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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**S.C. Supreme Court**

APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2015-001663  
Case No. 2011-CP-36-00588

Danny Abrams and Frances Abrams ..... Petitioners,

v.

City of Newberry ..... Respondent.

**CORRECTED RESPONSE TO PETITION  
FOR WRIT OF CERTIORARI**

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### **Questions presented.**

- I. Should the writ be denied when the Petitioners fail to demonstrate any ground for granting the writ in a case where the Court of Appeals affirmed the grant of summary judgment to the Respondents on the ground that the Petitioners failed to present any evidence of proximate cause?
- II. Is proximate cause absent when the Petitioners offered no evidence that the “rolling blockage” in the sewer line was present long enough so that a periodic inspection by the Respondent would have discovered its existence?
- III. Does a duty exist 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 Respondent on notice or to show that a reasonable inspection would have disclosed its presence?

### **Statement of the Case**

The Respondent, City of Newberry, owns and operates a municipal sewer system. The Petitioners are residents of the City of Newberry and have a home at 1446 Calhoun Street. App. 18. They suffered property damage from a sewer backup that entered their home on March 4, 2008. App. 18. The damages total approximately \$24,000. Petitioners allege that the backup was caused by a “rolling blockage” in the sewer main in front of their home. App. 89. 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. App. 84. Since the Petitioners’ home is higher than the neighboring homes, it is evident that the “rolling blockage” was in the main sewer line past the Petitioners’ sewer tap but before the next homeowner’s sewer tap. App. 84-85. The Respondent offered expert testimony as to the location of the blockage in the sewer system. App. 84-85.

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, Petitioners’ residence. His affidavit reveals that the Petitioners 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. App. 85.

Fred Yandle was the Director of Public Utilities, including the sewer system, at the time of the backup. App. 82. 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. App. 82-83. He indicated that the City had no knowledge of this blockage or other problem until after it occurred. App. 82-83. He also indicated that the City had no method by which to anticipate this blockage before it occurred. App. 83.

The Respondent moved for summary judgment and that motion was granted in the trial court. The trial court declined to address the proximate cause issue and found that no duty existed. On appeal the Respondent argued that the lack of proximate cause is an additional sustaining ground. The Court of Appeals affirmed the grant of summary judgment but on different grounds than the trial court. The Court of Appeals found that the “Petitioners failed to provide **any evidence** that a negligent act or omission attributable to the City was the **proximate cause** of their injury” (emphasis added). App. 2. A petition for rehearing was properly denied. The Petitioners then filed the instant writ.

## **Argument**

### **I. The Petitioners have not demonstrated any ground for granting the writ.**

The Petitioners have not demonstrated any reason for this Court to grant certiorari. SCACR 242(b) outlines the character of reasons which should be considered. The five enumerated circumstances include:

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved; and
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of the five circumstances outlined are present here in the Court of Appeals determination that the failure of the Petitioners to offer any evidence of proximate cause was fatal to their claim. No special or important reasons exist either. The Court of Appeals correctly outlined the law of negligence and proximate cause and concluded that the Petitioners were in error in claiming that they had no obligation to offer evidence of proximate cause. The alleged breach of a duty, without evidence of causation, is simply insufficient to state a claim in negligence. That is not a departure from the well recognized law.

The Court of Appeals properly found that the Petitioners did not offer any evidence that a negligent act or omission attributable to the City was the proximate cause of their injury. The evidence presented in the lower court was that there was a “rolling blockage” in the sewer line adjacent to the Plaintiff’s home that caused a backup. (App. 89) As support for that proposition, they point out that an inspection of the line after the backup revealed a rolling root ball further downstream that *could have been* closer to the Plaintiff’s home at the time of this backup. (App. 89). They claim that the absence of a periodic maintenance program *creates liability*, without the need for any further proof. That analysis totally ignores causation.

Petitioners continue to argue that proof of causation is unnecessary. At the trial court, Petitioners admitted that there was no evidence in the record of causation and argued that they are not required to produce such evidence. (App. 161-162). Before the Court of Appeals, Petitioners continued to claim that the failure of the Respondent to have any periodic inspection program *created liability* without more. In the Petition for Rehearing before the Court of Appeals, the Petitioners continue to argue that Respondent’s alleged failure to exercise reasonable care creates liability. (App. 8-9). There was no presentation of any evidence before the trial court that would have demonstrated that a reasonable inspection prior to the sewer

backup would have discovered and prevented this event. There is no evidence that the “rolling blockage” that caused the backup would have been discovered by an inspection a day before, a week before or six months before this event. There is no evidence that the “rolling blockage” was present to be discovered upon any reasonable inspection. The Petition completely ignores the Court of Appeals discussion of the cause-in-fact prong of proximate cause. The Court of Appeals stated the long standing law that:

“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 that the injury would not have occurred but for the defendant’s negligence....”).

(App. 3).

