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



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

Danny Abrams and Frances Abrams ..... Appellants,

v.

City of Newberry ..... Respondent.

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# RESPONDENT CITY OF NEWBERRY'S FINAL BRIEF

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Columbia, South Carolina

May 6, 2014

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment on the ground that no duty exists when the evidence demonstrates that the Respondent did not create the defect or have actual notice of its existence and the evidence does not demonstrate that the "rolling blockage" in the sewer line had been present for a sufficient time to place the City of Newberry on notice or to show that an inspection would have disclosed its presence. (To the extent the court's ruling on the duty issue does not consider address actual or constructive notice, this may be an additional sustaining ground that can be considered pursuant to SCACR, Rule 220(c).)
2. Should this court affirm the grant of summary judgment upon the additional sustaining ground that proximate cause is absent, when the evidence does not demonstrate that the "rolling blockage" in the sewer line was present long enough so that a periodic inspection by the City of Newberry would have discovered its existence? SCACR, Rule 220(c).
3. Did the lower court properly apply *Hawkins v. Greenville* 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004) and the South Carolina Tort Claims Act immunities to find that the Respondent has no duty to inspect or otherwise maintain the sewer system in any particular fashion and that the City is immune from suit for allegations concerning negligent design or maintenance of its sewer system?

## STATEMENT OF THE CASE

The Appellants commenced this action in negligence and trespass against the City of Newberry on May 20, 2009. They alleged that a sewer backup caused property damage to their home. Respondent timely answered.

The Respondent filed a motion for summary judgment. After conducting a hearing on August 13, 2012, the Court issued an Order granting summary judgment to Respondent City of Newberry on November 30, 2012. The Appellants timely filed this appeal.

## STATEMENT OF FACTS

The Respondent, City of Newberry, owns and operates a municipal sewer system. The Appellants are residents of the City of Newberry and have a home at 1446 Calhoun Street. {R. p. 7}. They suffered property damage from a sewer backup that entered their home on March 4, 2008. {R. p. 7}. The damages total approximately $24,000. Appellants allege that the backup was caused by a "rolling blockage" in the sewer main in front of their home. Pl. response in opposition to summary judgment {R. p. 25}. The sewer line in this area is a gravity line, so that a blockage would result in the sewage escaping the system at the lowest point downstream from the blockage. {R. p. 20}. Since the Appellants' home is higher than the neighboring homes, it is evident that the "rolling blockage" was in the main sewer line past the Appellants' sewer tap but before the next homeowner's sewer tap. {R. p. 20-21}. The Respondent offered expert testimony as to the location of the blockage in the sewer system. {R. p. 21}.

Danny Hill, the engineering expert retained by the Respondent, testified that he surveyed the portion of Calhoun Street from the manhole near the creek to the manhole past 1446 Calhoun Street. He developed plans showing the profile of the street and the elevations of the floor levels of the houses adjacent to 1446 Calhoun Street, Appellants' residence. His affidavit reveals that the Appellants residence is on a hill so that only a blockage in the line between their sewer tap and the next door neighbor's sewer tap could result in a backup at their residence and not at some residence lower down the hill. {R. p. 21}.

The manhole in the sewer line downstream from 1446 Calhoun Street is 12.6 feet below the floor level of the house at 1446 Calhoun Street. Therefore, any blockage downstream from

that manhole would have resulted in an overflow at that manhole since it was the lower than the Appellants' residence. There is no evidence or indication of any overflow at that manhole. {R. p. 20}. Therefore the blockage had to be upstream from that manhole.

The floor elevation of the structure at 1447 Calhoun Street is 12.7 feet below the floor level of the structure at 1446 Calhoun Street. There was no backup into 1447 Calhoun Street. That indicates that the blockage that caused the backup into 1446 Calhoun Street was upstream from 1447 Calhoun Street. {R. p. 21}.

The floor elevation of the structure at 1450 Calhoun Street is 5.4 feet below the floor level of the structure at 1446 Calhoun Street. There was no backup into 1450 Calhoun Street. That indicates that the blockage that caused the backup into 1446 Calhoun Street was upstream from 1450 Calhoun Street. {R. p. 21}.

Danny Hill determined the location of the blockage that caused this sewer backup. The backup into 1446 Calhoun Street was caused by a blockage in the sewer main between the service line downstream from 1446 Calhoun Street and upstream from the service lines for 1447 Calhoun Street and 1450 Calhoun Street. {R. p. 21}.

By way of explanation, the Appellants residence is uphill or upstream from 1447 and 1450 Calhoun Street and from the manhole. Any blockage downstream from those locations would result in a backup in those locations. There was no backup in those locations. The blockage had to exist between the sewer tap at 1447 Calhoun Street and the uphill sewer tap at the Appellants' residence, 1446 Calhoun Street.

