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S.C. Supreme Court

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, ... Petitioner^s,

v.

City of Newberry, ...Respondent,

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Danny Abrams and Frances Abrams, Appellants,

v.

City of Newberry, Respondent.

Appellate Case No. 2013-000022

Appeal From Newberry County
George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-259
Heard February 5, 2015 – Filed May 20, 2015

AFFIRMED AS MODIFIED

Christian Stegmaier, Claude Townsend Prevost, III, both
of Columbia, and Amy Lynn Neuschafer, of Murrells
Inlet, all of Collins & Lacy, P.C., for Appellants.

David Leon Morrison and Kassi B. Sandifer, of Morrison
Law Firm, LLC, of Columbia, for Respondent.

WILLIAMS, J.: Danny and Frances Abrams (Appellants) appeal the circuit court's order granting summary judgment in favor of the City of Newberry (the City), arguing the circuit court erred in finding the City (1) did not owe a duty to

inspect or otherwise maintain the sewer system in any particular fashion and (2) was not immunized from liability pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 through -200 (Supp. 2014). We affirm as modified.

First, we hold the circuit court erred in finding the City did not owe a duty to inspect or otherwise maintain the sewer system in any particular fashion pursuant to *Hawkins v. City of Greenville*, 358 S.C. 280, 294, 594 S.E.2d 557, 564 (Ct. App. 2004). ~~In *Hawkins*, this court held the plaintiffs negligence claim was barred~~ under the Tort Claims Act and did not rule on whether a municipality has a duty to inspect or otherwise maintain a sewer system. *Id.* at 292-94, 594 S.E.2d at 563-64. Therefore, the circuit court erred in finding the holding in *Hawkins* implied a municipality does not have a duty to inspect.¹ Accordingly, we vacate the portion of the circuit court's order in which it found the City has no duty to inspect or otherwise maintain the sewer system pursuant to this court's holding in *Hawkins*.

Next, we find the issue of whether the circuit court erred in finding the City was immune from liability pursuant to the Tort Claims Act is not preserved for appellate review because the circuit court did not rule upon 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)).

Finally, we affirm the circuit court's grant of summary judgment because Appellants failed to provide any evidence that a negligent act or omission attributable to the City was the proximate cause of their injury. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 56(c), SCRCP (noting summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010) ("In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party."

¹ Nothing in this opinion, however, should be construed as finding a municipality has a duty to inspect the sewer system.

(citation omitted)); *Hubbard v. Taylor*, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000) ("Negligence is not actionable unless it is the proximate cause of the plaintiff's injury." (citation omitted)); *Gause v. Smithers*, 403 S.C. 140, 164, 742 S.E.2d 644, 657 (2013) ("Proximate cause requires proof of: (1) causation-in-fact and (2) legal cause." (citation omitted)); *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011) ("The cause-in-fact requirement is proved by showing the injury would not have occurred but for the defendant's negligence. The legal cause requirement is proved by establishing the plaintiff's injury was foreseeable." (citations omitted)); *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) ("The court looks to the natural and probable consequences of the complained of act to determine foreseeability." (citing *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996))); *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 409, 563 S.E.2d 109, 113 (Ct. App. 2002) ("Ordinarily, the question of proximate cause is one of fact for the jury and the [circuit court]'s sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." (internal quotation marks and citation omitted)); *id.* ("Only when the evidence is susceptible to only one inference does it become a matter of law for the court." (quoting *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992))); *Singleton v. Sherer*, 377 S.C. 185, 203-04, 659 S.E.2d 196, 205-06 (Ct. App. 2008) (holding summary judgment is appropriate on a negligence claim when there was no genuine issue of material fact as to the proximate cause of the plaintiff's injuries).

AFFIRMED AS MODIFIED.

HUFF, J., concurs.

FEW, C.J., concurring: I agree with the majority's decision to affirm for two reasons. First, the circuit court correctly concluded the City of Newberry owed no duty to the Abramses to protect against the harm they suffered. Second, even if there were a duty, the majority correctly points out, "Appellants failed to provide any evidence that a negligent act or omission attributable to the City was the proximate cause of their injury."

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JUN 05 2015

SC Court of Appeals

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).

GROUND 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

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

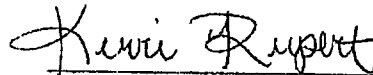
Based on the foregoing arguments, Appellants respectfully request this Court grant its Petition for Rehearing.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

COLLINS & LACY, P.C.

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Columbia, South Carolina
June 4, 2015

The South Carolina Court of Appeals

Danny Abrams and Frances Abrams, Appellants,

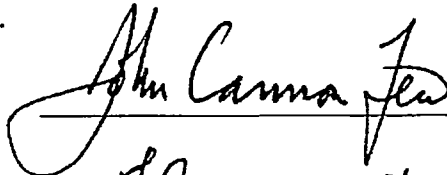
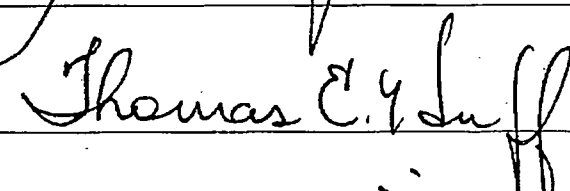
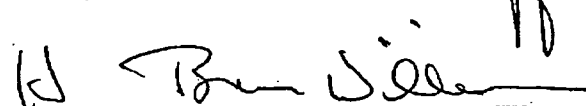
v.

City of Newberry, Respondent.

Appellate Case No. 2013-000022

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

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FILED

July 6, 2015

Kerri Brown Rupert, Esquire
The Honorable George C. James, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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APPELLANTS' FINAL BRIEF

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SC Court of Appeals

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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

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, SCRC. 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

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.

§ 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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Columbia, South Carolina
May 1, 2014

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,

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."

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SC Court of Appeals

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A handwritten signature in black ink, appearing to read 'C. Stegmaier', written over a horizontal line.

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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
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Danny Abrams and Frances Abrams

Appellants,

City of Newberry

Respondent.

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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.

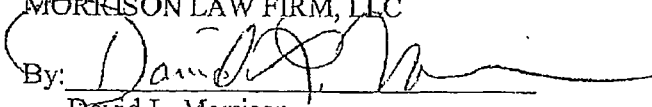
The trial court properly granted summary judgment. The court found that the Respondent does not have a duty to inspect or otherwise maintain a sewer system in any particular fashion and that the City is not liable for claims arising from the design or maintenance of the sewer system. While the court 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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Columbia, South Carolina

May 6, 2014

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,

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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

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v.

City of Newberry, ...Respondent,

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Final 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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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,

PROOF OF SERVICE

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:

COUNSEL SERVED:

David L. Morrison, Esquire
Morrison Law Firm
7453 Irmo Drive, Suite B
Columbia, SC 29212

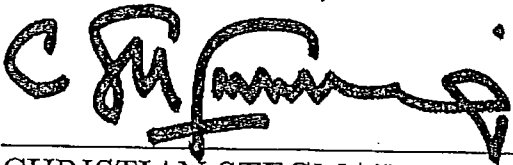
[SIGNATURE PAGE TO FOLLOW]

RECEIVED

MAY 01 2014

SC Court of Appeals

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANTS

**PROOF OF SERVICE –
APPELLANTS' FINAL REPLY
BRIEF**

Columbia, South Carolina
May 1, 2014

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,

RECORD ON APPEAL

Christian Stegmaier
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, SC 29211
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Attorney for Appellants

David L. Morrison, Esquire
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Attorney for Respondent

RECEIVED

MAY 01 2014

SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Danny Abrams and Frances Abrams,
Plaintiffs,
v.
City of Newberry,
Defendant.

C/A #: 11-CP-36-00588

ORDER GRANTING SUMMARY
JUDGMENT

FILED
NEWBERRY COUNTY
CLERK OF COURT
JACQUES S. BOWERS
2012 NOV 30 A 8:19

This matter came before the court for hearing of the defendant City of Newberry's motion for summary judgment. Christian Stegmaier appeared on behalf of the plaintiffs. David L. Morrison appeared on behalf of the City of Newberry (the City). Based upon the record, the Court grants the City's motion for summary judgment and dismisses this action with prejudice. Any factual recitations herein are set forth in the light most favorable to the plaintiff.

Under Rule 56, SCRCP, summary judgment may be granted if the record establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment is a drastic remedy, and the nonmoving party is required to present only a mere scintilla of evidence to overcome summary judgment. In this case, the facts surrounding the sewer backup and accompanying damages are largely irrelevant, as the Court concludes the City had no duty to take the actions the plaintiffs claim the City negligently did not take. The question of the existence of a duty of care is purely a question of law.

The plaintiffs allege negligence by the City caused a sewer backup into their home that resulted in damages to the home and contents. The City owns and operates the sewer system but denies any negligence or proximate cause. The plaintiffs' residence is on a hill. The sewer line

is a gravity line. The backup did not affect any other homes. The next home on the sewer line is downstream and at a lower elevation, but that home was not affected.

The plaintiffs contend that a rolling blockage in the sewer line caused this backup during a heavy rain. The plaintiffs further contend that a routine inspection program would have discovered this rolling blockage and that corresponding maintenance would have prevented the backup into the plaintiffs' home. The plaintiffs contend the City's failure to have an inspection program and the resulting failure to inspect was negligent.

The City contends it does not have a duty to inspect the sewer line under South Carolina law and that even if such a duty exists, there is no evidence an inspection would have revealed the blockage. It further contends that it neither created the blockage nor had notice of any defect or blockage in the sewer line. The plaintiffs rest on the premise that, as noted above, a reasonable periodic inspection would have revealed the blockage and that resulting maintenance would have prevented or cured this particular backup. For the reasons stated below, the Court concludes the City does not have a duty to inspect or maintain the sewer system. While the City contends that summary judgment is also warranted on the issue of proximate cause, the Court need not reach that issue since its ruling on the absence of a duty is dispositive.

Under existing South Carolina law, a city is immune from liability for claims arising out of the design and maintenance of a stormwater drainage system. See Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App. 2004). In Hawkins, the Court relied upon the reasoning of the Supreme Court of Texas in City of Tyler v. Likes 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." See Hawkins at 294 (citing City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997)). The

Hawkins court concluded that the defendant City was granted sufficient discretion "to exercise the measured policy judgments required to build and **maintain** an adequate municipal sewer and drainage system." See Hawkins at 294 (emphasis added).

In Likes, the court explained the common law distinction between proprietary and governmental functions with regard to governmental immunity. The Likes court noted, as observed in Hawkins, that the duties of a municipality in adopting a general plan of drainage systems are quasi-judicial functions subject to immunity. The Likes court further noted that acts of constructing and maintaining the systems are proprietary and therefore **not** subject to immunity. See Likes at 501. The Hawkins court did not note a distinction between government and proprietary functions (perhaps because the function in Hawkins was undoubtedly governmental), and instead summarily concluded that the City of Greenville was immune from liability for claims arising from both the design **and maintenance** of the system. In my view, any duty to inspect the sewer line would necessarily be included within an overall duty to maintain the system.

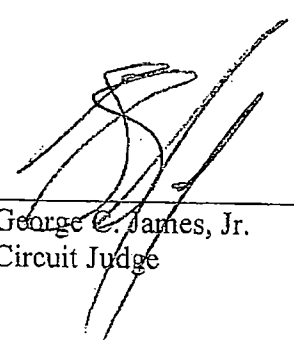
It should be noted that South Carolina does not observe a distinction between governmental and proprietary functions. See Wells v. City of Lynchburg, 331 S.C. 296, 305, 501 S.E.2d 746, 751 (Ct.App. 1998). Accordingly, in applying the Hawkins ruling that a municipality has sufficient discretion to exercise the measured policy judgments required "to build and maintain" an adequate sewer system, this Court is compelled to conclude that the City of Newberry does not owe a duty to inspect or otherwise maintain the sewer system in any particular fashion and that the City is not liable for claims arising from either the design or maintenance of the sewer system.

[Handwritten signature]

For the reasons stated herein, the Court grants summary judgment in favor of the defendant City of Newberry and dismisses this action with prejudice.

AND IT IS SO ORDERED.

November 29 2012
Newberry, South Carolina



George E. James, Jr.
Circuit Judge

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)
)
Danny Abrams and Frances Abrams,)
)
Plaintiffs,)
)
vs.)
)
City of Newberry,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER:

2009CP36 - 222

SUMMONS

(Jury Trial Requested)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices at 1330 Lady Street, Suite 601, Post Office Box 12487, Columbia, South Carolina 29211, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

[SIGNATURE PAGE TO FOLLOW]

JACKIE S. BOWERS
CLERK OF COURT

2009 MAY 20 A 10:53

FILED
NEWBERRY COUNTY

Respectfully submitted,

COLLINS & LACY, P.C.

By:



CHRISTOPHER STEGMAIER

cstegmaier@collinsandlacy.com

CLAUDE T. PREVOST, III

cprevost@collinsandlacy.com

1330 Lady Street, Sixth Floor 29201

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660

(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFFS

SUMMONS

Columbia, South Carolina

19 MAY . 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)
)
Danny Abrams and Frances Abrams,)
)
Plaintiffs,)
)
vs.)
)
City of Newberry,)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER:

2009CP36-222

COMPLAINT

(Jury Trial Requested)

FILED
NEWBERRY COUNTY
2009 MAY 20 A 10:57
JACQUE S. BOWERS
CLERK OF COURT

Plaintiffs, complaining of the above-named Defendant, do allege and show unto this Honorable Court the following:

1. Plaintiffs are residents of Newberry County, South Carolina
2. Upon information and belief, Defendant is a municipality, which is incorporated under the laws of South Carolina.
3. The acts or omissions giving rise to the causes of action alleged in this Complaint occurred in Newberry County, South Carolina; accordingly, venue in the instant case is proper.
4. Plaintiffs are the owners of a home located at 1446 Calhoun Street, Newberry, Newberry County, South Carolina.
5. On or about March 4, 2008, the sewage line running from Plaintiffs' home backed up into their home causing substantial damage.
6. Upon information and belief, Defendant owns, operates, and maintains the sewage line that backed up into Plaintiffs' home.

