THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, ...Petitioners,

v.

City of Newberry, ...Respondent,

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on July 6, 2015.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals Err in Failing to Find the City of Newberry Had a Duty to Inspect the Sewer System?

II. Did the Court of Appeals Err in Finding Petitioners Did Not Prove a Negligent Act or Omission Attributable to the City of Newberry Was the Proximate Cause of Their Injury?

STATEMENT OF THE CASE

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

Petitioners were paying customers of the City of Newberry's utility on March 4, 2008, and for many years before that time.[1] A subsequent investigation by a plumbing vendor retained

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[1] There is no dispute that Petitioners were **paying customers** of the City of Newberry and that their monthly bill included paying for maintenance of the sewer system:

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

by the City of Newberry to investigate the incident revealed the existence of what Petitioners assert was debris (i.e., a rootball or rolling blockage) in the sewer line adjacent to their home.[2] Petitioners maintained this blockage was a proximate cause for the damage to their home, and the City of Newberry either knew or should have known about the blockage prior to March 4, 2008.

Jim Liptak, Superintendent of the Department of Water and Wastewater for the City of Newberry, was familiar with the retention of the plumbing vendor by the City, the existence of the video, and the existence of a blockage caused by a rootball. (App. 127-33). Liptak also agreed to the possibility that this blockage could have been higher up the line and closer to Petitioners' home on March 4, 2008. (App. 133). Liptak admitted the City of Newberry did not perform any periodic or routine maintenance on the sewer system. (App. 118). Instead, the City of Newberry only performed maintenance on its sewer system when there was a problem. (App. 118).

. . . .

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.

(App. 121-22).

[2] 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 Petitioners' home.

In May 2009, Petitioners filed suit against the City of Newberry in the Court of Common Pleas for Newberry County. They maintained that by virtue of this customer-provider relationship, they were owed a duty by the City of Newberry to periodically inspect the sewer line servicing their home for evidence of defect or blockage. Petitioners asserted the City of Newberry breached that duty and that due to this breach they sustained the damages relating to having several inches of sewer water in their home.

The City of Newberry denied liability for Petitioners' damages and moved for summary judgment. Petitioners opposed the grant of summary judgment to the City of Newberry 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. The Circuit Court heard the City of Newberry's motion in Newberry County on August 13, 2012. The Court elected to grant summary judgment to the City of Newberry. (App. 65-68). The Court issued a formal written order articulating this holding on November 30, 2012. (App. 65-68).

Petitioners timely appealed the Circuit Court's decision to the Court of Appeals. After briefing and oral argument, the Court of Appeals entered a decision on May 27, 2015, affirming the Circuit Court as modified. See Abrams v. City of Newberry, Op. No. 2015-UP-259 (S.C. Ct. App. filed May 20, 2015). Petitioners then filed a Petition for Rehearing, and the Court of Appeals issued an order denying rehearing. (App. 12).

This review followed.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id; Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 330–31, 673 S.E.2d at 803.

LAW/ANALYSIS

I. The Court of Appeals Erred in Failing to Find the City of Newberry Had a Duty to Inspect Its Sewer System

The Court of Appeals properly found the Circuit Court erred in relying on the holding of Hawkins v. City of Greenville, 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004), to imply a municipality did not have a duty to inspect its sewer system. Hawkins concerned whether a municipality was liable under the Tort Claims Act for the design and planning of their sewage and drainage systems because the acts of designing and planning were considered quasi-judicial, discretionary functions for which a government entity was not liable. Id. at 292-94, 594 S.E.2d

at 563-64. The Hawkins Court did not rule on whether a municipality had a duty to inspect or otherwise maintain a sewer system. Id. Thus, as the Court of Appeals held, the Circuit Court erred in finding Hawkins implied a municipality did not have a duty to inspect its sewer system because Hawkins was a design case. (App. 2). However, despite finding the Circuit Court's grant of summary judgment was in error and vacating the Circuit Court's opinion in which it found the City of Newberry had no duty to inspect, the Court of Appeals failed to address whether a municipality owes a duty of care in maintaining its sewer system. (App. 2). See e.g., Underwood v. Coponen, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006) (holding the circuit court must determine, as a matter of law, whether the law recognizes a particular duty before granting summary judgment).

This is a novel issue in South Carolina. Although South Carolina's appellate courts have not addressed a negligent maintenance claim, numerous 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) (recognizing a town's duty to exercise "needful prudence, watchfulness, and care" in the maintenance of the sewer system is consistent with the holdings in other states); 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).[3]

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[3] 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.

Although a municipal was not the insurer of the condition of its sewage system, the Creighton court held a municipal was liable where an obstruction occurred from the ordinary use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing. Id. 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.

Similarly, American Jurisprudence 2d, the persuasive secondary authority that has enjoyed much favorable treatment by our appellate courts 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**

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).

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). See also 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.").

The City of Newberry owed a duty to inspect and maintain its sewer system. The City of Newberry 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 the City of Newberry did not have any protocol for periodic or routine inspections or maintenance of the sewer lines. (App. 118-19). During his deposition, Liptak admitted the following:

> 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.