Fred Yandle was the Director of Public Utilities, including the sewer system, at the time of the backup. {R. p. 18}. Mr. Yandle is familiar with this event and with the wastewater system in Newberry. Mr. Yandle testified that after searching the records he was not aware and the City had no evidence of any other sewer problems in this area of line prior to this one. {R. p.

18-19}. He indicated that the City had no knowledge of this blockage or other problem until after it occurred. {R. p. 18-19}. He also indicated that the City had no method by which to anticipate this blockage before it occurred. {R. p. 19}.

Appellants have alleged that the City had a duty to periodically inspect the sewer lines and that the duty was breached because the City has no periodic maintenance program. App. Brief @ Pp. 6-8. They allege that is fatal to the Respondent's defense. However, Appellants also acknowledge that they have no evidence whatsoever that the "rolling blockage" had been present long enough so that a periodic inspection by the City of Newberry would have discovered its existence. {R. p. 94-98}. Instead, Appellants argue that a periodic inspection "could arguably" have cured the problem. App. Brief @ P. 4. They assert that "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 [Appellants'] home for blockages that could cause a backup." App. Brief at 12. However, without evidence that such a program would have made a difference, proximate cause is absent.

## ARGUMENT

### I. Background.

The trial court properly granted summary judgment, and this court should affirm for the reasons stated by the trial court. Additionally Respondent contends that this Court should affirm upon the additional sustaining ground that the Appellants have failed to offer any evidence of proximate cause. SCAPR, Rule 220(c). The Respondent argued to the trial court that summary judgment was appropriate because there is no evidence of actual or constructive notice of a defect and even if notice existed, there is no evidence that a routine maintenance program would have discovered this "rolling blockage", so that proximate cause is absent. The court granted summary judgment on the ground that there is no duty by the City to inspect or maintain the

sewer line in any particular fashion and that the City is not liable for claims arising from the design or maintenance of the sewer system. {R. p. 3}. The court expressly declined to rule on the proximate cause issue, {R. p. 2}, but the Respondent asserts that is an additional sustaining ground as the Plaintiffs presented no evidence of proximate cause other than pure speculation. There is simply no evidence to show that the "rolling blockage" which caused the backup had been present for sufficient time to place the City of Newberry on notice or to show that an inspection would have disclosed its presence.

**II. No duty exists when the evidence demonstrates that the Respondent did not create the defect or have actual notice of its existence and the evidence does not demonstrate that the "rolling blockage" in the sewer line had been present for a sufficient time to place the City of Newberry on notice or to show that an inspection would have disclosed its presence.**

Appellants' pled claims in their complaint for negligence and trespass. At summary judgment, the parties and the court properly considered this action as a negligence action. This Court has previously considered the law to apply to a municipal sewer backup situation and concluded that such a claim sounds in negligence. *Rolandi v. City of Spartanburg*, 363 S.E.2d 385 (Ct.App. 1987).

In order to establish a breach of a duty for a defect that results in property damage, the Appellant must demonstrate either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.Ed2d 530 (1988); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores,* 232 S.C. 139, 101 S.E.2d 262 (1957).

Appellants admit and assert that a "rolling blockage" was most likely responsible for this sewer backup. App. Brief @ P. 1. There is no allegation or evidence that the Respondent

created that situation. Consequently, the Appellant must offer evidence of actual or constructive notice of the condition in order to state a claim for negligence.

Shortly after the backup occurred, an inspection of the sewer system revealed no blockage in the sewer line that would have accounted for the backup into Plaintiff's home, but did discover a moving blockage further down in the line. Appellants noted in their response to the Respondent's summary judgment motion that this "rolling blockage" could have "possibly" been closer to the Appellants' home at the time their backup occurred. App. Brief @ P. 1. There was no other defect or blockage in the sewer line that would have caused this backup.

The Appellants have the burden of proof on the issue of notice. They have offered no evidence to satisfy their burden. Instead, the record reveals that Fred Yandle, the Director of Public Utilities has demonstrated that the Respondent did not have actual notice. Mr. Yandle's affidavit attests that the Respondent has no record of any prior blockage or any other problem with the wastewater disposal system in the area of Calhoun Street where this blockage occurred. {R. p. 18}. Respondent had no prior problems with the sewer pipes in this area. {R. p. 18}. The Respondent had no prior complaints of problems along Calhoun Street near the Plaintiff's home. {R. p. 18}. The Respondent had no notice of the blockage that caused the backup in the Plaintiff's home. {R. p. 18}. No evidence of actual notice exists.

Likewise, no evidence of constructive notice exists. Appellants have not offered any evidence to show that the "rolling blockage" which allegedly caused the backup had been present for sufficient time to place the City of Newberry on notice. There is absolutely no evidence to support the Appellants' claim. The lack of notice is fatal to their claim.