7. Upon information and belief, Defendant either knew or should have known about the existence of problems on the sewage line with regard to the potential for back up prior to the date of loss.

FOR A FIRST CAUSE OF ACTION

(Negligence)

8. Plaintiffs reallege, and by this reference incorporate, as if fully set forth herein, the allegations in Paragraphs 1 through 7 of Plaintiffs' Complaint.
9. Defendant owed Plaintiffs a duty to properly maintain and operate the sewage line that backed up into Plaintiffs' home.
10. Defendant further owed Plaintiffs a duty to comply with all applicable state, county, and municipal codes and regulations regarding the maintenance and operation of the sewage line.
11. Defendant breached these duties in the following particulars:
- a. By failing to properly maintain the sewage line;
 - b. By failing to properly operate the sewage line;
 - c. In failing to act upon knowledge of the existence of problems on the sewage line with regard to the potential for back up prior to the date of loss;
 - d. In other particulars as may be shown at trial.
12. As a direct and proximate result of Defendant's negligence, the sewage line running from Plaintiffs' home backed up causing substantial damage to Plaintiffs' home and personal property.

FOR A SECOND CAUSE OF ACTION

(Trespass)

13. Plaintiffs reallege, and by this reference incorporate, as if fully set forth herein, the allegations in Paragraphs 1 through 12 of Plaintiffs' Complaint.
14. Plaintiffs are the true owners of the home located at 1446 Calhoun Street, Newberry, South Carolina, were in possession of that home, and had a right to possess the same.
15. By its acts or omissions, Defendant caused sewage to enter Plaintiffs' Property.
16. The entry by Defendant was without Plaintiffs' permission.
17. As a direct and proximate result of Defendant's trespass, Plaintiffs' home and personal property were substantially damaged.
18. Further, as a direct and proximate result of Defendant's trespass, Plaintiffs were denied the right to use, possess, and inhabit their home.

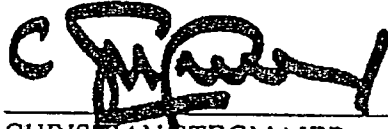
WHEREFORE, Plaintiffs pray for a Judgment awarding them damages in an amount to be determined at trial, and such other and further relief the Court determines just and proper.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

By:



CHRISTIAN STEGMAIER

cstegmaier@collinsandlacy.com

CLAUDE T. PREVOST, III

cprevost@collinsandlacy.com

1330 Lady Street, Sixth Floor 29201

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660

(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFFS

COMPLAINT

Columbia, South Carolina

19 MAY, 2009

COPY

7.22.09

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

Danny Abrams and Frances Abrams,)
Plaintiffs,)
v.)
City of Newberry,)
Defendant.)

C/A #: 09-CP-36-222

ANSWER
(Jury Trial Requested)

The Defendant answers the Complaint of the Plaintiffs as follows:

FOR A FIRST DEFENSE

1. The Summons and Complaint fails to state facts sufficient to state a cause of action.

FOR A SECOND DEFENSE

2. This Defendant denies each and every allegation of the Plaintiffs' Complaint not hereinafter specifically admitted.

3. This Defendant admits upon information and belief those allegations contained in Paragraph #1 of the Plaintiffs' Complaint.

4. This Defendant admits Paragraphs #2 and #3 of the Plaintiffs' Complaint.

5. As to Paragraphs #4 and #5 of the Plaintiffs' Complaint, this Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same and therefore, denies same.

6. Paragraphs #6 and #7 of the Plaintiffs' Complaint are denied.

7. As to Paragraph #8 of the Plaintiffs' Complaint, this Defendant re-alleges and reiterates each paragraph and affirmative defense set forth herein.

8. Paragraphs #9 and #10 of the Plaintiffs' Complaint make legal allegations rather than stating factual allegations. To the extent Paragraph #9 states legal conclusions, this Defendant craves reference to the South Carolina common and statutory laws as the best evidence of its duties. To the extent paragraph #9 states factual allegations, they are denied.

9. Paragraphs #11 and #12 of the Plaintiffs' Complaint are denied.

10. As to Paragraph #13 of the Plaintiffs' Complaint, this Defendant re-alleges and reiterates each paragraph and affirmative defense set forth herein.

11. As to Paragraph #14 of the Plaintiffs' Complaint, this Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same and therefore, denies same.

12. Paragraphs #15, #16, #17 and #18 of the Plaintiffs' Complaint are denied.

FOR A THIRD DEFENSE

13. This Defendant, upon information and belief, alleges that any injuries or damages allegedly suffered by the Plaintiffs, without admitting same to be true, were due to and caused entirely by the negligence of the Plaintiffs or the Plaintiffs' negligence which is more than the Defendant's negligence, and that such is a complete bar to the Plaintiffs' recovery herein. Further, the Defendant, upon information and belief, alleges that if the Plaintiffs' negligence was less than the Defendant's negligence, that such negligence should be compared to that negligence of the Defendant, so as to apportion the relative fault as to each party.

FOR A FOURTH DEFENSE

14. This Defendant is immune from suit pursuant to the South Carolina Tort Claim Act, S.C. Code Ann. § 15-78-10, *et seq.*

FOR A FIFTH DEFENSE

15. This Defendant alleges that they are immune from suit and liability under the Doctrine of Sovereign Immunity.

FOR A SIXTH DEFENSE

16. This Defendant is immune from suit pursuant to the South Carolina Tort Claim Act, S.C. Code Ann. § 15-78-10, *et seq.* including, but not limited to, § 15-78-60(1)(2)(4)(5) and (13).

FOR A SEVENTH DEFENSE

17. This Defendant is entitled to legislative budgetary immunity from suit for the allegations contained in the Plaintiffs' Complaint.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

MORRISON LAW FIRM, LLC

By: David L. Morrison, Esquire
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212
Phone: (803) 661-6285
Fax: (803) 661-6289
E-mail: david@dmorrison-law.com

ATTORNEY FOR THE DEFENDANT

Columbia, South Carolina

July 22, 2009

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Danny Abrams and Frances Abrams,

Plaintiffs,

v.

City of Newberry,

Defendant.

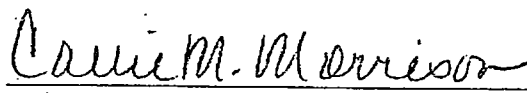
IN THE COURT OF COMMON PLEAS

C/A #: 09-CP-36-222

CERTIFICATE OF SERVICE

The undersigned employee of Morrison Law Firm, LLC, attorney for the Defendant, does hereby certify that service of the Answer 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 22nd day of July, 2009, addressed as follows:

Christian Stegmaier, Esquire
Claude T. Prevost, III, Esquire
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, South Carolina 29211



Callie M. Morrison

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS
	)	
Danny Abrams and Frances Abrams,	)	C/A #: 09-CP-36-222
	)	
Plaintiffs,	)	
	)	
v.	)	NOTICE OF MOTION AND MOTION
	)	FOR SUMMARY JUDGMENT
City of Newberry,	)	
	)	
Defendant.	)	
_____	)	

TO: CHRISTIAN STEGMAIER, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Presiding Judge of the Eighth Judicial Circuit at the Newberry County Courthouse, Newberry, South Carolina, on the tenth (10th) day after service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard, or at such time and place as may be set by the Court, for an Order granting summary judgment to the City of Newberry on the following grounds:

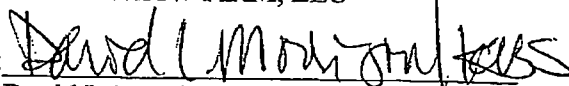
1. There is no genuine issue of material fact and Defendant is entitled to summary judgment as a matter of law.
2. There is no evidence of notice of any defect that caused this backup.
3. There is no evidence of actionable negligence by the Defendant.
4. There is no evidence of any action by this Defendant that caused this sewer backup.

Said Motion is based upon the Affidavits of Fred Yandle and Danny Hill filed herewith, the depositions of record, including the deposition of Danny Abrams and Frances Abrams and such

other matters as may be properly presented to the Court at the time of the hearing.

MORRISON LAW FIRM, LLC

By:



David L. Morrison, Esquire, #4101

Kassi B. Sandifer, Esquire, #68027

7453 Irmo Drive, Suite B

Columbia, South Carolina 29212

Phone: (803) 661-6285

Fax: (803) 661-6289

E-mail: david@dmorrison-law.com

E-mail: kassi@dmorrison-law.com

ATTORNEY FOR THE DEFENDANT

Columbia, South Carolina

December 14, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

Danny Abrams and Frances Abrams,)

Plaintiffs,)

v.)

City of Newberry,)

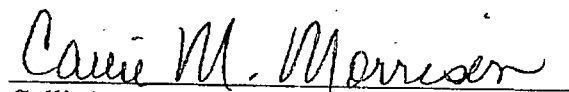
Defendant.)

C/A #: 09-CP-36-222

CERTIFICATE OF SERVICE

The undersigned employee of Morrison Law Firm, LLC, attorney for the Defendant, does hereby certify that service of the **Notice of Motion and Motion for Summary Judgment** in the above-captioned action was made upon all counsel of record by forwarding through E-mail this the 14th day of December, 2010, addressed as follows:

Christian Stegmaier, Esquire
Claude T. Prevost, III, Esquire
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, South Carolina 29211


Callie M. Morrison

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Danny Abrams and Frances Abrams,

Plaintiffs,

v.

City of Newberry,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A #: 09-CP-36-222

AFFIDAVIT OF FRED YANDLE

Personally appeared before me, Fred Yandle, who being duly sworn, deposes and states as follows:

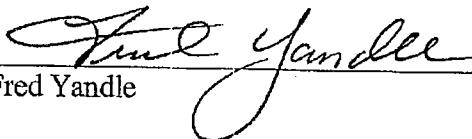
1. I am the Director of Public Utilities for the City of Newberry.
2. I am familiar with the allegations of this lawsuit and with the event giving rise to this lawsuit. I am also familiar with the wastewater disposal system for the City of Newberry.
3. The Plaintiff's home is located at 1446 Calhoun Street in Newberry.
4. I have researched the records for the City of Newberry for prior sewer backups in the area of the Plaintiff's home. The City does maintain records of work orders for any work performed including any sewer line malfunctions and blockages. The City also maintains records of complaints made regarding sewer line malfunctions and blockages.
5. The City of Newberry 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. The City had no prior problems with the sewer pipes in this area. The City had no prior complaints of problems along Calhoun Street near the Plaintiff's home.
6. The City had no notice of the blockage that caused the backup in the Plaintiff's home.

7. The City had no notice of any problem with the sewer lines along Calhoun Street in the vicinity of the Plaintiff's home. The line in this area is a gravity line.

8. The City did hire an engineer to determine the cause of the backup in Plaintiff's home. Upon information and belief, the backup into Plaintiff's home was caused by a blockage in the sewer line in the immediate vicinity of 1446 Calhoun Street. The home immediately downstream from the Plaintiff's home is 1450 Calhoun Street. The home at 1450 Calhoun Street is also lower in elevation than is the Plaintiff's home. As that home is downstream any blockage past 1450 Calhoun Street would have resulted in a backup into 1450 Calhoun Street prior to any backup into 1446 Calhoun Street. The home at 1450 Calhoun Street did not incur any backup of sewage. Consequently, the blockage had to have occurred between 1446 Calhoun Street and 1450 Calhoun Street.

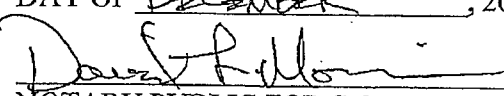
9. The City has had no prior blockages in that area and had no means by which to anticipate this blockage.

FURTHER AFFIANT SAYETH NOT.


Fred Yandle

SWORN TO BEFORE ME THIS 3RD

DAY OF DECEMBER, 2010


NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 10/20/18

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Danny Abrams and Frances Abrams,

C/A #: 09-CP-36-222

Plaintiffs,

DANNY B. HILL

v.

City of Newberry,

Defendant.

Personally appeared before me, who being duly sworn, deposes and states as follows:

1. I am a professional engineer licensed by the State of South Carolina. My license is in good standing. I graduated from the University of South Carolina in 1970 with a degree in structural engineering. I have been involved in engineering with regard to water and sewer systems for approximately thirty years.

2. In May 2008, I was retained by the City of Newberry with regard to a sewer backup at 1446 Calhoun Street in Newberry. I was asked to determine the cause of the backup.

3. I surveyed the portion of Calhoun Street from the manhole near the creek to the manhole past 1446 Calhoun Street. We developed plans showing the profile of the street and the elevations of the floor levels of the houses adjacent to 1446 Calhoun Street.

4. The sewer system in this area is a gravity system. When a backup or clog occurs the sewer will back up and come out at the lowest point. For that reason the elevations of the floor levels of the houses adjacent to 1446 Calhoun Street was important.

5. The manhole below 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 lowest point. There is no evidence or indication of any overflow at that manhole.

6. 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.

7. 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.