(App. 118-19).

The blockage that caused the damage to Petitioners' home was an ordinary result of the use of the sewer, which the City of Newberry should have anticipated and guarded against by

occasionally examining and cleaning the sewer lines. Similar to Creighton, summary judgment was inappropriate here where Petitioners showed there was a material issue of whether the City of Newberry had a duty to inspect its sewer line, whether a periodic inspection would have avoided the sewage overflow into Petitioners' home, and whether the blockage was an ordinary result of use of the sewer. Id. at 685. Liptak testified his personal investigation revealed the cause of the flooding into Petitioners' home was caused by a blockage of a rootball. (App. 124-25, 130). According to Liptak, rootballs occured in sewer lines when "large, impenetrable mass of roots" accumulated. (App. 126). A periodic inspection of the sewer lines would have revealed the blockage caused by the rootball. At the very least, the City of Newberry assumed a duty of care to Petitioners because Petitioners were paying for the sewer maintenance systems. See Hendricks v. Clemson, 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)).[4]

Further, the City of Newberry 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 the City of Newberry could have anticipated due to its lack of inspections. Petitioners urge this Court to reject constructive notice as the standard. See Hughes, 533 P.2d at 562 (holding actual or constructive notice of an obstruction in a sewer is not a condition precedent to liability on the part of a municipality for damages when the

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[4] See also Restatement (Second) of Torts § 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.").

obstruction ought to be anticipated and could be guarded against by occasional examination and cleansing). Even if this Court adopts such a standard, Petitioners assert the blockage was of such a size and nature so as to place the City of Newberry on constructive notice of the defect and show that an inspection would have disclosed its presence in the sewer line. Thus, the Court of Appeals erred in failing to find the City of Newberry owed a duty of care to inspect and maintain its sewer lines.

Finally, Petitioners aver the Court of Appeals properly found Respondent's Tort Claims Act argument was not preserved for appellate review because the Circuit Court did not rule on this issue. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [Circuit Court] to be preserved for appellate review." (citation omitted)). Even if the Court finds the issue preserved, Petitioners assert the City of Newberry did not offer any proof it was entitled to immunity under the Tort Claims Act. See S.C. Code Ann § 15-78-60. 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." Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004); Wooten ex rel. Wooten v. S. 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. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002). The City of Newberry did not present any evidence when considering whether to conduct periodic inspections of the sewer line, it actually weighed competing considerations and made a conscious choice using accepted professional standards. Liptak testified there was no written protocol for a routine inspection program, the City of

Newberry did not have time to inspect the sewer lines, and he did not know whether it was common practice for other municipalities to inspect their sewer lines. (App. 119-20, 136). Accordingly, even if this issue is preserved, the City of Newberry cannot show they are entitled to immunity under the Tort Claims Act.

II. Petitioners Provided Evidence that a Negligent Act or Omission Attributable to the City of Newberry Was the Proximate Cause of Their Injury

The Court of Appeals erred in concluding summary judgment was appropriate because Petitioners "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). "The court looks to the natural and probable consequences of the complained act to determine foreseeability." McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (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 of Appeals erred in finding there was no genuine issue of material fact as to the proximate cause of Petitioners' injuries. Here, the injury would not have occurred but for the City of Newberry's lack of inspection, and the City of Newberry should have foreseen that their failure to inspect or maintain the sewer lines in any manner would cause some type of injury to Petitioners and other homeowners. See id. (holding "negligence may be proved by circumstantial evidence as well as direct evidence"). After raw sewage overflowed into Petitioners' home, an inspection of the sewer lines revealed a blockage. The sewage overflow could have been avoided if the City of Newberry had properly inspected and serviced the sewer lines. See McKnight, 385 S.C. at 387, 684 S.E.2d at 569 (providing the natural and probable consequences of the complained act determine foresseability). Moreover, 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 (holding proximate cause is a question of fact for the jury). Thus, Petitioners assert the Court of Appeals erred in affirming the Circuit Court's grant of summary judgment by finding a lack of proximate cause existed.

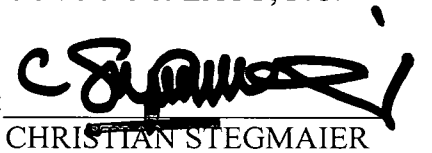
CONCLUSION

Petitioners assert the City of Newberry owed them a duty to periodically inspect and clean the sewer system, which the City of Newberry did not fulfill. Further, Petitioners' property

damage would not have occurred but for the City of Newberry's lack of inspection, and the City of Newberry should have foreseen that their failure to inspect or maintain the sewer lines in any manner would have caused an injury to Petitioners. Accordingly, Petitioner respectfully request this Court reverse the grant of summary judgment.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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PROOF OF SERVICE

I hereby certify that I served a copy of the Petition for Writ of Certiorari upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 5, 2015, addressed to the following:

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[SIGNATURE PAGE TO FOLLOW]

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