waste disposal.

Stegmaier: So they are paying for maintenance systems?

Liptak: Yes.

{R. p. 56, ll. 14-25; p. 57, ll. 12-21}.

Respondent denied liability for Appellants' damages and moved for summary judgment. Appellants opposed the grant of summary judgment to Respondent in this matter and averred that —based on the law they believed governs such a dispute, along with the facts of the instant case —summary judgment should have been denied by the Circuit Court.

STATEMENT OF THE CASE

Appellants Danny and Frances Abrams filed suit against Respondent City of Newberry in the Court of Common Pleas for Newberry County on May 20, 2009, for substantial damages they sustained March 4, 2008, after the sewer owned and operated by Respondent had apparently backed up into their home during a heavy rainstorm. Appellants' complaints sounded in negligence and trespass. Respondent timely answered.

Following a period of discovery between the parties, Respondent moved for summary judgment. The Circuit Court heard Respondent's motion in Newberry on August 13, 2012. The Court elected to grant summary judgment to Respondent. The Court issued a formal written order articulating this holding on November 30, 2012. Appellants timely appealed the Circuit Court's decision to this Court.

This appeal follows.

LAW/ANALYSIS

I. Summary Judgment Should Have Been Denied Because Evidence of a Defect Exists, as Does Evidence Evincing Respondent's Failure to Observe the Proper Standard of Care Owed to Appellants

A. Standard of Review

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56, SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). However, because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

Our Supreme Court has recently stated that where the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

B. Grant of Summary Judgment

In its motion for summary judgment, Respondent asserted relief should be granted to it because, inter alia, :

- There is no evidence of notice of any defect that caused this backup.
- There is no evidence of actionable negligence by the Respondent.
- There is not evidence of any action by this Respondent that caused this sewer back up.

{R. p. 15 at 1}.

Appellants disagree with Respondent's position. To the contrary, Appellants maintain evidence of defect exists, which – had Respondent engaged in a program of periodic inspection of its sewer lines – could arguably have been cured prior to Appellants sustaining loss. The evidence in this case reveals there was no such program of periodic inspection by Respondent, which Appellants assert is fatal to Respondent's case.

Jim Liptak is Superintendent of the Department of Water and Wastewater for the City of Newberry. He is the individual responsible for the day-to-day maintenance and operation of Respondent's sewer system, including the sewer lines that serviced Appellants' home on Calhoun Street. Liptak was deposed in the instant litigation. During this examination, Liptak admitted Respondent did not possess or observe a program that featured periodic and routine inspections of the sewer line in Newberry:

Stegmaier: [T]ell me what exists in the way of written protocol outlining periodic and routine inspections of the sewer line.

Liptak: There is none.

Stegmaier: There is no schedule, there is no routine as it relates to inspection of the sewer lines[?]

Liptak: That's correct.

Stegmaier: So how are they maintained? Just when a problem exists?

:Liptak: Yes, as needed.

Stegmaier: As needed; that's when inspections and corrections are made?

Liptak: That's correct.

Stegmaier: But there's no document that would sit within this building or wherever you keep records that would be able to demonstrate, prior to ... March 4, 2008, that there has been just a regular routine preventative maintenance inspection of the sewer line running between Lindsay Street and Calhoun Street and then in front of the Abramses' house?

Liptak: No, sir.

{R. p. 54, ll. 2-17, 22-25 – p. 55, ll. 1-8}.

Respondent's failure to observe a protocol for the periodic and routine inspection of its sewer line runs contrary to what Appellants aver is the standard of care that governs operators of sewer systems.

American Jurisprudence 2d, the persuasive secondary authority that has enjoyed much favorable treatment by our appellate entities in South Carolina in the modern era elucidates:

> **Even in jurisdictions recognizing the immunity of governmental entities from liability for injuries or damage resulting from the exercise of governmental functions, it has been held that the operation and maintenance of drains and sewers, the duty to make repairs, and the duty to keep them clear and free of obstruction are not governmental functions but ministerial or proprietary functions of the municipal corporation, for which it may be held liable for damages caused by its negligence in the same way and to the same extent as an individual. Moreover, while the function of providing a sewage and drainage system may be committed to the exercise of a municipality's governmental discretion, once it has acted to provide a sewer and its improvement causes damage, it is liable to compensate for the injury sustained.**