8. Exhibit one attached demonstrates the elevations mentioned above. That document was prepared by me.

9. I have 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. I am not familiar with any other problems in the sewer main along Calhoun Street prior to this event.

FURTHER AFFIANT SAYETH NOT.

Danny B. Hill
Danny B. Hill

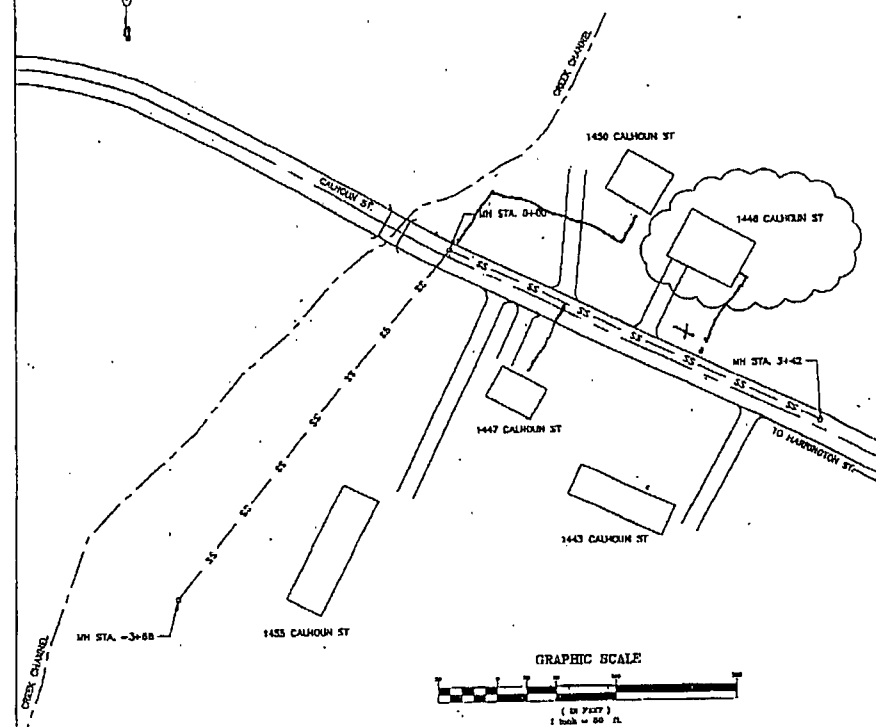
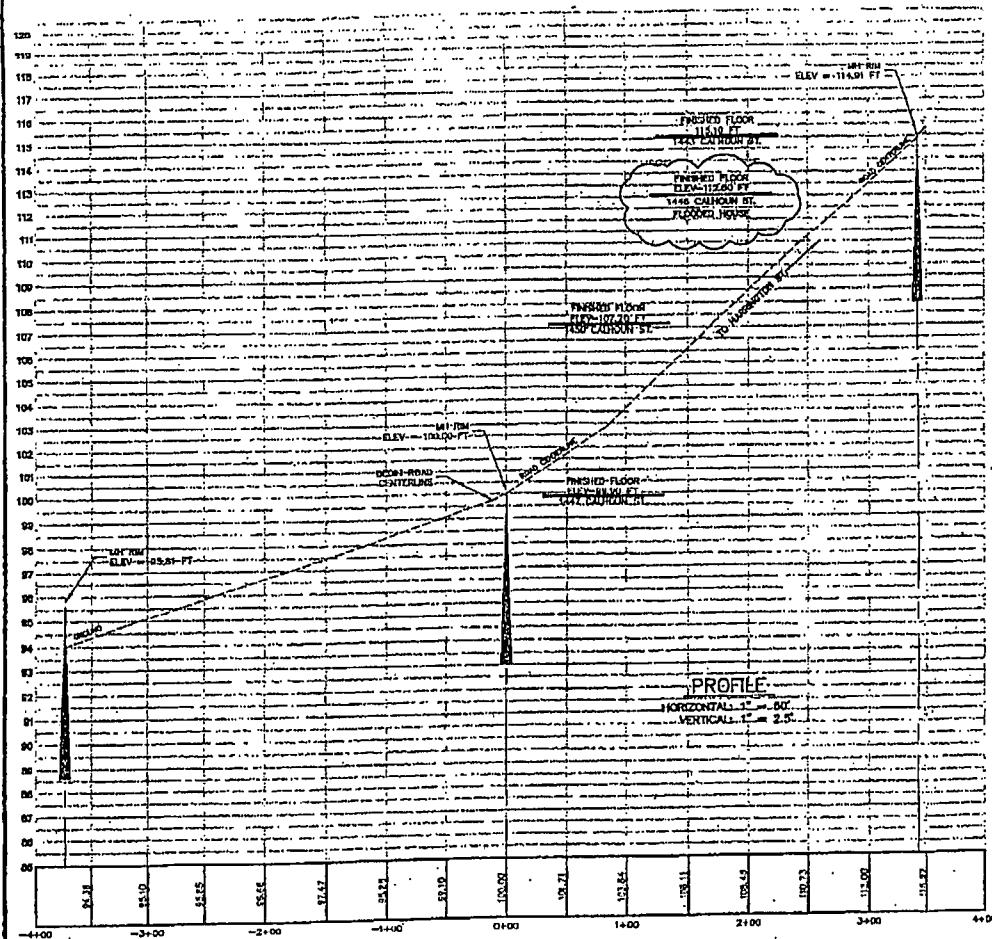
SWORN TO BEFORE ME THIS 14th

DAY OF December, 2010

Camille M. Morrison

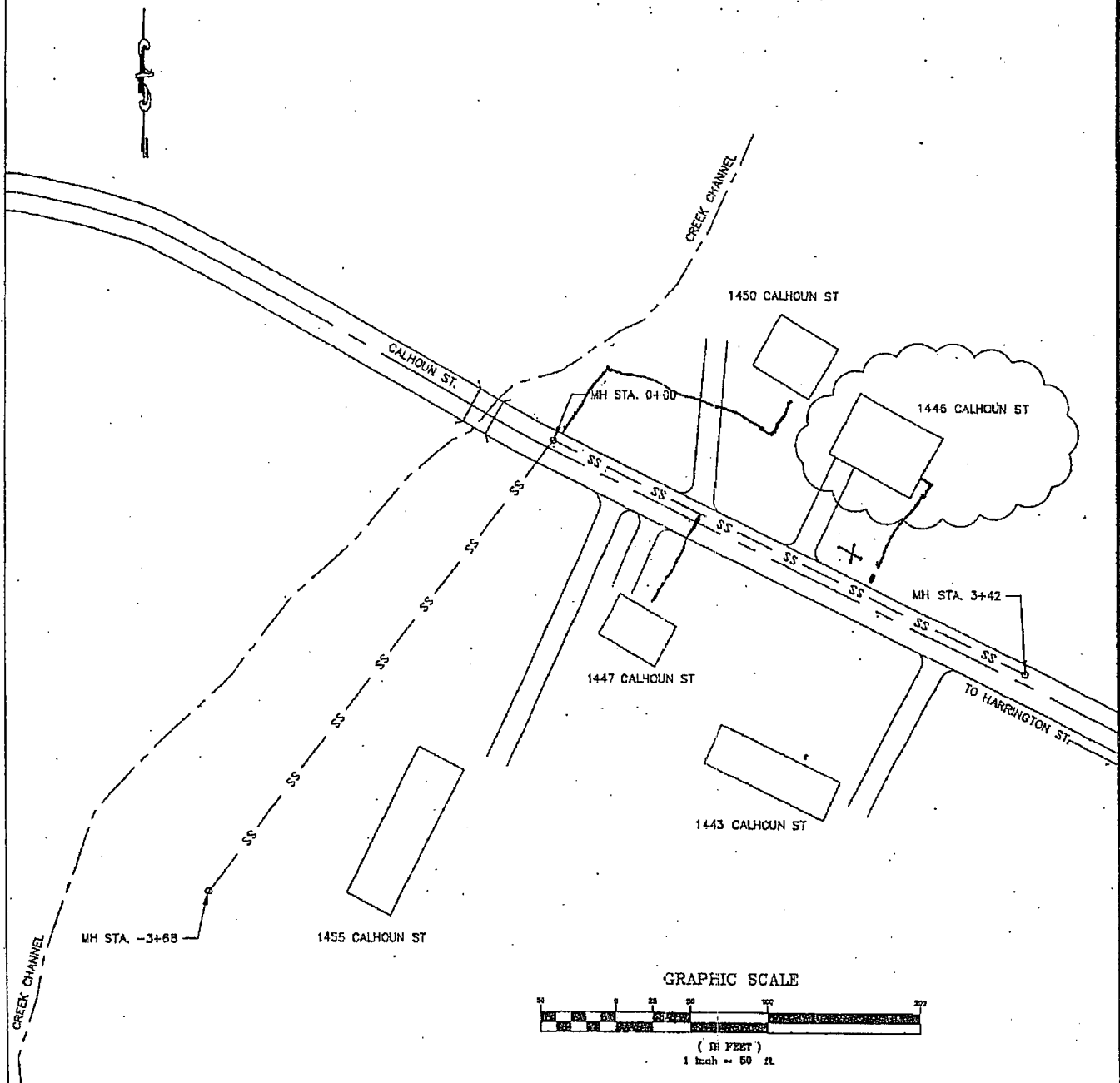
NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 8-16-14



			HILL ENGINEERING, LLC PO BOX 452 3258 SCOTT ROAD GREAT FALLS, SC 29055 (803) 402 - 3528 (PHONE) (803) 402 - 2870 (FAX)	CITY OF NEWBERRY NEWBERRY, SC		CALHOUN STREET SEWER OVERFLOW		
				Newberry0009		DESIGNED BY: _____ DRAWN BY: _____	CHECKED BY: _____ JOB NO. 1077-014	DATED MAY 2008 SCALE AS SHOWN

LARGER VIEW OF ATTACHMENT



CITY OF NEWBERRY
NEWBERRY, SC



CALHOUN STREET
SEWER OVERFLOW

Newberry0009

DESIGNED: DBH

CHECKED: DBH

DATE: MAY 2008

DRAWN: DKA

JOB NO. 1011-014

SCALE: AS SHOWN

SHEET 87

REV

THIS LINE _____ IS ONE INCH LONG WHEN PLOTTED FULL SCALE

[illegible]

HILL ENGINEERING, LLC
PO BOX 452
3258 SCOTT ROAD
GREAT FALLS, SC 29055
(803) 482 - 3528 (PHONE)
(803) 482 - 2870 (FAX)

1325-100
8/13/13

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Danny Abrams and Frances Abrams,

Plaintiffs,

vs.

City of Newberry,

Defendant.

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2011-CP-36-0588

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

FILED
NEWBERRY COUNTY
CLERK OF COURT
SEP 24 PM 2 48

TO: DAVID L. MORRISON, ESQUIRE, COUNSEL TO DEFENDANT:

The instant case is a property damage matter, which emanates from substantial damages sustained by Plaintiffs 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 Defendant City of Newberry, which had apparently backed up into the structure during a heavy rainstorm. Needless to say, this was an unpleasant discovery.

A subsequent investigation by a plumbing vendor retained by Defendant to investigate the incident arguably revealed the existence of what Plaintiffs assert was debris (i.e., a rootball or "rolling blockage") in the sewer line adjacent to their home,¹ which Plaintiffs maintain was a

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." See Liptak Deposition, p. 29, l. 2 - p. 35, l. 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. See Liptak Deposition, p. 35, ll. 2-11.

proximate cause for their loss that Defendant either knew or should have known about prior to March 4, 2008.

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

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?

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 [Plaintiffs] 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?

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

Defendant denies liability for Plaintiff's damages and has moved for summary judgment. Plaintiffs oppose the grant of summary judgment to Defendant in this matter and assert that -- based on the law they believe governs such a dispute, along with the facts of the instant case -- summary judgment or directed verdict should actually be awarded in their favor by this Court.

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, SCRPC. 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).

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).

Liptak: Yes.

Liptak Deposition, p. 22, ll. 14-25; p. 23, ll. 12-21.

LAW/ANALYSIS

In its motion for summary judgment, Defendant asserts relief should be granted to it because:

- (1) There is no genuine issue of material fact and Defendant is entitled to summary judgment as a matter of law.
- (2) There is no evidence of notice of any defect that caused this backup.
- (3) There is no evidence of actionable negligence by the Defendant.
- (4) There is not evidence of any action by this Defendant that caused this sewer back up.

Id. at 1.

Plaintiffs respectfully disagree with Defendant's position. To the contrary, Plaintiffs maintain evidence of defect exists, which – had Defendant engaged in a program of periodic inspection of its sewer lines – could arguably have been cured prior to Plaintiffs sustaining loss. The evidence in this case reveals there was no such program of periodic inspection by Defendant, which Plaintiffs assert is fatal to Defendant's case. Moreover, Plaintiffs assert that no case law extant in our jurisprudence immunizes Defendant from liability in this matter.

I. Evidence of Defect Exists, as Does Evidence Evincing Defendant's Failure to Observe the Proper Standard of Care Owed to Plaintiff

As noted in footnote 1, Jim Liptak is Superintendent of the Department of Water and Wastewater for the City of Defendant. He is the individual responsible for the day-to-day maintenance and operation of Defendant's sewer system, including the sewer lines that service Plaintiff's home on Calhoun Street. Liptak was deposed on February 27, 2012. During this examination, Liptak admitted Defendant 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.

Liptak Deposition, p. 20, ll. 2-17, 22-25 - p. 21, ll. 1-8.

