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,

PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANTS

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 219 and 221, of the South Carolina Appellate Court Rules, Appellants Danny Abrams and Frances Abrams request that this Court grant a rehearing in this matter. Appellants respectfully asset that the issues set forth below warrant reconsideration by this Court.

STATEMENT OF THE CASE

Appellants 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. On May 20, 2015, this Court issued an opinion affirming the Circuit Court's order as modified. Appellants now petition for rehearing of this Court's opinion.[1]

[1] Appellants incorporate by reference its statement of facts and arguments set forth in their final brief and final reply brief with this Court.

STANDARD OF REVIEW

Pursuant to Rule 221(a), SCACR, a properly drawn petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." See Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 564 S.E.2d 322 (2001); see also James A. Atkins, 16 S.C. JUR. APPEAL AND ERROR §147 (2007). "The purpose of such a petition for rehearing is to aid the court in deciding correctly a case heard by it." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

In applying the aforementioned concept of articulating points and issues which were "overlooked or misapprehended," our Supreme Court has suggested that rehearing can be appropriate where the court issued a decision without keeping a material principle "fully in mind." Green v. E.B. Gresham Co., 168 S.C. 395, 167 S.E. 659 (1933) (implying that a decision by a court "unmindful" of a legal principle can be a candidate for rehearing).

GROUNDS FOR PETITION

For the reasons set forth below, Appellants respectfully assert the Court misapprehended, misconstrued, or overlooked the laws and rules regarding whether Appellants provided evidence that Respondent owed a duty to inspect and maintain its sewer lines and whether Respondent's failure to inspect and maintain its sewer lines was the proximate cause of their injuries.

A. The Court Erred in Failing to Find Respondent Had a Duty to Inspect the Sewer System

Although the Court properly held the Circuit Court erred in relying on Hawkins v. City of Greenville, 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004), the Court failed to enunciate a municipality's duty of care in maintaining its sewer system. This is a novel issue in South Carolina. Although South Carolina's appellate courts have not addressed a negligent maintenance claim, other jurisdictions have found a municipality's obligation with respect to

sewer maintenance is to exercise "needful prudence, watchfulness, and care in the maintenance of the sewer system." See Creighton v. Town of Windsor, 557 A.2d 681, 684-85 (Vt. 1990); see also Rotella v. McGovern, 288 A.2d 258, 261 (R.I. 1972) (holding municipalities have a duty to exercise due care in the maintenance of a sewer line including making reasonable periodic inspections when by the passage of time, deterioration, or obstructions are reasonably foreseeable), Floyd v. City of Butte, 412 P.2d 823, 826 (Mont. 1966) (holding municipality becomes chargeable with notice of what a reasonable inspection would disclose).

In Creighton, the public works director admitted the town did not maintain its sewer system because the director did not even have an accurate map of it. 577 A.2d at 684. The Creighton court concluded summary judgment was inappropriate because the plaintiff homeowners had shown there was a material issue of whether the town had a duty to inspect its line, whether inspection would have avoided plaintiffs' damages, and whether the blockage was an ordinary result of use of the sewer. Id. at 685.

Respondent owed a duty to inspect and maintain its sewer system. Respondent breached that duty of care by failing to exercise any prudence, watchfulness, or care in the maintenance of the sewer lines. Jim Liptak, Superintendent of the Department of Water and Wastewater for the City of Newberry, admitted Respondent did not have any protocol for periodic or routine inspections or maintenance of the sewer lines. **(R. 54-55).** The blockage was an ordinary result of the use of the sewer, which Respondent should have anticipated and guarded against by occasionally examining and cleaning the sewer lines. Similar to Creighton, summary judgment was inappropriate here where Appellants showed there was a material issue of whether Respondent had a duty to inspect its sewer line, whether a periodic inspection would have avoided the sewage overflow into Appellants' home, and whether the blockage was an ordinary

result of use of the sewer. Id. at 685. Thus, the Court erred in failing to find there was a material issue as to whether Respondent owed a duty of care to inspect and maintain its sewer lines.[2]

B. Mere Absence of Constructive Notice Does Not Absolve Respondent from Negligence; Respondent's Failure to Exercise a Reasonable Degree of Prudence and Watchfulness Renders Respondent Liable

Again, this is a novel issue in South Carolina, which the Court did not address in its opinion. Appellants argue this Court should adopt the reasoning that Respondent's "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." See City of Tucson v. Hughes, 533 P.2d 561, 563 (Ariz. 1975). In City of Tucson, the Court explained "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." Id.