> **Thus, where a municipal corporation uses and assumes the management and control of a sewer within the municipality, it is required to exercise reasonable diligence and care to keep the same in repair and free from conditions that will cause damage to private property; and the municipality's failure in this respect makes it liable for damages caused by its negligence, in the same manner and to the same extent as a private person under the same circumstances**. At the same time, it must be remembered that municipal agencies are not guarantors of the safety and good operation of their sewer and other public utility systems.
>
> **The duty of a municipality to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the municipality liable. The duty of maintenance, keeping in repair, and proper working order, and preventing the sewer from becoming a source of discomfort and injury to others, is a continuing duty which a municipality cannot avoid by delegation or shifting to the shoulders of the lot owners.**
>
> A municipality has two specific phases of duty with regard to maintenance and repair of its sewers: (1) the duty to prevent obstructions, and (2) the duty to remove an obstruction from the sewer within a reasonable time after actual or constructive notice thereof. **Where a municipality breaches its duty, for example, to exercise reasonable care to keep its sewer line free of obstructions by failing to pursue effective clearing operations, or where the municipality breaches its duty to remove an obstruction from the sewer within a reasonable time after actual or constructive notice thereof, sufficient grounds exist for an action for damages based on negligence.**

42 Am. Jur. Proof of Facts 3d 289 at § 3 (emphasis added) (footnotes omitted).

Appellants recognize, as do the authors of this section in American Jurisprudence 2d, that a municipality cannot be held to be a guarantor of the good operation of its sewer and system; however, what Appellants expected -- and what the law arguably requires -- is that municipalities or other operators of sewer systems are required to exercise reasonable diligence and care to keep their systems in repair and free from conditions that will cause damage to private property. In the case at bar, by Jim Lipak's own admission, Respondent did not possess a protocol in 2008

that is proactive or preventative in place, which evinced any exercise reasonable care to periodically inspect its sewer line for obstructions and/or pursue effective clearing operations. Appellants assert this failure by Respondent to demonstrate **any** exercise of reasonable care to periodically inspect its sewer line on Calhoun Street created liability for Respondent in this matter.

II. Respondent is Not Immunized by Operation of Case Law from Liability in the Instant Case

At summary judgment, Respondent maintained Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2002), supported the argument that Respondent is immunized from liability in this case. The Circuit Court agreed. On appeal, Appellants respectfully aver the Circuit Court was in error with this holding.

In Hawkins, a Greenville business was flooded during a heavy rainfall, causing substantial damage to the business and surrounding property. The business owner blamed the city of Greenville for the damage, arguing the flooding was caused by, inter alia, the City's neglect in designing its stormwater drainage system.

Respondent relied Hawkins due to the Court of Appeals having included the words "maintenance" in its narrative. Specifically, the Court stated:

> Hawkins argues the trial court erred in finding his negligence claim against the City was barred under the South Carolina Tort Claims Act. S.C. Code Ann. §§ 15-78-10 to 15-78-200 (Supp.2003). We disagree.
>
> The Tort Claims Act governs all tort claims against governmental entities. Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct.App.2003). It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann § 15-78-70(b) (Supp.2003); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 215, 544 S.E.2d 38, 49 (Ct. App. 2001); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like

circumstances," subject to certain limitations and exemptions provided in the Act. S.C. Code Ann. § 15-78-40 (Supp.2003). "Governmental entity" is defined by the act as "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d) (Supp. 2002); Flateau, 355 S.C. at 204, 584 S.E.2d at 416. The provisions of the Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting liability of the State. S.C. Code Ann § 15-78-20(f) (Supp.2003); Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999); Arthurs v. Aiken County, 338 S.C. 253, 270, 525 S.E.2d 542, 551 (Ct. App. 1999); Staubes v. City of Folly Beach, 331 S.C. 192, 205, 500 S.E.2d 160, 167 (Ct. App. 1998). The governmental entity asserting the Act as an affirmative defense bears the burden of establishing a limitation upon liability or an exception to the waiver of immunity. Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994); Steinke, 336 S.C. at 393, 520 S.E.2d at 152; Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. The Act does not create a new substantive cause of action against a governmental entity. Moore v. Florence Sch. Dist. No. 1, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 121, 542 S.E.2d 736, 739 (Ct. App. 2001). The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the Act. Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. The Tort Claims Act expressly preserves all existing common law immunities. Williams v. Condon, 347 S.C. 227, 246, 553 S.E.2d 496, 507 (Ct. App. 2001). The Tort Claims Act is a limited waiver of governmental immunity. Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. Section 15-78-60 sets out thirty-seven "exceptions" to this waiver of sovereign immunity. These exceptions significantly limit the tort liability of government entities.