Defendant's failure to observe a protocol for the periodic and routine inspection of its sewer line runs contrary to what Plaintiffs 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).

Plaintiffs 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 Plaintiffs expect – and what the law apparently 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, Defendant does not possess a protocol that is proactive or preventative in place, which evinces any exercise reasonable care to periodically inspect its sewer line for obstructions and/or pursue effective clearing operations. Plaintiffs assert this failure by Defendant to demonstrate any exercise of reasonable care to periodically inspect its sewer line on Calhoun Street creates liability for Defendant in this matter.

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

Defendant maintains Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2002), provides it with the legal support that Defendant is immunized from liability in this case. Defendant is in error.

In Hawkins, a Greenville business Hawkins' 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.

Defendant relies Hawkins due to the Court of Appeals having included the words "maintenance" in its narrative. Notwithstanding the injection of the term "maintenance" into the case, Plaintiffs 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, Plaintiffs have made no

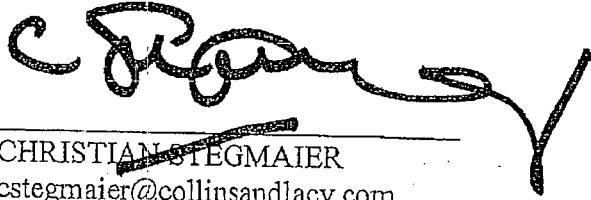
avertment concerning design. The size of the pipes serving their home is not an issue. Their sole basis for negligence is bottomed and premised upon the argument that Defendant failed to have any protocol in place to periodically inspect the lines servicing their home for blockages that could cause a backup. As paying customers of this utility, Plaintiffs maintain this was a reasonable expectation of their provider.

Alternatively, if the Court is attracted to Defendant's argument that inspecting and maintaining the sewer line was discretionary, there is no proof in the case at bar that Defendant – 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 Defendant - 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, Plaintiffs maintain there is no evidence or showing by Plaintiff – 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, Plaintiffs assert Defendant cannot be immunized from liability in the case at bar by operation of law.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request this Court to deny Defendant's motion for summary judgment in the case sub judice.

Respectfully submitted,
COLLINS & LACY, P.C.



By:

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
August 13, 2012

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Danny Abrams and Frances Abrams,
Plaintiffs,

vs.

City of Newberry,

Defendant.

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2011-CP-36-0588

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Sixth Floor, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below via hand delivery on the date indicated below:

COUNSEL SERVED:

David L. Morrison, Esquire
Morrison Law Firm
7453 Irmo Drive, Suite B
Columbia, SC 29212
Attorney for Defendant

PLEADINGS:

- PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT



Columbia, South Carolina
August 13, 2012

FILED
NEWBERRY COUNTY
2013 SEP 24 PM 2 49
JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF NEWBERRY

COPY

DANNY and FRANCES ABRAMS,

Plaintiffs, _____

vs. CASE NO. 09-CP-36-222

CITY OF NEWBERRY,

Defendant.

FILED
NEWBERRY COUNTY
2003 SEP 24 PM 2 49
JACKIE S. BOWERS
CLERK OF COURT

DEPOSITION OF: JIM LIPTAK

DATE: February 27, 2012

TIME: 11:15 A.M.

LOCATION: Offices of
City of Newberry
1330 College Street
Newberry, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Leslie T. Stanley,
Certified Shorthand Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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17 David@dmorrison-law.com

18 ALSO PRESENT:

19 Mr. Danny Abrams
20 Mrs. Frances Abrams

21 (INDEX AT REAR OF TRANSCRIPT)
22
23
24
25

1 STIPULATION

2 It is stipulated by and between Counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil Procedure,
5 Rule 30; that all objections as to Notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent waives reading and
9 signing of this deposition.

10 * * * * *

11 JIM LIPTAK,

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MR. STEGMAIER:

15 Q. Mr. Liptak, good morning.

16 A. Good morning.

17 Q. We have met several times today, but my
18 name is Christian Stegmaier. I'm with the law firm
19 of Collins & Lacy, and we are lawyers in Columbia.
20 We have the great privilege of representing our
21 friends, Danny and Frances Abrams here, in a case
22 that is pending in the Court of Common Pleas in
23 Newberry County.

24 The Abramses, as you well know, have
25 brought suit against the City of Newberry, because

4

1 on March 4, 2008, they came home to find their
2 house inundated with sewer water on Calhoun Street.
3 As you probably can imagine, that's not a
4 particularly pleasant experience. Have you ever
5 had the opportunity to be deposed before?

6 A. Yes.

7 Q. Okay, tell me about that.

8 A. I was with the DOT.

9 Q. The state DOT?

10 A. Yes, sir.

11 Q. And when was that?

12 A. Oh, God, 20, 20 plus.

13 Q. Have you been knowing Mr. Morrison for
14 awhile?

15 A. Well, I --

16 MR. MORRISON: That was my old firm,
17 not me.

18 BY MR. STEGMAIER:

19 Q. I was going to say, if it involves a
20 state department or -- probably it was Mr.
21 Morrison's former partners that were involved in
22 that.

23 A. Okay.

24 Q. What was the basis or the reason for
25 lawsuit in that case?

1 A. A gentleman was jogging at night, fell
2 into a manhole where the lid was missing.

3 Q. How long have you been working for the
4 City of Newberry?

5 A. About eight and a half years.

6 Q. Are you from up here?

7 A. No, sir, I moved up here in '98.

8 Q. Where are you from?

9 A. Lexington prior to that.

10 Q. Where are your people from?

11 A. My father was from Colorado. My mother
12 was from Pennsylvania. A military brat.

13 Q. How did you get to South Carolina?

14 A. My wife was -- I met her in Germany.

15 Q. She's from Newberry?

16 A. No, sir, she's not. Her -- she was
17 also military, her parents were also military too.

18 Q. Do you live in the actual city of
19 Newberry?

20 A. Right on the outside limits, right by
21 the high school.

22 Q. Before we get off into this too far,
23 the Supreme Court requires me to give you some
24 ground rules. As I related to you, the Abramses
25 have brought suit in Newberry County, because they

6

1 would like to be reimbursed for their expenses, and
2 the City of Newberry, to date, has denied that
3 claim. That's why we have the seventh amendment in
4 this country. So when we file a lawsuit in civil
5 courts in South Carolina, the parties typically get
6 to engage in something known as discovery.

7 Discovery takes many forms. There are
8 requests for production of documents, there are
9 written questions, and there is what we are doing
10 here today, and it's called a deposition. And of
11 course, as you have detailed to me, you have
12 previous experience in depositions.

13 But for purposes of complete clarity,
14 today is not unlike being across the street at the
15 courthouse. We don't have a judge or a jury, but
16 you are under oath, and I'm sure you understand the
17 significance of being under oath.

18 A. Yes, sir.

19 Q. And we have a court reporter, who is
20 here taking down every word that you and I say and
21 Mr. Morrison says, and I don't anticipate hearing
22 from the Abramses, but if they were to say
23 something, it would be put on the record as well.
24 So what I try to do is, I live pretty carefully
25 with the mind that the transcript is being created,

1 so I ask the questions, and you answer them, and if
2 we could do a couple things; number one, I am
3 certain, from time to time, when I ask a question,
4 you will already have anticipated what I am asking,
5 and you will be ready to answer. If, however, you
6 can let me finish the question before you answer,
7 that will be fantastic, because when you're talking
8 while I'm talking, the transcript becomes somewhat
9 disjointed.

10 MR. MORRISON: Illegible.

11 BY MR. STEGMAIER:

12 Q. And I have been in that situation.
13 When you're in court, trying to ask somebody what
14 they've testified to, it's very disjointed, very
15 difficult.

16 The other thing too is, I don't
17 anticipate this is going to be an endurance
18 contest; Mr. Rikard -- I don't think his deposition
19 lasted more than an hour. I'm pretty efficient. I
20 don't anticipate this being more than an hour, but
21 with that said, this isn't an endurance contest.
22 So if you need to take a break, let me know, and we
23 will accommodate you.

24 A. Okay.

25 Q. However, here is one of the rules with

8

1 taking a break. The other 99.9 percent of the time
2 we are involved in litigation, you can talk to
3 Mr. Morrison about anything, and that's protected
4 by attorney-client privilege; however, if we take a
5 break, what you are precluded from doing is having
6 any sort of substantive conversation with Mr.
7 Morrison about, you know, how am I doing, how am I
8 ~~answering his questions, that sort of thing.~~

9 The other thing too is, like Mr.
10 Morrison, I take a lot of depositions. And I like
11 to think that I'm pretty clear on what I'm asking,
12 but you might not necessarily agree. So if I, for
13 whatever reason, ask a question that you don't
14 understand, just let me know, and I will do
15 everything I can to make it more understandable.

16 What you are prevented or precluded
17 from doing is talking to Mr. Morrison about, you
18 know, what did he ask, what does it mean? That
19 kind of thing. I will let you know by just
20 rephrasing the question.

21 The last thing is, I would like to
22 think I didn't ask any questions in the last
23 deposition that would have drawn an objection to
24 the form, but they might have, and Mr. Morrison
25 might have just laid off, but there are two types

1 of objections that get raised in a deposition.
2 There's one that's an objection to the form, which
3 is a technical objection, and you may hear Mr.
4 Morrison make a technical objection to the form.
5 If you do, unless he otherwise instructs you not to
6 answer, you need to go ahead and answer, and then
7 we will take it up with the judge or whatever.

8 The other type of objection would be
9 one that relates to privilege or one that's
10 calculated to embarrass you, and I can promise I'm
11 not going to do either, so we don't need to worry
12 about it. And I don't think there's anything
13 proprietary out there, or anything that constitutes
14 a trade secret, so I think we'll be okay.

15 You've already told me, so forgive me
16 for asking you again, but you've worked for the
17 City of Newberry for how long?

18 A. Eight and a half years.

19 Q. And your responsibility for the City of
20 Newberry is what?

21 A. Basically, my title is Superintendent
22 of Water -- the Department of Water and Wastewater.

23 Q. And that's in the utilities department?

24 A. That's correct.

25 Q. And for whom do you work directly?

10

1 A. I presently work for the City Manager,
2 Mr. Jeff Schachner (sic).

3 Q. Has there been a point in time where
4 you worked for other people, other than him?

5 A. Yes, sir.

6 Q. Okay. All right, tell me, in the eight
7 and a half years, who have you worked for?

8 A. ~~Mr. Charles Garry~~, which is the utility-
9 director, and Mr. Fred Yandle, who was also the
10 utility director.

11 Q. Mr. Yandle was the man I was thinking
12 about. Is Mr. Yandle still employed by the City of
13 Newberry?

14 A. No, sir, he's not.

15 Q. When did he leave?

16 A. I would say roughly three, maybe four
17 months ago. Don't know the exact date.

18 Q. Okay. Now, let me share something with
19 you. Your very capable lawyer has already outlined
20 this for you. I am not deposing you personally
21 today as a fact witness. You are testifying as a
22 Rule 30(b)6 representative of the City of Newberry,
23 and that means you would have been a person that
24 has been identified as the person most
25 knowledgeable about the instances and circumstances

1 that relate to the Abramses' claim.

2 MR. MORRISON: Let's talk outside for a
3 minute.

4 (Brief recess.)

5 BY MR. STEGMAIER:

6 Q. All right, let me fix what I just told
7 you. Apparently, based on -- just the lack of
8 communication, probably, but this is not a Rule
9 30(b)6 deposition, so you are not the corporate
10 representative of the City of Newberry, but you are
11 still a witness to this case.

12 So let me reverse what I told you. We
13 will be taking your deposition as you, being a fact
14 witness, and it's my understanding you are a
15 witness to the events -- to some of these events
16 relating to the Abramses' claim, correct?

17 A. I'm sorry. I have an ear that's
18 stopped up.

19 Q. Okay, it is my understanding -- it's my
20 understanding -- is my understanding correct that
21 you are a witness to some or all of the events
22 relating to the Abramses' claim?

23 A. That's correct.

24 Q. Okay. And you are knowledgeable about
25 it?

12

1 A. Yes, sir.

2 Q. So we are completely clear.

3 MR. MORRISON: Yes.

4 BY MR. STEGMAIER:

5 Q. All right. Let me ask this though. If
6 you are not the 30(b)6 deponent, if you are not the
7 person who would necessarily be the most

8 knowledgeable about everything relating to the
9 Abramses' claim, who would be that person? Would
10 it be Mr. Yandle?

11 A. I would assume it would be the
12 utilities division.

13 MR. MORRISON: He probably is the most
14 knowledgeable we have, but I don't know -- when you
15 said 30(b)6, don't know what areas you intend to
16 inquire into. We would have to know specific areas
17 to identify somebody. But as far as knowledge --
18 what's involved in this litigation, he probably is
19 the most knowledgeable person.

20 Q. Well, okay. Let's keep going. Here's
21 an overall general question. What do you know
22 about March 4, 2008, as it relates to the Abramses
23 and the water from the sewer in their home on March
24 4, 2008?

25 A. What do I know?

1 Q. Yes.

2 A. Transitioned? How it transitioned? Is
3 that what you are asking?

4 Q. In the course of deposing Mr. Rikard,
5 we introduced this as an exhibit. This is a
6 document that apparently he created several months
7 after the incident, where he kind of recited what
8 he recalled and remembered, and that's been marked
9 as Plaintiff's 1. Did you create -- did you create
10 a similar document?

11 A. No, sir, I did not show up at the
12 scene.

13 Q. Have you ever created any sort of
14 documents or memoranda or materials relating to the
15 Abramses' claim against the City of Newberry?

