

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 REPLY BRIEF

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LAW/ANALYSIS

Appellants Danny Abrams and Frances Abrams assert the instant case should be decided by this Court upon its answering the following question:

Whether a sewer system operator in South Carolina has a duty to periodically inspect the system for defects and conditions that may create defects?

And if the answer to that question is “yes,” then:

Whether a sewer system operator in South Carolina is liable to its customers for damages due to the operator’s failure to periodically inspect the system for defects and conditions that may create defects?

In the case at bar, in arriving at its disposition in favor of Respondent City of Newberry at the summary judgment stage, the Circuit Court determined a sewer system operator in South Carolina is not liable to its customers in matters pertaining to maintenance, which Appellants maintain includes periodically inspecting the system for defects and conditions that may engender defects. The Court’s holding was premised upon a passage within Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2000), which Appellants aver is dicta, or in the alternative, vague and unsupported by authority.

We know this about the instant case:

- Appellants were customers of Respondent;
- Appellants were billed for services rendered by Respondent, which Appellants paid;
- Appellants sustained approximately \$24,000 in damages when their house was flooded with sewer water;
- Appellants' house was flooded by a blockage in the sewer line on their street; and
- Appellants' investigation of this matter revealed, among other things, that Respondent had no program of periodic inspection of the sewer lines.

Appellants aver a sewer system operator in South Carolina has a duty to periodically inspect its system for defects and conditions that may create defects. Moreover, Appellants aver a sewer system operator is liable to its customers for damages relating to its failure to periodically inspect and maintain its system.

I. Respondent Owed a Duty of Care to Appellants, Including the Duty of Periodic Inspection of Sewer Lines for Blockages

Appellants maintain that Respondent, like any other utility or provider of goods or services, possesses a duty of care to its customers, which may be enforced by those customers when they suffer colorable damages that are

proximately caused by the breach of that duty. See Michael A. Rosenhouse, J.D., Municipal Liability for Damage Resulting from Obstruction or Clogging of Drain or Sewer, 54 A.L.R.6th 201, 201 (2010) (“In general, a city may be held liable for damage resulting from the obstruction or clogging of a municipal drain or sewer when it has actual or constructive notice of a problem and still fails to take action to remedy it.”)

As explicated within persuasive secondary authority, it has been held that the duty of a municipal corporation to prevent the obstruction of its drains and sewers implies a duty of inspection, also sometimes called a duty of watchfulness, and, when found necessary, of cleaning. Id. at § 12. The breach of this duty renders the city liable and renders moot any requirement that the city have advance notice of the problem or condition and an opportunity to remedy it. Id.

In the following cases decided in the modern era, courts held or impliedly recognized that a municipal corporation, as part of its duty to maintain and operate its sewer systems with reasonable care, has a duty to inspect the same:

- City of Birmingham v. Norwood, 126 So. 619 (Ala. 1930)
- City of Tucson v. Hughes, 533 P.2d 561 (Ariz. Ct. App. 1975)

- E. T. Barwick Mills, Inc. v. Stevens, 136 S.E.2d 28 (Ga. Ct. App. 1964)
- Burford v. Village of La Grange, 234 N.E.2d 120 (Ill. App. Ct. 1967)¹
- Elledge v. City of Des Moines, 144 N.W.2d 283 (Iowa 1966)
- Holmes v. Incorporated Village of Piermont, 863 N.Y.S.2d 774 (2d Dept 2008)
- Pet Products, Inc. v. City of Yonkers, 736 N.Y.S.2d 699 (N.Y. App. Div. 2002)
- People v. White, 642 N.Y.S.2d 492 (Sup 1996)²
- Pickersgill v. City of New York, 642 N.Y.S.2d 469 (N.Y. Civ. Ct. 1996)
- Ward v. City of Charlotte, 269 S.E.2d 663 (N.C. Ct. App. 1980)

¹ The court in Burford v. Village of La Grange, 234 N.E.2d 120 (Ill. App. Ct. 1967), held liability of a city for improper maintenance of a sewer leading to backup, would have to be predicated on a violation of the city's duty to inspect its sewers.