Respondent should not be able to argue that it had no constructive notice when it never undertook any periodic inspections of the sewer lines. The blockage was an ordinary result of the use of the sewer, which Respondent could have anticipated due to its lack of inspections. As

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[2] As Appellants cited in their reply brief, many other jurisdictions have found municipalities owe a duty to maintain and operate their sewer systems with reasonable care. See 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. Vill. of La Grange, 234 N.E.2d 120 (Ill. App. Ct. 1967), Elledge v. City of Des Moines, 144 N.W.2d 283 (Iowa 1966), Holmes v. Incorporated Vill. of Piermont, 54 A.D.3d 809 (N.Y. App. Div. 2008), Pet Prods., 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), 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), Lewis v. Vill. of Batavia, No. CA84-04-032, 1985 WL 8143 (Ohio Ct. App. 1985), Stoneking v. Orleans Vill., 243 A.2d 763 (Vt. 1968), Freitag v. City of Montello, 153 N.W.2d 505 (Wis. 1967).

noted above, many jurisdictions have held municipalities have a duty to inspect and maintain sewer lines, and thus, Respondent should not be absolved of liability by asserting lack of constructive notice. Appellants urge this Court to reject constructive notice as the standard. Even if this Court adopts such a standard, Appellants assert the blockage was of such a size and nature so as to place Respondent on constructive notice of the defect and show that an inspection would have disclosed its presence in the sewer line.

C. Appellants Provided Evidence that a Negligent Act or Omission Attributable to the Respondent Was the Proximate Cause of their Injury

The Court erred in concluding summary judgment was appropriate because Appellants "failed to provide any evidence that a negligent act or omission attributable to the City was the proximate cause of their injury." To establish a negligence action, a plaintiff must prove (1) a duty of care owed by defendant to a plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). Proximate cause requires proof of both causation in fact and legal cause. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause, in contrast to the 'but for' nature of causation in fact, turns on the issue of foreseeability." Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 408-09, 563 S.E.2d 109, 112 (Ct. App. 2002) (citation omitted). Normally, the question of proximate cause is one of fact for the jury and the Circuit Court's only function regarding the issue "is to inquire whether particular conclusions are the only reasonable inference that can be drawn from the evidence." Id. at 409, 563 S.E.2d at 113.

"The touchstone of proximate cause in South Carolina is foreseeability." Holmes v. Black River Elec. Co-op, Inc., 274 S.C. 252, 257, 262 S.E.2d 875, 877 (1980). "The law is well

settled that in order to establish liability it is not necessary that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen that his negligence would probably cause injury to something or someone." McQuillen v. Dobbs, 262 S.C. 386, 393, 204 S.E.2d 732, 735-36 (1974)

The Court erred in finding there was no genuine issue of material fact as to proximate cause of Appellants' injuries. Here, the injury would not have occurred but for Respondent's lack of inspection and Respondent should have foreseen that their failure to inspect or maintain the sewer lines in any manner would cause some type of injury to Appellants and other homeowners. See id. (holding "negligence may be proved by circumstantial evidence as well as direct evidence"). After raw sewage overflowed into Appellants' home, an inspection of the sewer lines revealed a blockage. Appellants believe the sewage overflow could have been avoided if Respondent had properly inspected and serviced the sewer lines. Moreover, Appellants maintain the question of proximate cause was one for the jury to determine. See Thomas, 349 S.C. at 409, 563 S.E.2d at 113. Thus, Appellants assert the Court erred in affirming the Circuit Court's grant of summary judgment by finding a lack of proximate cause existed.

CONCLUSION

Based on the foregoing arguments, Appellants respectfully request this Court grant its Petition for Rehearing.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

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June 4, 2015

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PROOF OF SERVICE

I hereby certify that I served a copy of the Petition for Rehearing upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on June 4, 2015, addressed to the following:

COUNSEL SERVED:
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[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
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PROOF OF SERVICE – PETITION FOR REHEARING

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