16 A. No, sir.

17 Q. Okay. Were you at all involved in the
18 investigation of what happened on Calhoun Street on
19 March 4, 2008?

20 A. Yes, sir.

21 Q. Okay. Tell me about that. What was
22 your involvement about?

23 A. Other than the point of getting the
24 engineering firm, Hill Engineering, to do a survey
25 study of the area --

14

1 Q. Okay.

2 A. -- to initiate the cameraing of the
3 lines.

4 Q. Who did that cameraing?

5 A. Lide Plumbing, John Mark Hall. I
6 sometimes get the names confused. I think -- I
7 initiated it again later, when we had another
8 ~~contractor clear some roots down below where the~~
9 incident occurred.

10 Q. Who did the second?

11 A. Pascon.

12 Q. They are out of what?

13 A. Lexington.

14 Q. So the -- but the Lide camera work was
15 done first?

16 A. That's correct.

17 Q. I've got a video of that event from May
18 21, 2008, which would have been more than two
19 months, almost three months, after this incident.
20 Does that jive with your recollection?

21 A. Yes, sir.

22 Q. Were you out there with the Lide folks
23 when they were doing the camera work?

24 A. No, sir, I had two crew members there.
25 I can't really remember who they were.

1 Q. Would Mr. Rikard have been one of the
2 people there?

3 A. It's a possibility. Usually, I have
4 one of my crew leaders.

5 Q. Who are your crew leaders currently?
6 I'll ask you two questions -- well, who are your
7 crew leaders currently?

8 A. Brad Rikard and Steven Hendricks.

9 Q. In 2008, March, 2008, did you have the
10 same job as you do now?

11 A. Yes, sir.

12 Q. Who were the crew leaders at that point
13 in time?

14 A. The date's getting kind of touchy here.

15 Q. That's fine.

16 A. But Brad Rikard and Michael Surrett.

17 Q. Where is Mr. Surrett these days?

18 A. Aberdeen, Virginia.

19 Q. How long has he been gone from the City
20 of Newberry?

21 A. I believe three, possibly four years.

22 Q. Another gentleman was named in the
23 statement by Mr. Rikard, a Mr. Bodie?

24 A. Clay Bodie.

25 Q. Right. He no longer works for the

16

1 city, does he?

2 A. That's correct.

3 Q. He lives in Laurens?

4 A. Not exactly sure. Laurens or Clinton,
5 somewhere up in that area.

6 Q. Does he do similar work up there, do
7 you know?

8 ~~A. I do not know.~~

9 Q. How long has he been gone from the
10 city, he being Mr. Bodie?

11 A. Six to seven months.

12 Q. What were the terms or reasons or
13 circumstances of his separation from the city?

14 MR. MORRISON: Let me object to that,
15 in that it calls for a personnel matter, which is
16 accorded some privilege. I don't know the terms,
17 so can I discuss that with him before he answers?

18 MR. STEGMAIER: Sure.

19 (Brief recess.)

20 BY MR. STEGMAIER:

21 Q. Was Mr. Bodie terminated?

22 A. Yes, sir, he was.

23 Q. That was six or seven months ago?

24 A. Yes, sir.

25 Q. All right. Tell me what -- if you and

1 I were riding up the elevator, give me your
2 elevator speech about what you do for a living;
3 tell me what you do. What's your responsibilities?

4 A. Maintain the water system, wastewater
5 system, 24/7, 365 days a year.

6 Q. And would this responsibility include
7 sewer lines in the city of Newberry?

8 A. Wastewater systems, yes.

9 Q. And I asked Mr. Rikard this, and I
10 stumped him. How many miles of sewer line exist in
11 the city of Newberry?

12 A. Roughly 124.

13 Q. And the City of Newberry is responsible
14 for all those sewer lines?

15 A. That's correct.

16 Q. There's no third party or private
17 entity that has an interest or -- anywhere in the
18 city?

19 A. There is some private entity, like an -
20 apartment complex or something, where we do not own
21 the sewer system within their facilities.

22 Q. Okay. Is there any -- well, let me
23 show what was marked as Plaintiff's 2 from
24 Mr. Rikard, and this is a schematic that was
25 created by Hill Engineering shortly after the

18

1 incident. That's what I would represent to you.
2 And you have depicted here the sewer line that runs
3 along Calhoun Street in front of the Abramses'
4 house. Are you in agreement with that?

5 A. Uh-huh.

6 Q. Okay, let me give you another ground
7 rule about depositions. If I ask you a yes or no
8 question

9 A. Say yes or no.

10 Q. If you don't mind.

11 A. Excuse me.

12 Q. Because uh-huhs and huh-uhs, later on,
13 they don't make any sense.

14 MR. MORRISON: Don't know how to spell
15 it either.

16 THE WITNESS: Sorry about that.

17 BY MR. STEGMAIER:

18 Q. That's okay. That's just our natural
19 tendency. There isn't any dispute with the water
20 line -- I'm sorry, the sewer lines that run in
21 front of the Abramses' house, that it is owned and
22 operated and maintained by the City of Newberry, is
23 there?

24 A. No.

25 Q. Prior to coming to the City of

1 Newberry, did you have other experience working
2 with or for entities related to maintenance of
3 water systems?

4 A. No, sir.

5 Q. Okay. So did you come from the
6 Department of Transportation?

7 A. No, sir, I was the Director of Public
8 Works for Newberry County.

9 Q. So you were working for the county?

10 A. Yes, sir.

11 Q. Okay, and as far as public works goes,
12 is there any sewer in the city -- in the county of
13 Newberry?

14 A. There is, but it's an authority.

15 Q. So that didn't come within your
16 wheelhouse of responsibility?

17 A. That's correct.

18 Q. Okay.

19 A. Other than the stuff that I did
20 maintain there.

21 Q. What brought you to the City of
22 Newberry?

23 A. Personal reasons, lack of politics.

24 Q. Just a different kind of politics?
25 It's still Newberry.

20

1 A. The City's very structured. Procedures
2 and policies.

3 Q. All right. Well, it's interesting you
4 say that. As far as policies and procedures --
5 well, with regard to policies and procedures, as it
6 relates to wastewater management here in the City
7 of Newberry, tell me what exists in the way of a
8 written protocol outlining periodic and routine
9 inspections of the sewer line.

10 A. There is none.

11 Q. There is no schedule, there is no
12 routine, as it relates to inspection of the sewer
13 lines?

14 A. That's correct.

15 Q. So how are they maintained? Just when
16 a problem exists?

17 A. Yes, as needed.

18 Q. So as needed?

19 A. Uh-huh.

20 Q. Is that a yes?

21 A. Yes.

22 Q. As needed; that's when inspections and
23 corrections are made?

24 A. That's correct.

25 Q. But there's no document that would sit

1 within this building or wherever you keep records
2 that would be able to demonstrate, prior to May 4
3 -- I'm sorry, March 4, 2008, that there has been
4 just a regular routine preventive maintenance
5 inspection of the sewer line running between
6 Lindsey Street and Calhoun Street and then in front
7 of the Abramses' house?

8 A. No, sir.

9 Q. Is it your understanding that there are
10 other municipalities and other subdivisions that do
11 have periodic preventative maintenance inspections
12 conducted of their sewer lines?

13 A. I really don't quite understand what
14 you're asking.

15 Q. Are you part of any sort of
16 professional organizations?

17 A. Yes.

18 Q. What's that? What are they?

19 A. Rural Water Association, also
20 A-Certified Wastewater.

21 Q. Sorry?

22 A. A-Certified Wastewater. D being the
23 lowest, A being the highest.

24 Q. Who creates that certification?

25 A. It's a voluntary program through the

22

1 State of South Carolina.

2 Q. Is that DHEC that administers that?

3 A. I think the City Association.

4 Q. Of what association?

5 A. Rural water, wastewater. Kind of like
6 the water certifications. They were independent,
7 and then they went to national.

8 Q. Well, let me ask you this. What
9 prevents or precludes you, the City of Newberry,
10 from having a routine inspection protocol?

11 A. Time.

12 Q. Okay.

13 A. Manpower restraints, cost.

14 Q. Now, the Abramses don't get their water
15 for free, correct?

16 A. That's correct.

17 Q. They pay to get their water? Do they
18 pay taxes? Or do they pay a monthly bill?

19 A. Utilities.

20 Q. Utility fees?

21 A. Yes.

22 Q. So the same goes for sewer?

23 A. Yes.

24 Q. Are they considered, in the language of
25 the City, to be customers?

1 A. That's correct.

2 Q. So if they came in here and wanted to
3 ask questions about their sewer line, and there was
4 some talk amongst people who work for the City,
5 they would be referred to as customers, correct?

6 A. That's correct.

7 Q. All right. So what they are getting in
8 the way of service from the City with regard to
9 either the water or sewer is not free or gratis, is
10 it?

11 A. That's correct.

12 Q. And what do the Abramses, as customers
13 of the City of Newberry, get in return for their
14 monthly payments for water and sewer?

15 A. What do they get in return?

16 Q. You send them a bill, what are they
17 paying for?

18 A. Safe drinking water, waste disposal.

19 Q. So they are paying for maintenance
20 systems?

21 A. Yes.

22 Q. They are not paying for several inches
23 of sewer water in their house, are they?

24 A. No.

25 Q. And you would agree with me, wouldn't

24

1 you, that coming home to a house full of sewer
2 water is probably a pretty unpleasant circumstance?

3 A. Yes, sir.

4 Q. Okay. As far as the Abramses and their
5 difficulties there in March of 2008, what did you
6 do personally in response to what had happened?

7 A. Well --

8 ~~Q. I think you said something along the~~
9 lines of getting Hill Engineering involved?

10 A. Uh-huh.

11 Q. Is that a yes?

12 A. Yes.

13 Q. Sorry.

14 A. Okay.

15 Q. And then you got the camera work done
16 by the folks at Lide, correct?

17 A. That's correct.

18 Q. And then there was some sort of
19 subsequent camera work done by the folks in
20 Lexington?

21 A. That's correct.

22 Q. Have you -- anything else? Did you do
23 anything else?

24 A. Yes, sir, I believe we put them in
25 touch with the contractor that would clean up the

1 house.

2 Q. The Servpro people?

3 A. That's correct.

4 Q. Did the City pay for the Servpro
5 people?

6 A. That I'm not sure.

7 Q. Okay. Anything else that you
8 personally did?

9 A. Not that I can remember, no.

10 Q. If the Abramses or some other customer
11 of the City of Newberry -- if they processed a
12 complaint that required attention, and it went
13 beyond, you know, dealing with maybe a crew leader
14 or somebody, who would they talk to? Would it be
15 you?

16 A. That's correct.

17 Q. Is there anybody else?

18 A. Other than -- as of now, the City
19 Manager.

20 Q. Is there a utilities director in the
21 city?

22 A. No, sir, not at the present time.

23 Q. Is there going to be?

24 A. That I don't know.

25 Q. Were you ever called upon to make any

26

1 sort of report concerning what happened to the
2 Abramses, to either the City Manager, the utilities
3 person or the city council or the --

4 A. We did advise the utility people what
5 the situation was, yes.

6 Q. When did that conversation occur?

7 A. Probably within a day or so. I can't
8 remember.

9 Q. When you say we, who was that?

10 A. Myself.

11 Q. Okay. So you had a conversation at
12 that point -- that was Mr. Yandle, correct?

13 A. That's correct.

14 Q. What did you talk about?

15 A. Informed him of what the situation was.

16 Q. And what did he say?

17 A. What had happened, what procedures we
18 had followed, whether we got the blockage cleared.

19 Q. Okay, at that point in time, did you
20 know whether the blockage had been cleared?

21 A. Yes, sir, by the reports from
22 Mr. Rikard, yes.

23 Q. What did he report? When I say he,
24 Mr. Rikard, what did he report?

25 A. That it -- that the blockage was clear.

1 The sewer system was flowing as normal.

2 Q. At what juncture was the sewer system
3 flowing as normal? Was it flowing normal all the
4 way up to Calhoun Street, in front of the Abramses'
5 house?

6 A. By his report, yes, the manhole level
7 dropped, yes.

8 Q. Okay. Was that after they had blown
9 the line out with the vac truck?

10 A. That's correct.

11 Q. Okay, so that wasn't before, was it?

12 A. That's correct.

13 Q. Have you made any sort of personal
14 investigation as to what the cause of the flooding
15 of the Abramses' house was?

16 A. Yes, sir..

17 Q. Okay. Tell me about your personal
18 investigation.

19 A. It's what I would call a rolling
20 blockage.

21 Q. Okay. Mr. Rikard talked about that
22 too, and I asked him how he would describe a
23 rolling blockage, but tell me what you think -- how
24 you would define a rolling blockage?

25 A. It's a large mass of material.

28

1 Q. Okay.

2 A. Grease, rags, you name it.

3 Q. How about root balls?

4 A. There probably would be some roots in
5 each one.

6 Q. How do root balls form in the system?

7 A. Root balls? What do you define as a
8 root ball?

9 Q. Okay. Well, since I'm the one asking
10 the question, the question I have for you is, what
11 would you define as a root ball?

12 A. A root ball, to me, is a large,
13 impenetrable mass of roots.

14 Q. Okay.

15 A. Now, roots in the system would look
16 like hair hanging down in the line.

17 Q. But a root ball -- let me ask you this.
18 This line that runs -- this is private property. I
19 don't know if you know Mr. Paul Duncan. That was
20 his house that he owned, and that was the sewer
21 line that ran through his yard.