Without proof of proximate cause, the Petitioners cannot prevail. Proof that a backup occurred does not create liability. The Court of Appeals was correct in its ruling. Its ruling does not involve any novel issue, there was no dissent, there is no conflict with a prior ruling of the Supreme Court, there are no substantial constitutional issues involved and there are no federal issues involved. Petitioners contend that the Court of Appeals erred in not determining whether a duty exists. That determination would not advance the outcome of this case since proximate cause is absent. The Writ should be denied.

**II. 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.**

Petitioners 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 Petitioners analysis completely ignores the third element of negligence – proximate cause.

Petitioners have asserted 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. 6-8. They allege that is fatal to the Respondent’s defense and that no proof of proximate cause is necessary. However, Petitioners 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. App. 156-162. At the summary judgment hearing before the trial court, counsel for Petitioners 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. App. 156–162. The colloquy included this question from the Court: “So what’s the proximate cause?” App. 158. The discussion ended with Petitioners’ 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.” App. 161-162.

Petitioners’ 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 Petitioners’ home would have discovered this rolling blockage would require the fact finder to speculate with no evidentiary basis. Petitioners bear the burden of proving proximate cause by

competent evidence. In *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), the Court stated:

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).

Instead, Petitioners argue that a periodic inspection “could arguably” have cured the problem. App. 23. 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 [Petitioners’] home for blockages that could cause a backup.” App. 28.1. However, without evidence that such an inspection would have made a difference, proximate cause is absent. The Petitioners have offered no evidence that this “rolling blockage” would have been present to be discovered at the time of any reasonable inspection. They have no evidence that the “rolling blockage” was present six months earlier, one week earlier or even one day earlier. Without some evidence that a reasonable inspection would have discovered this “rolling blockage” so that this incident could have been prevented, the Petitioners have failed to demonstrate proximate cause and that is fatal to their claim. The Court of Appeals correctly found that “Petitioners failed to provide *any evidence* that a negligent act or omission attributable to the City was the *proximate cause* of their injury” (emphasis added). App. 2.

Petitioners’ failure to offer evidence of proximate cause defeats their claim. The Writ should be denied because the Court of Appeals correctly ruled that the Petitioners cannot prevail when they lack any of evidence of proximate cause.

**III. 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.**

In order to establish a breach of a duty for a defect that results in property damage, the Petitioners 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.E.2d 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).

Petitioners admit and assert that a “rolling blockage” was most likely responsible for this sewer backup. (App. 18). There is no allegation or evidence that the Respondent created that situation. Consequently, the Petitioners 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 grease ball or root ball further down in the line. Petitioners noted in their response to the Respondent’s summary judgment motion that this “rolling blockage” could have “possibly” been closer to the Petitioners’ home at the time their backup occurred. (App. 18). There was no other defect or blockage found in the sewer line that would account for this backup.

The Petitioners 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. (App. 82-83). Respondent had no prior problems with the sewer lines in this area. (App. 82-83). The Respondent had no prior complaints of problems along Calhoun Street near the Plaintiff's home. (App. 82-83). The Respondent had no notice of the blockage that caused the backup in the Plaintiff's home. (App. 82-83). No evidence of actual notice exists.

Likewise, no evidence of constructive notice exists. Petitioners 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 Petitioners' claim. The lack of notice is fatal to their claim. The writ should not be issued.

**IV. The Court of Appeals correctly refused to impose a duty to conduct periodic inspections based upon this record.**

Petitioners erroneously contend that the Court of Appeals should have declared that the Respondent owed a duty to conduct reasonable inspections of its sewer system and that the failure to do so, renders the Respondent liable. First, it's not necessary to reach that issue since the lack of any evidence of proximate cause is dispositive. See, *Henry v. Lewis*, 327 S.C. 336, 340 n. 1, 489 S.E.2d 639, 641 n. 1 (Ct.App.1997). (stating that because the appellate court affirmed the circuit court on one independent ground, it need not reach the alternative ground).

The cases from other jurisdictions cited by Petitioners do not obviate the need for the proof of proximate cause. Further, many of the cases and the treatises cited by Petitioners are from other states which recognize a distinction between proprietary and governmental functions.

South Carolina recognizes no such distinction. *Wells v. City of Lynchburg*, 331 S.C. 296, 305, 501 S.E.2d 746, 751 (Ct.App. 1998).

The leading case relied upon by Petitioners is *Creighton v. Town of Windsor*, 577 A.2d 681 (Vermont 1990). The issue in *Creighton* was different than the issue here. *Creighton* involved tree roots from silver maple trees planted above the sewer line. Those roots penetrated the sewer lines over time resulting in an obstruction at that location. The roots penetrated the sewer line over time and that was evidenced by the extensive area of roots within the line. The fact that roots from trees growing directly above the sewer line could result in roots penetrating the line was known. Here, the obstruction is a sudden “rolling” blockage not in any area where the blockage would have been foreseeable. In *Creighton*, the Court held that in that situation there was a factual dispute that precluded summary judgment as to the issues 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 the use of the sewer.” *Creighton*, 577 A.2d @ 685. While we do not agree that *Creighton* is good law that should be followed, clearly, there was no imposition of a duty that rendered the town liable without proof of proximate cause as the Petitioners here suggest should be the case. This case differs tremendously in that the Petitioners failed to provide *any evidence* that an inspection would have avoided Petitioners’ damages. Even under an analysis by *Creighton* standards, Petitioners’ claim fails.