Several of these exceptions bear directly upon the alleged acts and failures to act by the City with respect to the municipal drainage system. Specifically, under section 15-78-60, the City is not liable for a loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (3) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (4) "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee"; or (5) "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60(1), (2), (4), (5), and (13) (Supp.2003).

For each of these specific provisions, the determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). "The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense." Sabb v. South Carolina State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002).

Although our courts have not applied the Tort Claims Act to facts similar to those of the present case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for which a government entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

Id. We find a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the City is immune from liability for negligence claims arising out of the design and **maintenance** of the drainage system in the Laurel Creek Basin.

Id. at 292-94, 594 S.E.2d at 563-64 (emphasis added).

Notwithstanding the injection of the term "maintenance" into the case, Appellants assert Hawkins is a design case and was decided as such. A close inspection and review of the facts reveals as much. Specifically, the business owner asserted the city failed to build and maintain an adequate municipal sewer and drainage system to service his business (i.e., in the owner's

estimation, the size of the pipes serving his business were inadequate to manage the stormwater created by heavy rainstorms).

In the instant case, Appellants have made no averment concerning design. The size of the pipes serving their home is not an issue. Their sole basis for negligence is bottomed and premised upon the argument that Respondent failed to have any protocol in place to periodically inspect the lines servicing their home for blockages that could cause a backup. As **paying customers** of this municipality-owned utility, Appellants maintain this was a reasonable expectation of their provider.[3]

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[3] As identified in footnote 1 of this brief, Stegmaier: So they are paying for maintenance systems? Jim Liptak acknowledged that a component of their monthly fees to Respondent was for maintenance systems.

Stegmaier:	And what do the Abramses, as customers of the City of Newberry, get in return for their monthly payments for sewer and water?
Liptak:	What do they get in return?
Stegmaier:	You send them a bill, what are they paying for?
Liptak:	Safe drinking water, waste disposal.
Stegmaier:	**So they are paying for maintenance systems?**
Liptak:	**Yes.**

(emphasis added).

Appellants maintain this recognition by a senior-level agent of Respondent obviates any immunizing effect Respondents believe exists in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2002), inasmuch as Respondent acknowledges that maintenance—which arguably would include the corollary function of periodic inspection—was a service that was purchased, which Respondent arguably performed negligently. At the very least, Respondent assumed a duty of care to Appellants in this regard. See Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003) (holding that where an act is voluntarily undertaken, the actor assumes the duty to use due care.) (citing Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). See also Restatement (Second) of Torts

Alternatively, if the Court is attracted to Respondent's argument that periodically inspecting and maintaining the sewer line was discretionary, there is no proof in the case at bar that Respondent—faced with alternatives—actually weighed competing considerations and made a conscious choice using accepted professional standards. Such a demonstration of proof is required in order for a municipality to evade liability via the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -200. See id. at 293-94, 594 S.E.2d at 564 (citing Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). ("[T]he determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act 'is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.'"). The governmental entity—which in this case is Respondent—bears the burden of establishing discretionary immunity as an affirmative defense. Id. at 294, 511 S.E.2d at 564 (citing Sabb v. South Carolina State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002)). Again, Appellants maintain there is no evidence or showing by Respondent—when considering whether or not to conduct periodic inspections of the sewer line—actually weighed competing considerations and made a conscious choice using accepted professional standards. Accordingly, Appellants assert Respondent cannot be immunized from liability in the case at bar by operation of law.

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§ 323 ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.")

CONCLUSION

Appellants maintain Respondent owed them a duty to periodically inspect and clean the subject sewer system existed, which Respondent's did not fulfill. Appellants assert this duty was not discretionary, or at the very least, was one that Respondent assumed (by Respondent's own admission in discovery). Alternatively, if the Court determines that maintenance of the subject sewer system was a discretionary function, Appellants nevertheless maintain there is no proof in the case at bar that Respondent—faced with alternatives—actually weighed competing considerations and made a conscious choice using accepted professional standards. Appellants asseverate that such a demonstration of proof is required in order for a municipality to evade liability via the South Carolina Tort Claims Act

Accordingly, for the reasons stated herein, Appellants respectfully request this Court to deny Respondent's motion for summary judgment in the case sub judice.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant in the above-captioned matter complies with Rule 211(b), SCACR and also certifies the Final Brief of Appellant complies with the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I served Appellants' Initial Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on May 1, 2014, addressed to the following:

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