22 The question I have for you is -- and
23 if you don't know, that's fine, but what is the
24 size of the sewer line that runs through
25 Mr. Duncan's yard?

1 A. I don't have my maps in front of me,
2 but I believe it's a ten.

3 Q. That's fine. If you don't know, that's
4 fine. And I'm not holding it to you -- holding you
5 to it. If we define large -- a root ball as a
6 large, impenetrable mass, the question I have for
7 you is, have you had the opportunity to review the
8 camera work that was done by Lide?

9 A. Yes, sir.

10 Q. Okay.

11 A. Several, several years ago.

12 Q. Okay. And I will share with you -- I
13 may have the opportunity to -- well, as I
14 understand it, they did their camera work on May
15 21, 2008. Does that jive with your memory?

16 A. I think so.

17 Q. Okay, that's -- they wrote it down,
18 that's what I'm telling you. Was that the one and
19 only time they had done the camera work in
20 connection with the Abramses' loss? There weren't
21 other instances where Lide came out, were there?

22 A. No, sir, not that I can remember.

23 Q. And you said, I don't think I was
24 there; but do you know where they would have done
25 the camera work? Where they would have positioned

30

1 themselves?

2 A. The best that I can remember was, they
3 came in both directions with the line.

4 Q. Okay. What's the street that runs
5 parallel to Calhoun to the south?

6 A. Lindsey Street.

7 Q. And there's a manhole -- this line that
8 runs through Mr. Duncan's yard, that runs all the
9 way to Lindsey Street, doesn't it?

10 A. That's correct.

11 Q. But do you know where they started
12 their work, as far as the camera work?

13 A. Not without looking at the video,
14 because there's usually an outline of where the
15 start and stop points are.

16 Q. With regard to the video, what do you
17 remember in it?

18 A. If I remember correctly, coming from
19 the manhole back to the Abramses', there was some
20 fine hair roots in this system. He did find some
21 roots in here.

22 Q. And you are pointing to the sewer line
23 in Mr. Duncan's yard?

24 A. Yes.

25 Q. Was there a point in time where you saw

1 on the video what appeared to be a large,
2 impenetrable mass on the sewer line toward the
3 creek?

4 A. We didn't see anything that was
5 impenetrable.

6 Q. Okay. Well, I just -- not to be
7 argumentative, but for purposes of refreshing your
8 recollection, I don't have the computer and all
9 that set up, but sometime after all this, you might
10 want to review the video, and I believe
11 particularly at 39 minutes, at one hour, and
12 especially at one hour and 27 minutes. And I will
13 leave it at that.

14 A. And what location was that in?

15 Q. It was along this line toward the
16 creek.

17 A. Okay. That's what the secondary
18 contractor came in and -- they rodded the line with
19 a root cutter and cut those out and recameraed the
20 line to make sure --

21 Q. That's with the second --

22 A. That's correct.

23 Q. So as we sit here today, does your
24 recollection reflect that there was, in fact, a
25 root ball in the system on the line running in

32

1 Mr. Duncan's yard?

2 A. Yes, there was some roots.

3 Q. A root ball or some roots?

4 A. Without looking at the video, I don't
5 know.

6 Q. That's completely fair.

7 A. Yes.

~~8 Q. Are we in agreement that the elevation~~
9 -- of course, here, as we look at the schematic, we
10 have several manholes, and the Hill people assigned
11 -- I think it's based on elevation. Zero line is
12 apparently where the beginning of the survey
13 started, so they assigned the elevation over a
14 hundred feet at manhole station zero plus zero
15 zero. You see that right there?

16 A. That's correct.

17 Q. And that's on Calhoun Street, where the
18 creek is. 1446 Calhoun Street is the Abramses'
19 yard.

20 A. Uh-huh.

21 Q. You see this other manhole to the right
22 of the Abramses' house?

23 A. Uh-huh.

24 Q. Identified as manhole station three
25 plus 4-2.

1 A. Uh-huh.

2 Q. And you see in Mr. Duncan's yard at
3 1455 Calhoun Street, manhole station minus three
4 plus 6-8, and when I look at the schematic to the
5 left, this all connotes to me -- I'm no engineer,
6 but I'm good at reading maps, and this all connotes
7 to me that the elevation here at manhole station
8 three plus 4-2 was higher than the one at manhole
9 station minus three plus 6-8. Do you concur?

10 A. Yes, sir.

11 Q. Is it fair to say that -- at least at
12 this part of the sewer line here in the City of
13 Newberry -- that -- that this is known as a gravity
14 line?

15 A. That's correct.

16 Q. Okay. So if the elevation was higher
17 at this particular manhole station, three plus 4-2,
18 water is running downhill or down the elevation
19 toward Lindsey Street; is that fair to say?

20 A. That's correct.

21 Q. So if there was, in fact -- and again,
22 I encourage you to re-review the video taken by the
23 Lide folks, but if it was, in fact, identified that
24 a root ball or root mass was identified along the
25 sewer line on May 21, 2008, is it fair to say or is

34

1 it reasonable to believe that the possibility
2 exists that this root ball or line was further up
3 the line on May 4 -- on March 4, 2008?

4 MR. MORRISON: Object to the form. You
5 can answer.

6 THE WITNESS: Sorry?

7 MR. MORRISON: You can answer.

8 ~~THE WITNESS: ... Would you mind giving me~~
9 a little more clarification? You have a lot of
10 points you are asking me to answer. I want to make
11 sure I give you the information you want. I'm
12 sorry, excuse me.

13 BY MR. STEGMAIER:

14 Q. Sure. Right. I will make a couple of
15 statements, then I will ask you the question.

16 A. Okay.

17 Q. The video taken on May 21, 2008 depicts
18 a root ball or root mass, as you defined it.

19 A. Yes.

20 Q. Along this sewer line toward the creek.

21 A. Yes.

22 Q. We've also agreed that the elevation to
23 the right of the Abramses' house on Calhoun Street
24 was higher than it was in Mr. Duncan's yard,
25 correct?

1 A. Correct.

2 Q. Is it fair to say, therefore, based on
3 those two principles, the existence of a root ball
4 in the system and this part of the sewer line near
5 the Abramses' house is higher, so -- well, is it
6 fair to say that this root ball that was in the
7 system could have been higher up the line on March
8 4, 2008, the date of loss?

9 MR. MORRISON: Same objection. You can
10 answer.

11 THE WITNESS: Yes.

12 BY MR. STEGMAIER:

13 Q. Thank you. Would that fall -- that
14 being the root ball, would that fall into the
15 category of a rolling blockage?

16 A. Yes, sir.

17 Q. What did you do to prepare for this
18 deposition? And I'm not asking you to relate to me
19 anything that was said between you and your lawyer.

20 A. Basically, looked over the statements,
21 and that was it.

22 Q. What statements did you review?

23 A. Mr. Rikard's statements.

24 Q. Did you have any consultation with him?

25 A. With Mr. Rikard?

36

1 Q. Yes, sir, prior to this deposition.

2 A. No. Other than we did have a meeting.
3 It was canceled and rescheduled.

4 Q. For the sake of this question, if we
5 are in agreement that a root ball did exist in this
6 line on March 4, 2008, why isn't the City
7 responsible for flooding incurred by the Abramses?

8 ~~MR. MORRISON: Object to the form. You~~
9 can answer it.

10 THE WITNESS: No prior knowledge.

11 BY MR. STEGMAIER:

12 Q. When was the last preventative
13 maintenance inspection of this line before March 4,
14 2008?

15 A. Not that I know -- none that I know of.
16 I don't understand where you keep going with
17 preventive maintenance.

18 Q. I will ask it a different way. When
19 was the last time this line running from Lindsey
20 Street back up to Calhoun, along Calhoun, in front
21 of the Abramses' house, was inspected by the City
22 of Newberry prior to March 4th of 2008?

23 A. I don't have an exact date.

24 Q. Is there any way you can find that out?

25 A. I can attempt to, but I don't know of

1 anything.

2 Q. There are no records kept?

3 A. Yes, sir, we have a work order program,
4 and also whatever videos they have taken.

5 Q. But that's always after the date of
6 loss, is it not, these videos?

7 A. I can't answer for anything prior to my
8 time of service here.

9 Q. When did you join the City of Newberry?

10 A. 2004.

11 Q. That would have been four years prior
12 to March 4, 2008, correct?

13 A. That's correct.

14 Q. And as we sit here today, you don't
15 know or you don't recall when that line was
16 inspected?

17 A. That's correct. Correct.

18 Q. Do you know when any camera work would
19 have been done prior to March 4, 2008?

20 A. I don't remember.

21 Q. Do you know when there would have been
22 any rodding of that line prior to March 4th of
23 2008?

24 A. I think there was some information,
25 possibly, about 2001.

38

1 Q. Okay. That would have been seven years
2 before?

3 A. That's correct.

4 Q. And again, for purposes of clarity,
5 there is no written protocol that exists in the
6 City of Newberry detailing or describing a routine
7 inspection program for the sewer lines in the City
8 of Newberry?

9 A. That's correct.

10 Q. You make a response as needed when a
11 complaint is registered with the department?

12 A. That's correct.

13 MR. STEGMAIER: We're going to take a
14 break. Might be in the home free stance here.

15 (Brief recess.)

16 MR. STEGMAIER: We're fine.

17 MR. MORRISON: I have no questions.

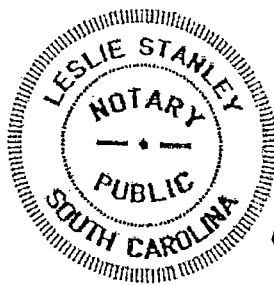
18 (The deposition was concluded at 12:10
19 p.m.)

1 CERTIFICATE OF REPORTER.
2

3 I, Leslie Toole Stanley, Certified
4 Shorthand Reporter and Notary Public for the State
5 of South Carolina at Large, do hereby certify that
6 the foregoing transcript is a true, accurate, and
7 complete record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 4th day of March,
13 2012, at Columbia, Richland County, South Carolina.
14
15
16
17
18



Leslie Stanley

23 Leslie Toole Stanley,
24 Certified Shorthand Reporter
25 My Commission expires
January 13, 2021

I N D E X

	Page	Line
WITNESS/EXAMINATION		
STIPULATION	3	1
JIM LIPTAK	3	
EXAMINATION	3	13
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REQUESTED INFORMATION INDEX

(No Information Requested)

E X H I B I T S

(No Exhibits Proffered)

1 STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
2 COUNTY OF NEWBERRY) 2011-CP-36-0588
3)
4 Danny Abrams) TRANSCRIPT OF RECORD
5)
6 -vs-)
7 City of Newberry)

8 August 13, 2012
9 Greenville, South Carolina

10 A P P E A R A N C E S

11 Christian Stegmaier, Esquire
12 Attorney for the State

13 David Leon Morris, Esquire
14 Attorney for the Defendant

15
16 CAROLINE HISKELL
17 Thirteenth Circuit Court Reporter
18
19
20
21
22
23
24
25

Abrams versus City of Newberry

I N D E X

(There were no witnesses or exhibits admitted.)

Abrams versus City of Newberry

1 THE COURT: This is 2009-CP-36-222.

2 Mr. Morrison, you represent who?

3 MR. MORRISON: The City of Newberry.

4 THE COURT: And Mr. Stegmaier, you represent
5 the Abrams?

6 MR. STEGMAIER: Yes, Your Honor.

7 THE COURT: Mr. Morrison, this is your
8 motion?

9 MR. MORRISON: Yes, Your Honor.

10 THE COURT: I'll be glad to hear from you.

11 MR. MORRISON: Thank you, Your Honor.

12 Your Honor, we appreciate you hearing us on
13 this. We've had trouble getting it scheduled because
14 Judge Griffith who usually hears it recuse himself in this
15 case because he was the former city attorney for Newberry.

16 THE COURT: Okay.

17 MR. MORRISON: This case is a sewer backup
18 case. The City of Newberry does provide sewer service to
19 its residents. The issue in this case is whether there is
20 actual or constructive notice of a defect or whether the
21 City was otherwise negligent with regards to its sewer
22 lines.

23 As you can see from the briefs filed by the
24 plaintiffs, there's really no disagreement here that what
25 happened was probably a rolling blockage, a (inaudible)

Abrams versus City of Newberry

1 was rolling through the city system and got stuck and
2 caused the flooding at the Abrams's home.

3 THE COURT: What's a rolling blockage?

4 MR. MORRISON: It's a rolling ball of grease
5 or a rolling ball of roots that is moving through the
6 system and gets stuck temporarily at a certain point. It
7 causes a back of behind it, then gets free and continues
8 to roll on through the system.

9 THE COURT: Does it stop somewhere else?

10 MR. MORRISON: It may stop somewhere else or
11 it may disappear after that.

12 THE COURT: Like a blood clot?

13 MR. MORRISON: We don't have any evidence
14 that this blockage stopped anywhere else other than this
15 one house.

16 We provided two affidavits to the Court. One
17 is from our expert Gary Hill who is an engineer. As you
18 an imagine the Abrams's home sitting on a hill. The
19 Abrams's home is at one of the higher points on the hill.
20 The next house down the hill there was no blockage. The
21 next two houses down the hill there was no blockage. The
22 manhole down the hill from the Abrams's home there was no
23 blockage. This is a gravity line that's flowing down the
24 hill.