² In People v. White, 642 N.Y.S.2d 492 (N.Y. Sup. Ct. 1996), the Court held the defendant city is required to use reasonable care to inspect and repair sewers so as to prevent damages to citizen's property, and where the city fails to do this and the sewer becomes obstructed, the city can be liable for damages resulting from its acts or omissions.

- Lewis v. Village of Batavia, No. CA84-04-032, 1985 WL 8143 (Ohio Ct. App. 1985)
- Rotella v. McGovern, 288 A.2d 258 (R.I. 1972)
- Creighton v. Town of Windsor, 577 A.2d 681 (Vt. 1990)
- Stoneking v. Orleans Village, 243 A.2d 763 (Vt. 1968)
- Freitag v. City of Montello, 153 N.W.2d 505 (Wis. 1967)

Employing, inter alia, the above-stated authorities as support, Appellants maintain a sewer system operator in South Carolina—which is charging its customers for service—has a duty to periodically inspect the system for defects and conditions that may create defects. Appellants further maintain a sewer system operator in South Carolina is liable to its customers affected by the operator’s failure to periodically inspect the system for defects and conditions that may create defects.

II. Respondent’s Failure to Periodically Inspect Sewer System Obviates the Usual Burden of Proof Concerning Notice

In the alternative, Respondent attempts to avoid liability in this case, asserting Appellants have no evidence that Respondent either knew or should have known (i.e., actual or constructive knowledge) of the defect that caused Appellants’ house to flood. As an initial response, Appellants note the

Court's disposition was solely premised upon the finding that a sewer system operator in South Carolina is not liable to its customers in matters pertaining to maintenance (and design). The Court did not delve into issues pertaining to issues relating to breach or proximate cause. Additionally, Appellants assert that Respondent is only entitled to the defenses pertaining to absence of proof only if Respondent can demonstrate it actually engaged in a system of periodic inspection of its sewer lines. As outlined within Appellants' direct brief, there is no such evidence. Obviously, if Respondent is not going to inspect its sewer lines, it's never going to have any actual or constructive knowledge of defects and conditions that may create defects.

As noted in the analysis in Section 1 of this reply, it has been commonly held in the United States that a municipal corporation possesses a duty to prevent the obstruction of its drains and sewers and that this duty implies a responsibility to inspect the system for defect. Id.

Further, many courts have held the breach of this duty to inspect renders the sewer operator liable and renders moot any requirement that the operator have advance notice of the problem or condition and an opportunity to remedy it. Id.

In City of Tucson v. Hughes, 533 P.2d 561 (Ariz. Ct. App. 1975), a suit for damages caused by raw sewage backing up into a home as a result of an accumulation of grease in the sewer line, the Court recognized that courts were divided concerning whether actual or constructive notice of an obstruction in a sewer or drain was a condition precedent to liability on the part of a municipality for damages, but determined it believed those cases that do not require notice to be the better reasoned. The Court explained that 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 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. Floyd v. City of Butte, 147 Mont. 305, 412 P.2d 823 (1966); City of Portsmouth v. Mitchell Mfg. Co., 113 Ohio St. 250, 148 N.E. 846 (1925); 57 Ma.Jur.2d Municipalities, School, and State Tort Liabilities § 209 (1971). In the case of Vitucci Importing Co. v. City of Seattle, 72 Wash. 192, 130 P. 109 (1913), the court cites with approval on the issue of notice the case of Vanderslice v. City of Philadelphia, 103 Pa. 102 (1883):

The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens

that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it 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 keep the sewers clear is a neglect of duty which renders the city liable.

130 P. at 111.

In accord with the position taken in Vitucci are City of Birmingham v. Norwood, 220 Ala. 497, 126 So. 619 (1930); Kramer v. City of Los Angeles, 147 Cal. 668, 82 P. 334 (1905); Town of French Lick v. Teaford, 78 Ind.App. 609, 131 N.E. 86 (1921); Floyd v. City of Butte, *supra*; Randall v. City of Chadron, 112 Neb. 120, 198 N.W. 1020 (1924); Henry Clay v. Jersey City, 74 N.J.Super. 490, 181 A.2d 545 (1962); McCarthy v. City of Syracuse, 46 N.Y. 194 (1871).