Closer to home, the North Carolina courts have also considered this issue. In *Ward v. City of Charlotte*, 48 N.C.App. 463, 269 S.E.2d 663 (Ct.App. 1980), the North Carolina Court of Appeals found that:

The general rule is that a municipal corporation which adopts sewer lines constructed by third persons becomes responsible for maintenance and liable for injuries resulting from lack of due care in upkeep. *Johnson v.*

*Winston-Salem*, 239 N.C. 697, 81 S.E.2d 153 (1954), accord, *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966). The duty of maintenance includes the duty of exercising a reasonable degree of watchfulness so as to keep the sewerage system free from obstruction. *Hotels, Inc. v. Raleigh*, supra. However, a municipal corporation is not an insurer of the condition of its sewerage system, and liability may only arise where the municipality has actual or constructive notice of the existence of an obstruction or defect and fails to act. See 18 McQuillin, *Municipal Corporations*, s 53.125, p. 466 (1977); *Printing Co. v. Raleigh*, 126 N.C. 516, 36 S.E. 33 (1900)....

Assuming arguendo that the sewer lines serving plaintiffs' home had not been inspected or cleaned between October 1974 when defendant accepted the system for maintenance and November 1976 when the incident occurred, plaintiffs still have offered no evidence to show that the broken bell causing the pipe to drop or the obstruction in the line had been present for a sufficient period of time so as to place the City on constructive notice of the defects or to show that an inspection would have disclosed their presence. Although plaintiffs' evidence showed that overflows from the manhole in front of their home had occurred on occasion, there was uncontradicted testimony that such overflows would have been caused by stoppages downstream from the manhole, in a line separate from that through which the sewage eventually backflowed into plaintiffs' house. Upon this record, no prima facie case of negligence has been shown.

Allowing the Petitioners here to impose liability without any showing of notice or proximate cause results in strict liability or *res ipsa loquitur*. South Carolina has never recognized *res ipsa loquitur*. *Gilliand v. Peter's Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857 (1940); *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Tucker v. Doe*, 776 S.E. 2d 121 (Ct. App. 2015). Respondents contend that under any analysis the Petitioners must show that a reasonable inspection would have discovered the blockage. That evidence does not exist here. The writ should be denied.

Additionally, there is insufficient factual development in this record to determine whether a particular duty is owed and the parameters of that duty. In dealing with underground sewer lines, the determination of whether inspections are feasible or can be performed in a cost

effective manner, is subject to factual development and there is no such development in this record. The burden of performing routine inspections, the cost in manpower and equipment to perform inspections, the miles of line within a given system, the amount of equipment and manpower that are necessary to perform those underground inspections and the time frames required to inspect each mile of pipe are all facts which would shape the nature and extent of any duty. None of that was presented to the lower court at summary judgment, and none of that is in this record. Whether it is even possible to inspect the miles of underground sewer lines within any particular time frame, such as yearly, has not been developed factually in this record. Without any knowledge whatsoever of what an inspection would entail, it is impossible to impose a duty based upon this record.

### **Conclusion**

The Court of Appeals Correctly ruled that the Petitioners failed to provide any evidence of proximate cause and upheld the grant of summary judgment to Respondent. That ruling does not provide any basis for granting the writ and the Petitioners have not demonstrated any appropriate reason for doing so. Petitioners arguments regarding the imposition of a duty are misplaced in that it makes no difference to the outcome of the case and the legal arguments are based upon foreign law and are misplaced. The cases relied upon still require proof of proximate cause. Adopting Petitioners theory that proof of proximate cause is not necessary if the Respondent does not provide periodic maintenance invokes the doctrine of *res ipsa loquitur*. The duty argument makes no difference because the Court of Appeals correctly ruled that proximate cause is absent. The writ should be denied.

*(Signature to follow on page 13)*

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Columbia, South Carolina

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George C. James, Jr., Circuit Court Judge

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Danny Abrams and Frances Abrams ..... Petitioners,

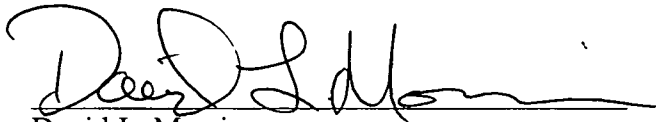
v.

City of Newberry ..... Respondent.

**PROOF OF SERVICE**

The undersigned employee of Morrison Law Firm, LLC, attorney for the Respondent, City of Newberry, does hereby certify that service of the **Corrected Respondent City of Newberry's Response to Petition for Writ of Certiorari** 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 25<sup>th</sup> day of September, 2015, addressed as follows:

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