25 The sewage backed into the Abrams's house so

Abrams versus City of Newberry

1 our expert opined that the backup had to occur in the line
2 between the Abrams's house and the next two houses down.
3 If it had occurred below that, those houses are 10 feet
4 below the Abrams's house, it would have backed up into
5 those houses first. It didn't. So the blockage was just
6 past the Abrams's house in the main sewer line. We
7 provided that affidavit from Mr. Hill.

8 We've also provided an affidavit from a city
9 employee who is asserted their records. They do keep
10 records on problems in the area, on prior root problems,
11 on prior complaints. They've had no prior complaints.
12 They've had no prior problems in that area where this
13 backup occurred between the Abrams and the house next
14 house down hill from the Abrams where this blockage
15 occurred.

16 So it's our position that while they have no
17 notice either actual or constructive of a defect or any
18 problem in the sewer line that caused this backup into the
19 Abrams's house.

20 The plaintiff contends that because the City
21 has no ongoing maintenance program that they are negligent
22 and the City does make this problem as a complaint driven
23 program where they get a complaint they go fix it. They
24 don't have an ongoing maintenance program. However, there
25 is no evidence that any maintenance program, had they been

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1 out there the day before, would have discovered this
2 rolling blockage in this section of line.

3 THE COURT: How many households are users of
4 the sewer service are above the Abrams's gravity line or
5 how does that work?

6 MR. MORRISON: There is a gravity line. The
7 flooding occurred at the Abrams's home only -- they were
8 the next point in the line for anything to come out or the
9 backup occurred at their household -- I'm not sure how
10 many were there at the top of the hill or how many people
11 were beyond that. If there are people beyond them, from
12 my memory of having ridden by there, wouldn't be just a
13 few houses above but not many.

14 THE COURT: Does the gravity line start at
15 the highest point?

16 MR. MORRISON: And flows down hill.

17 THE COURT: So nothing beyond the highest
18 point going uphill?

19 MR. MORRISON: There will be a pump station
20 where the gravity line has to go up here to pump it up
21 hill at some point, but at the point where the Abrams are
22 on, the line that they are on is a gravity line. There
23 may be a low point somewhere in the system to pump it back
24 up hill somewhere but not where they are.

25 THE COURT: Who is Fred Yanty(ph)?

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1 MR. MORRISON: The city employee who ---

2 THE COURT: Director of Public Utilities?

3 MR. MORRISON: Correct. And he is the one
4 who searched the records and said that there was no prior
5 problems in the area of the line. They didn't have an
6 ongoing maintenance problem. They didn't have a root
7 problem. They didn't have any notice of any problem in
8 the area of line. They do have problems in the City.
9 When they've had problems, they've gone out and fixed it,
10 but this was not one of those areas.

11 So it's our position there was not actual
12 notice of this rolling blockage, there was no constructive
13 notice of any defect in the line in this area of which the
14 City was aware. And without actual or constructive
15 notice, they can't be held liable on this sewer backup.
16 They could not have predicted that this rolling blockage
17 was going to be in this area at this time. There was no
18 way for them to have prevented it.

19 And for that reason, the City is entitled to
20 summary judgment. I don't recall if the complaint
21 included a claim for contract or not, but to the extent it
22 did, the Supreme Court has held in Rolondi versus the City
23 of Spartanburg that your remedy for a sewer backup is in
24 tort not in contract. There is no contract claim. So
25 given there is no contract claim, the issue is actual or

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1 constructive notice of a defect and we don't believe they
2 have any.

3 THE COURT: Is there any evidence that a
4 backup of this kind would be negligent or is it something
5 that naturally occurs within the context of sewer service?

6 MR. MORRISON: This is something that occurs
7 within the context of sewer service. People put grease in
8 the line and grease accumulates into balls, roots can grow
9 into lines at certain places and break into lines and
10 sometimes the City goes in to cut them out. Roots will
11 intrude into a city line and we don't know whether this
12 rolling blockage was a root ball, a grease ball or
13 something else, but it's apparent there was a rolling
14 blockage that caused a backup at this point on the hill
15 and disappeared and went away.

16 THE COURT: Mr. Stegmaier.

17 MR. STEGMAIER: Thank you, Your Honor.
18 Again, I'd like that thank you for hearing this. We've
19 had some difficulty getting it before the Court. As
20 Mr. Morrison has outlined for you, this case does emanate
21 from a property damage claim. We represent the
22 defendants, the Abrams, Danny and Francis Abrams.
23 Mrs. Abrams is here with me today.

24 The bottom line here is with regard to this
25 claim as Mr. Morrison did outlined, this case does

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1 Our position is, of course, as this Court
2 knows the negligence analysis duty breach and proximate
3 cause analogist that this particular case we take the
4 position that there is a covered duty on the part of the
5 City of Newberry to do several things. We cite in our
6 brief to this Court from American juris prudence. As this
7 Court knows federal treatments by our governmental
8 entities in South Carolina, I would almost hazard a guess
9 proof of facts served Section 42, Page 289 where
10 outlines where a usable corporation like the City of
11 Newberry uses and assumes a management and control of a
12 sewer within a municipality, it is required to exercise
13 reasonable diligence in the care and keep and repair and
14 free from condition that cause damage to surrounding
15 property.

16 THE COURT: How do you do that on a day to
17 day basis?

18 MR. STEGMAIER: Well, Mr. Morrison and I have
19 talked informally and it's not unlike if the City of
20 Newberry was Belk Department Store.

21 THE COURT: What?

22 MR. STEGMAIER: Belk Department Store. The
23 analysis is akin to the Winsky(ph) analysis premises
24 liability litigation. There is a duty to periodically
25 inspect the lines the make sure they are in proper working

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1 condition.

2 What was determined after this incident
3 occurred after the Abrams had come home and found six
4 inches of sewer water, the City went out and they hired
5 plumbers to make a determination about what happened. And
6 by virtue of the fact that we live in the 21st Century,
7 these plumbers the rodded the lines, they were able to
8 video what they were able to see. There is a May 28, 2008
9 video --

10 THE COURT: May 21, 2008?

11 MR. STEGMAIER: May 28th, sir.

12 THE COURT: Created by Johnson and Lot(ph)?

13 MR. STEGMAIER: Right.

14 THE COURT: It is May 21, 2008 created by
15 Johnson and Lot(ph) Systems and they vendor. It's a
16 Newberry firm. They were retained by the City to
17 investigate what caused it. They rodded the line. They
18 were able to video -- it wasn't a grease trap. It was a
19 big root ball and if you try this case, you'll see on the
20 big screen a big root ball to where it completely obscured
21 and took up the entire space of the line.

22 At the time the line was rodded and this
23 investigation done, it was south of the Abrams's home and
24 we had the great benefit of having the opportunity to
25 depose the man who was responsible for the sewer lines in

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1 the City of Newberry. His name is Jim Lipac(ph) and I
2 asked Mr. Lipac specifically did you know about the root
3 ball and he goes yes. Obviously familiar with the fact
4 that this had to be done. I asked him, you saw where the
5 root ball was located at the time this investigation was
6 made, was there a possibility that that root ball was high
7 off the line at the time this all occurred which was March
8 4th, 2008 and he acknowledged, yes, that's a possibility.

9 The problem that we have here that I alluded
10 to is if this was Belk Department Store, Abrams versus
11 Belk Department Store, Belk would be potentially subject
12 to a punitive damages charge if they had somebody come in
13 here and say we don't even have an inspection system.

14 If Mrs. Abrams had gone into Belk's
15 Department Store and slipped and fell and the manager of
16 Belk had said we don't even bother to look at the isles
17 and passage ways, we don't you have a system in place, you
18 would charge a jury with punitive damages charge because
19 the recklessness of this

20 Our position is this, Judge, is that there is
21 a duty of the municipality to conduct periodic inspections
22 in the line to determine if there's a problem and that's
23 the duty and where there is no system in place at all,
24 that's arguable the breach.

25 Now, admitted if Mr. Lipac had said, hey

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1 Mr. Stegmaier, we rodged that line a week before and we
2 didn't see a problem, I acknowledge that it would be a
3 potential problem for us in this case.

4 THE COURT: Do you think the duty is on the
5 City to rod the line every so often? How would you carry
6 your analogy further? How do you suggest that what the
7 law states as a duty, question of law, what is the duty to
8 video tape every line or to rod every line? How does the
9 law say you supposed to inspect it?

10 MR. STEGMAIER: Of course, keep in mind, this
11 is not Stegmaier sewers, I'm relying on the case out there
12 that's cited in my brief that says, "The duty to keep the
13 sewers in repair involves the exercise of a reasonable
14 degree of watchfulness in ascertaining the condition from
15 time to time."

16 THE COURT: What page?

17 MR. STEGMAIER: Page 6, sir, third paragraph.
18 "The duty of a municipality to keep its sewers in repair
19 involves the exercise of a reasonable degree of
20 watchfulness in ascertaining the condition from time to
21 time in preventing them from becoming (inaudible)." And
22 it goes on.

23 The answer to your question, Your Honor, and
24 I think what you want me to do is to get down to what is
25 reasonable for them to do. They have to do something

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1 within reasonability. What is in this case is they
2 weren't doing anything. So if Mr. Morrison or anybody
3 from the City had said, these are the efforts that we have
4 undertaken on a periodic basis to at least inspect the
5 lines and determine there is a problem, that would be a
6 pretty persuasive argument and then we get down to what is
7 reasonable and what is not, doing it every 90 days or
8 doing it every year reasonable.

9 But when we have a situation where they
10 freely and voluntarily acknowledge in a deposition under
11 oath we don't have any system in place, if there's a
12 problem, we'll come out and deal with it. That doesn't
13 satisfy, Your Honor, what the law requires and of course
14 we've seen the affidavits from the City of Newberry where
15 they say nobody called us about a problem, our response is
16 we don't agree with that.

17 We took the deposition of a man named Paul
18 Duncan who was a nearby neighbor who also said that I from
19 time to time had problems near the line.

20 THE COURT: At his house or his profession?

21 MR. STEGMAIER: At his house. And he was
22 also very knowledge ---

23 THE COURT: You say near the line, was he
24 near that line or was he on the line?

25 MR. STEGMAIER: He was.

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1 THE COURT: On that line?

2 MR. STEGMAIER: Yes.

3 THE COURT: Above or below?

4 MR. STEGMAIER: Below. And he was one of the
5 first responders in this particular situation and he was
6 instrumental in helping the agencies trying to get things
7 suited out.

8 But not withstanding that, Your Honor, the
9 fact that we got a city employee in charge of the sewer
10 saying we just don't have a system in place, that's what
11 we assert is to the defense in this case of obtaining
12 summary judgment. This is what the law says that you have
13 to exercise some sort of reasonable degree of careful
14 exercise. They don't even get to that and that's we say,
15 Your Honor, that gets us to the jury and certainly gets us
16 pass summary judgment.

17 THE COURT: How high was the water in your
18 house?

19 MR. STEGMAIER: I believe the testimony was
20 six inches.

21 MS. ABRAMS: The shot out of the toilet.
22 That's the way it came up.

23 MR. STEGMAIER: It wrecked the house. I mean
24 they incurred about \$25,000 in damages.

25 THE COURT: Okay. Mr. Morrison, you

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1 certainly don't suggest that you could assert lack of
2 actual and constructive notice because you didn't do
3 anything and I don't know about the Belk Department Store
4 analogy here today, but what is the duty of a municipality
5 to take care of its sewer lines.

6 MR. MORRISON: The law that Mr. Stegmaier
7 quotes from Amger is dealing with states that recognize
8 the distinction between proprietary and governmental
9 functions. South Carolina recognizes no such distinction.
10 The South Carolina governmental functions are just that,
11 governmental functions.

12 There is no law in South Carolina dealing
13 with any duty to maintain a sewer line other than Hawkins
14 versus the City of Greenville which is in reality a design
15 case not a maintenance case but in Hawkins they did say
16 that the design and maintenance of a storm drain or a
17 sewer system is an immune function.

18 THE COURT: Design.

19 MR. MORRISON: Design. The Hawkins case was
20 a design case of a storm drain but they did say in the
21 case the design and maintenance of a storm drain or sewer
22 system is an immune function. That's the only law we have
23 in South Carolina with regard to any duty to maintain a
24 sewer system.

25 Here, though, even if you consider that there

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1 may be some duty to maintain, some duty to actively go out
2 and maintain a sewer system, there is still a huge
3 proximate cause problem. There's no evidence in this
4 record or in this case anywhere that had the City gone out
5 there a week before or a day before, that root ball would
6 have been there. This was a rolling blockage, don't know
7 where it came from, but there's no evidence it would have
8 been there before this back-up.

9 There's no evidence that a maintenance
10 program would have discovered and prevented this back-up.

11 So even if you assume that it had such a duty
12 which we don't have any law in South Carolina on that,
13 even if they did, proximate cause is still missing. There
14 is no actual notice of a defect, there's no constructive
15 notice of a defect, and there's no proximate cause that
16 says had they done something more, this would have been
17 prevented.

18 As far as Mr. Duncan is concerned. He's at
19 the bottom of the hill. He's had problems in his area
20 before but there was not a problem in his area that caused
21 a back-up because the other problems between Mr. Abrams
22 and Mr. Duncan would have flooded first.

23 THE COURT: What kind of problems did
24 Mr. Duncan have?

25 MR. MORRISON: Sewer line ran through

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1 Mr. Duncan's yard and in his yard there were several large
2 trees, and where the large trees were in his yard, they
3 had blockages from the roots in his trees from time to
4 time.

5 THE COURT: Mr. Stegmaier, how about
6 proprietary versus government functions point?

7 MR. STEGMAIER: Well, Your Honor,
8 Mr. Morrison cites the case of Hawkins versus the City of
9 Greenville, Court of Appeals 2002. I was Judge Anderson's
10 law clerk right up until 2002 so I didn't have anything to
11 do with this case.