Id. at 562-63 (emphasis added) (internal quotations omitted).

Moreover, numerous decisions exist in the case law, which support the proposition that summary judgment in a defective condition case should not be available to an entity in control of a premises or utility where that entity had no protocol for periodic inspection at the time of loss. Such cases include the following:

- Rodrigues v. Hawaii, 472 P.2d 509 (Haw. 1970): Action under Hawaii Tort Liability Act by homeowners seeking damages for flooding of their home. The trial court found for owners and the state appealed. The Hawaii Supreme Court held that evidence sustained the trial court's finding that the state highway department was negligent in failing to protect homeowner from flood damage caused by failure of a highway culvert to drain surface waters after it became blocked as result of beach sand and tidal action. The state could not demonstrate a true system of periodic inspection prior to the loss: "One of the grounds on which the trial court based the State's liability was its failure to keep the culvert clear of sand. The State claims that it did not breach its duty in this regard. It contends that in light of its limited funds and manpower, it satisfied its duty by 'periodically' inspecting the culvert. There was no evidence submitted to indicate how often such periodic inspections took place." Id. at 516.
- Louis v. J. C. Penney Co., 246 So. 2d 294 (La. Ct. App. 1971): Suit for injuries allegedly sustained by a customer when she slipped on small, black plastic 'sock hanger' and fell in aisle in defendant's store. The trial court dismissed the suit, and plaintiff appealed. The Louisiana Court of Appeal held the customer was entitled to recover from the defendant retailer, even though she did not know how hanger came to be upon floor or how long it had been there, where concentration of hangers on floor was in immediate area of cash register counter under particular custody, control and supervision of store employees rather than in area of sock display farther to rear of store, and there was no evidence as to any periodic inspection of passageways or floors by employees.
- Steinhorst v. H. C. Prange Co., 180 N.W.2d 525 (Wis. 1970): On appeal, the Wisconsin Supreme Court, held that evidence in a customer's action against store for injuries sustained when she slipped on shaving foam and fell, that shaving soap from

self-serve counter had been found on counter previously and that clerk had seen boys playing around counter 15 minutes before customer slipped was sufficient to charge store with “constructive notice.” Of particular importance to the Court in arriving at this determination was the absence of evidence of periodic inspection of the subject aisle by the retailer. Id. at 527-28.

As recited within the above-referenced authorities, it has been held the breach of the duty of inspection and watchfulness renders a sewer operator liable for damages cause by blockage in the system and renders moot any requirement that the city have advance notice of the problem or condition and an opportunity to remedy it. Appellants concur with this proposition and assert this Court should embrace the same. In the instant case, Respondent did not routinely inspect its sewer lines. Appellants therefore maintain if Respondent is not going to inspect its sewer lines, it’s never going to have any actual or constructive knowledge of defects and conditions that may create defects. Accordingly, Appellants assert Respondent should not be given the benefit of the shield (or sword) of a notice argument for purposes of disposing of this dispute.

CONCLUSION

Appellants maintain Respondent owed them a duty to periodically inspect and clean the subject sewer system, which Respondent did not fulfill. Further, because of Respondent's failure to periodically inspect and clean its sewer system, Appellant maintains Respondent's alternative argument centering on alleged lack of notice fails.

Accordingly, Appellants respectfully request this Court reverse the grant of summary judgment to Respondent in the case sub judice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Finaly Reply Brief 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."

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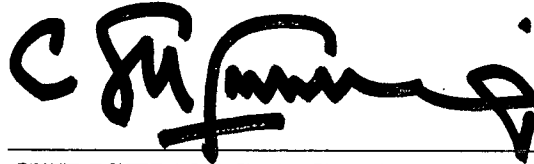
I hereby certify that I served a copy of Appellants' Final Reply Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on May 1, 2014, addressed to the following:

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