**III. Proximate cause is absent when the evidence does not demonstrate that the "rolling blockage" in the sewer line was present long enough so that a periodic inspection by the City of Newberry would have discovered its existence.**

Appellants contend that the lack of a periodic inspection program constitutes sufficient evidence of negligence to render the Respondent liable for their loss. However, to establish a negligence cause of action under South Carolina law, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Baggerly v. CSX Transportation, Inc.*, 370 S.C. 362 635 S.E.2d 97 (2006). The Appellants analysis completely ignores the second element of negligence – proximate cause.

At the hearing before the trial court, counsel for Appellants candidly admitted that they had no evidence that the "rolling blockage" had existed for a sufficient period of time that a periodic inspection of this area of pipe would have discovered its existence. {R. p. 94-100}. The colloquy began with a question from the Court: "So what's the proximate cause?" {R. p. 94}. The discussion ended with Appellants' counsel stating "Does such testimony exist in this particular case from the Plaintiff? No. Is it incumbent upon us to present testimony with that type of specificity? No. Our position is there is an overall legal responsibility to conduct periodic inspections. What we know is the City of Newberry didn't do anything." {R. p. 97-98}. Their position was that they did not have to present any such evidence. That argument is misplaced. Whether a recent inspection of the sewer line in the vicinity of the Appellants' home would have discovered this rolling blockage would require the fact finder to speculate with no evidentiary basis. Appellants bear the burden of proving proximate cause by competent evidence.

> In a negligence action, the plaintiff must prove proximate cause. *Rush v. Blanchard,* 310 S.C. 375, 426 S.E.2d 802 (1993); *McNair v. Rainsford,* 330 S.C.

> 332, 499 S.E.2d 488 (Ct.App.1998); *Vinson v. Hartley,* 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). Negligence is not actionable unless it proximately causes the plaintiff's injury. *Bishop v. South Carolina Dep't of Mental Health,* 331 S.C. 79, 502 S.E.2d 78 (1998); *Bergstrom v. Palmetto Health Alliance,* 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002).

*Hurd v. Williamsburg Cnty.*, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (S.C. Ct. App. 2003) *aff'd,* 363 S.C. 421, 611 S.E.2d 488 (2005).

For that reason, Appellants' failure to offer evidence of proximate cause defeats their claim. The grant of summary judgment should be affirmed on the additional sustaining ground of lack of proximate cause.

**IV. *Hawkins v. Greenville* dictates the inescapable conclusion that the Respondent has no duty to maintain its sewer lines in any particular fashion.**

The trial court properly applied *Hawkins v. City of Greenville* 594 S.E.2d 557 (Ct.App 2004) for the proposition that the Respondent has no duty to maintain its sewer lines in any particular fashion. Hawkins involved a storm drain that did not properly drain surface water, resulting in property damage from water entry into a business. Similarly, this case involves a sewer line that had a backup resulting in property damage from a sewer backup in a private residence.

In *Hawkins*, the Court found that several of the immunities under the South Carolina Tort Claims Act applied to that situation.

> 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).

. . . .

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.

*Hawkins v. City of Greenville*, 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004).

Clearly, the court properly applied the *Hawkins* precedent to this case.

## V. Conclusion.

The trial court properly granted summary judgment. The court found that the Respondent does not have a duty to inspect or otherwise maintain a sewer system in any particular fashion and that the City is not liable for claims arising from the design or maintenance of the sewer system. While the court did not couch its order in these terms, the Appellants have also failed to demonstrate the existence of a duty because there is no actual or constructive notice of the blockage that arguably resulted in the backup. The Respondent did not create the blockage and

had no actual notice of its existence. Absolutely no evidence exists regarding the location or existence of the blockage at any time prior to the backup.

Additionally, there is no evidence of proximate cause. There is no evidence that the blockage existed for a sufficient time so that a periodic inspection by the Respondent would have discovered its presence. While the Appellant contends that the lack of an inspection program renders the Respondent liable, that analysis totally ignores the element of proximate cause. There is no evidence that the blockage existed, how long it existed or where it existed prior to the backup. No evidence exists that an inspection prior to the backup would have discovered this blockage. Without that evidence, the Appellant has no evidence of proximate cause and summary judgment was properly granted.

For these reasons, the Respondent requests that this Court affirm the grant of summary judgment from the lower court.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that the Final Brief of Respondent in the above-captioned matter complies with Rule 211(b), SCACR.

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ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina

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**CERTIFICATE OF SERVICE**

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The undersigned employee of Morrison Law Firm, LLC, attorney for the Respondent, City of Newberry, does hereby certify that service of the **Respondent City of Newberry's Final Brief** in the above-captioned action was made upon all counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 7th day of May, 2014, addressed as follows:

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