12 The thing about the City of Hawkins versus
13 the City of Greenville, No. 1, Hawkins when you read it
14 and you read it closely notwithstanding the objection of
15 the term maintenance in the opinion from point to point,
16 it is a design case.

17 When we look at the facts of Hawkins, there
18 were two different instances where Mr. Hawkins owned a
19 business in the City of Greenville and the business had
20 flooded after some rain storms and the sewer system was
21 not capable of negotiating the water that was coming into
22 the business. In this particular case we are not
23 asserting anything as it relates to the design of the
24 system whether the pipes were too small or they weren't
25 the right material or there should have been an addition

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1 pipe or anything along those lines.

2 Our position is Hawkins, while on its face
3 seems attractive for purposes of the defendant's summary
4 judgment, it is not dispositive in this case and, in fact,
5 the opposite.

6 THE COURT: Do you have an expert witness?

7 MR. STEGMAIER: No, sir.

8 THE COURT: You say there is a duty to
9 inspect or maintain or whatever you want to call it.

10 MR. STEGMAIER: That's right.

11 THE COURT: But let's assume there was a duty
12 to do something, what would that be? You can't just say
13 well, you jump over it and they didn't do anything
14 therefore you take it to the jury, then you have to deal
15 with proximate cause and that's what I'm going to now.
16 The duty to do what?

17 MR. STEGMAIER: That's what I was references
18 before. The duty of a municipality to keep its sewers
19 repaired involves the exercise of a reasonably
20 watchfulness in ascertaining the condition from time to
21 time and preventing them from becoming dilapidated or
22 obstructed.

23 THE COURT: Okay. How do you know, what is
24 the evidence that this or a periodic inspection would have
25 led to the discovery or the prevention of this root ball

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1 or grease ball?

2 MR. STEGMAIER: What we project by the way of
3 argument compounded by the defendant in this particular
4 instance is that nobody ever told us anything, we didn't
5 know anything, we didn't have any complaints, and again we
6 believe that is not the case and we believe we can prove
7 otherwise, but our argument is that the defendant can not
8 escape liability in this case simply by doing nothing and
9 having ---

10 THE COURT: Well, a defendant can if their
11 failure to do anything was the proximate cause of
12 something. Let's assume you drove here at 190 miles an
13 hour, you have a duty not do that.

14 MR. STEGMAIER: Right.

15 THE COURT: But the fact that you were here
16 45 minutes than you should have been and happened to come
17 up to a light and went through it on green, your breach of
18 that duty in coming up the interstate so fast has nothing
19 to do with you going through a green light and getting
20 broadsided. In other words, the plaintiff couldn't say,
21 Mr. Stegmaier, you drove so fast to get here and if you
22 had driven the proper speed limit he wouldn't have been
23 here when I ran the red light. So there is a connection
24 between the failure to do something and your right to get
25 to a jury and that's called proximate cause.

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1 So what's the proximate cause?

2 MR. STEGMAIER: Let's take it two steps back.
3 I think we may, at least for purposes of this argument, we
4 may be on the same page with the idea notion that a legal
5 duty exists that ---

6 THE COURT: You have to accept the argument
7 to get to proximate cause. Let's assume there is a duty,
8 the duty is to do or not do something.

9 MR. STEGMAIER: That's right. I would answer
10 the question in two-fold. Number one, with regard to the
11 standard of review as it relates to the negligence in this
12 action, it's my understanding that the case law suggests
13 that proximate cause is an issue of fact and is ultimately
14 determined by the factfinders.

15 THE COURT: The duty is a question of law.

16 MR. STEGMAIER: Yes. But proximate cause is
17 a question of fact and not a question of law.

18 THE COURT: Not all the time.

19 MR. STEGMAIER: I understand. Yes, sir.
20 That would be the exception to the rule with regard to the
21 determination as to what constitutes proximate cause. To
22 answer the question, though, Your Honor, is we know this
23 when the investigation was done the root ball that was
24 lodged in the line that obviously had been there for a
25 long period, for an extensive period of time, we know that

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1 that number one, the Abrams's house was flooded and it was
2 flooded was sewer water and we know that root ball was
3 there.

4 And when we take the analysis a step further,
5 the analysis looked at about the idea of a prospect that
6 that root ball had been there for some time and even
7 higher up on the line at the date of loss, he acknowledged
8 that as a possibility.

9 I hope that answers your question, Your
10 Honor, because I think that testimony by Mr. Lipac is
11 important because there is an acknowledgment that that
12 root ball existed and the possibility of prospect existed
13 that that root ball had been there for some time, and the
14 City doesn't -- I understand Mr. Morrison's argument that
15 it was nothing to say that if we had done it a week before
16 we would have found this out. The fact is, the actual
17 reality is, they didn't do anything.

18 THE COURT: Maybe you're missing my question.
19 Assume that a municipality has a duty something.

20 MR. STEGMAIER: Yes, sir.

21 THE COURT: What is that something? You
22 can't just say they have a do something and they did
23 nothing, so therefore, it's probable cause. Do they have
24 a duty to go out, I don't know how many miles of sewer
25 lines there are in this town, but do they have a duty to

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1 do something like rod the sewer lines, flush them out ever
2 so often, what do they have a duty to do? It seems like
3 to me if there's a duty to do something, you got to be
4 more specific than saying you go to do something. If it
5 was something that you could see, like your Belk analogy,
6 you exercise care and safety, that's one thing, but a
7 sewer line that's underground, you say you have a duty to
8 do something, I need more from you than a duty to do
9 something.

10 MR. STEGMAIER: Well, my argument would be
11 this if you look at the Belk analogy when you look at the
12 law, the duty in a premises liability case is the duty to
13 inspect ---

14 THE COURT: The duty in a department store is
15 to walk around and look ever so often, look for the brown
16 banana peel, look for the grape, but in a sewer line, how
17 do you look?

18 MR. STEGMAIER: What we know is two things,
19 number one, to go back to the Belk analogy, there is no
20 law that says specifically how they are supposed to do
21 that, but as to the sewer line, there has to be some sort
22 of reasonable degree of watchfulness which would promote
23 inspection and we're not talking about after something
24 happens. So my position is we could get into again --
25 that ultimately would be the defendant's argument about,

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1 well, you know that might cost us a million dollars to do
2 it every year and it's too expensive for the City to do
3 that, but what we don't have in this case, and
4 Mr. Morrison brought this up, is something that is
5 discretionary.

6 What is helpful about the Hawkins case is
7 Hawkins requires an argument by the defendant effecting
8 sewer lines discretionary, there has to be proof that the
9 defendant faced with alternatives actually made a
10 conscious choice using a set of professional standards.

11 THE COURT: Discretionary has nothing to do
12 with the existence of duty and that's why I'm trying to
13 get at. That's what I'm trying to get from you is there
14 is a way for municipalities to come in here and do this
15 very easily. They can have this type of equipment and
16 route these lines once every six month, once a year, and
17 then you take out and say yeah, they've done that but in
18 my opinion to a reasonable degree of certainty this root
19 ball or grease ball would have not existed because it
20 takes this long for a root ball to intrude into the pipe,
21 this long for it to dislodge and this long for it to move
22 10 feet, 20 feet, 30 feet.

23 So in other words, I need something more
24 specific.

25 MR. STEGMAIER: Does such testimony exist in

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1 this particular case from the plaintiff? No. Is it
2 incumbent upon us to present testimony with that type of
3 specificity? No. Our position is there is an overall
4 legal responsibility to conduct periodic inspections.
5 What we know is the City of Newberry didn't do anything.

6 I think, Your Honor, with respect to the
7 Court's argument ---

8 THE COURT: I'm not arguing, I'm just asking.

9 MR. STEGMAIER: I apologies. I think the
10 Court's position or statements made in this particular
11 case would tend to better ethically if there was any
12 evidence whatsoever on the part of the City that they were
13 doing something or they said we weren't doing it because
14 of x,y and z.

15 THE COURT: I think what their argument is
16 even if they had done something there is no proof from
17 you, and you got the burden of proof, it wouldn't have
18 done any good.

19 And, obviously, Mr. Morrison, there is a duty
20 to do something. You can't just let the lines just sit
21 there. Can you?

22 MR. MORRISON: Certainly not if there's a
23 problem, you can't. I don't think there's been any law in
24 the State developed to do preventative maintenance or not.
25 I think it's about 50/50 in this state, counties that do

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1 maintenance and counties that don't do maintenance, but I
2 don't think there is any case law in this state addressing
3 the issue of preventative maintenance or fixing a problem
4 when it occurs.

5 THE COURT: Mr. Morrison, it's your motion,
6 I'll give you the last word.

7 MR. MORRISON: Your Honor, the bottom line is
8 even if there were a duty to maintain and we contend there
9 is not, there is a duty to fix problems as they occur, but
10 even if there were a duty to maintain, to do periodic
11 maintenance, there is absolutely no evidence in this case
12 that the City could have done anything in the form of
13 periodic maintenance that would have prevented this event.

14 It's the plaintiff's burden to prove that the
15 breach of the duty was the proximate cause of the damage.
16 There is no evidence, none, of proximate cause in this
17 case. There is no evidence that had the City gone out
18 there the day before, two days before, or a week before
19 and inspected this line that they would have been able to
20 do anything to have prevented this event. So we believe
21 summary judgment is appropriate.

22 THE COURT: Okay. Does anybody have a copy
23 of the Hawkins's case?

24 MR. STEGMAIER: I do, sir.

25 THE COURT: I'll have to look at all your

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1 material and I'll make a decision then. But if I deny
2 your motion, I'd like to pick a jury before Thursday.

3 MR. STEGMAIER: Yes, sir.

4 THE COURT: What's your preference?

5 MR. STEGMAIER: Mr. Morrison and I have
6 discussed it, if you want to pick a jury on Thursday,
7 that's fine. My only conflict is tomorrow, I have a
8 mediation in Florence.

9 THE COURT: If I pick the jury then I'll pick
10 it Wednesday morning because there are some lawyers in a
11 medical case that have a motion hearing 2:00 on Wednesday.
12 It's supposed to take an hour but it might be an all day
13 thing so we'll take a jury at 9:30 on Wednesday. If I do
14 grant it, we won't need a trial at all. Any pretrial
15 motions because what I want to do is pick the jury and
16 start without any pretrial matters. If you have any
17 pretrial matters, I'd like to do them tomorrow.

18 Any evidentiary disputes that might result in
19 long hearings or ---

20 MR. MORRISON: The only thing I can think of
21 and I hadn't thought about that is Mr. Duncan's testimony
22 about problems with the sewer line in his yard and that
23 probably could be resolved in fairly short order.

24 THE COURT: Alright. Thank you.

25 MR. MORRISON: Thank you.

Abrams versus City of Newberry

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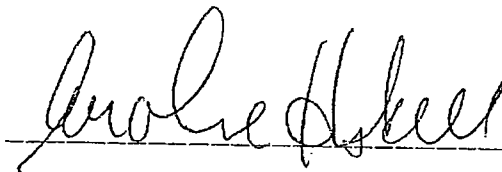
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Abrams versus City of Newberry

1 I, the undersigned Caroline Hiskell, Official
2 Court Reporter for the Thirteenth Judicial Circuit of the
3 State of South Carolina, do hereby certify that the
4 foregoing is a true, accurate, and complete transcript of
5 record of all the proceedings had and evidence introduced
6 in the trial of the captioned case, relative to appeal, in
7 the Common Pleas, Newberry, South Carolina on the 13th of
8 August.

9 I do further certify that I am neither of
10 kin, counsel, nor interest to any party hereto.

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14 Caroline Hiskell
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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,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

[SIGNATURE PAGE TO FOLLOW]

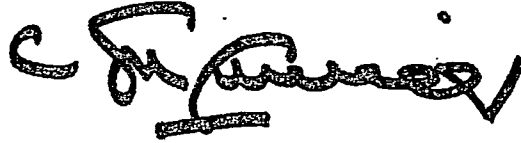
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MAY 01 2014

SC Court of Appeals

Respectfully submitted,

COLLINS & LACY, P.C.



By:

CHRISTIAN STEGMAIER

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ATTORNEYS FOR APPELLANTS

**CERTIFICATE OF COUNSEL –
RECORD ON APPEAL**

Columbia, South Carolina
April 11, 2014

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,

PROOF OF SERVICE

I hereby certify that I served a copy of the Record on Appeal upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on April 11, 2014, addressed to the following:

COUNSEL SERVED:

David L. Morrison, Esquire
Morrison Law Firm
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Columbia, SC 29212

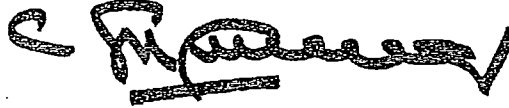
[SIGNATURE PAGE TO FOLLOW]

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APR 14 2014

SC Court of Appeals

Respectfully submitted,
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ATTORNEYS FOR APPELLANTS

**PROOF OF SERVICE – RECORD
ON APPEAL**

Columbia, South Carolina
April 11, 2014

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, ...Appellants,

v.

City of Newberry, ...Respondent,

PROOF OF SERVICE

I hereby certify that I served a copy of the Appendix to 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:

COUNSEL SERVED:

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[SIGNATURE PAGE TO FOLLOW]

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ATTORNEYS FOR APPELLANTS

**PROOF OF SERVICE – APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

Columbia, South Carolina
August 5, 2015