

FILED

OCT 05 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 343430

IN THE COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

DONALD and KATRINA SIMMONS,

Appellants,

v.

CITY OF OTHELLO,

Respondent.

APPELLANTS' REPLY BRIEF

Alicia M. Berry
WSBA no. 28849
LIEBLER, CONNOR, BERRY & ST.
HILAIRE, P.S.
1141 N. Edison, Ste. C
Kennewick, WA 99336
aberry@licbs.com
Attorney for Appellants

TABLE OF CONTENTS

I. Introduction	1
II. Argument.....	1
A. Location of the break was the City connection.....	1
B. Lateral line under control of City.....	3
C. Definition of “public dewer” not instructive.....	4
D. Negligence not necessary.....	5
E. Review of decision to strike witness testimony is de novo.....	6
F. Testimony based on personal observation admissible.....	6
G. Mayor’s testimony was improperly excluded Negligence.....	7
H. Witness testimony did not contradict their deposition testimony.....	8
III. Conclusion	8

TABLE OF AUTHORITIES

Cases

Keck v. Collins, 181 Wash.App. 67, 78-9, 325 P.3d 306 (Div. 3, 2014) 6

Other

Othello Municipal Code 12.04.050..... 4

Othello Municipal Code 12.04.070..... 3

Othello Municipal Code 12.12.040..... 3

Othello Municipal Code 12.16.290 (Prior to amendment). 4

I. INTRODUCTION

The City has already admitted that it was responsible to repair the connection between the Simmons property building sewer and the city main lateral trunk line. The question before the court is whether the City of Othello acted reasonably to repair the sewer connection. The evidence showed that after being notified that there was a problem in the sewer line under the public right of way, the city took no steps to investigate, uncover, or repair the break.

This court should find that sewer lines under the public right of way are by definition part of the city sewer and must be maintained by the City. The court should find that the city acted unreasonably and contrary to law by refusing to take any steps to investigate or repair the break in the connection until Appellants had excavated in the public right of way around water and gas lines to reach the location of the break.

II. ARGUMENT

A. Location of the break was the City connection.

The City erroneously suggests that the portion of the line that was broken fell between the connection and the building. Respondent's Brief, page 1. Mr. Gonzalez testified that, "[a]fter excavating all the sewage, we

finally discovered the broken city connection. The city connection is what the line from the residence feeds into.” CP 13. According to Mr. Gonzalez, “[t]he City installed a new connection for the building sewer line to connect to the main line on April 11, 2014.” Mr. Gonzalez installed a new line from the house to that connection only because the old line would not fit with the new connection. CP 13.

The City argues that Plumber Heist identified the broken line as being inside the property line. Mr. Heist was hired to run a locator to identify the location of the building sewer because the city had no documents that showed where the side sewer lateral connected to the sewer trunk line. In reviewing Mr. Heist’s deposition, he indicates that the contractor dug a big hole and when Mr. Heist came back to observe, the pipe in the hole was broken. CP 22. Mr. Gonzalez testified that while digging to find the line at the location identified by Mr. Heist, he broke the line. He further indicated that Mr. Heist then came back out and ran a camera up both sides of the broken line until he found the source of the blockage under the public right of way. CP 22 Thus there was no evidence of any other cause for the sewer problems experienced by the Simmons other than the broken connection under the public right of way.

Since the City had no witnesses to the location of the break, any determination by the court that the location was other than the connection

line is clear error. In the alternative, it would raise a question of fact that would make the decision to grant summary judgment for the city improper.

B. Lateral line under control of City.

The City asserts that it “did not own or have exclusive control over Appellants’ lateral line.” The use of the term, “lateral line” creates confusion because the only time that term is used by the city of Othello, it has nothing to do with the sewer line on the property of a homeowner.

As already discussed, the municipal code clearly defines the Simmons sewer as the “building” or “side sewer.” OMC 12.04.070 Everything else under the public right of way is referred to as a lateral. In OMC 12.12.040, the code refers to the main line as the “sewer lateral trunk.” The Public Works design standards define the connection from the property line to the sewer lateral trunk as the “side sewer lateral.”

If the city intended for citizens to dig up public streets and right of ways to repair sewer lines, then it would have defined the building sewer as the line between the building and the sewer lateral trunk. The utter silence on who has the duty to repair the side sewer lateral leaves the City with no bases to avoid Washington’s long standing policy that the City is responsible for the public sewer lines it requires its citizens to connect to.

The City acknowledged that “the City is obligated to install the coupling connection,”... between the line servicing Appellants’ residence and the main sewer line. Respondent’s Brief, page 21. The City asserts that it was the responsibility of the Appellants to perform all excavation to the breakage pursuant to OMC 12.16.290. The corporate representative for the City, Mr. Clements, stated that this OMC only applied to new connections and that was why the City amended the ordinance after the Simmons sewer problem. CP 32

The City has never denied its ownership over the public right of way, the soil underneath, or the use of either. Absent some other document that states otherwise, all items within that soil belong to the City. This explains why the City supervised Plaintiffs compaction of the soil around the lateral line once installed. CP 13

C. Definition of “public sewer” not instructive.

The City next argues that no one but Appellants had a right to use the connection making it not a public sewer. In support of this argument, the City points to OMC12.04.050. That section reads as follows:

The words, “public sewer” shall mean a sewer in which all owners of abutting properties have equal rights, and is controlled by public authority.

The City argues that no other property owners are connected to the same side sewer lateral, they must have no right to be. This argument confuses

the difference between the right to connect, and the ability to connect. Clearly abutting property owners would have just as much right to connect as the Simmons, but the line is controlled by the public authority. Plaintiff's engineer's legal opinion, solicited at pages 74-75 of his deposition, was that abutting property owners don't have the right to connect because the line is controlled by the public authority, not the individual property owners. "[t]hat responsibility is the city's authority to manage whatever in in that right of way." CP 17

D. Negligence not necessary.

The City erroneously argues that Appellants must show some negligence on the city's part in order to recover. Respondent's Brief, page 33 – 36 The Kempter case cited by the City is not on point. In that case, the homeowners had experienced a backup of the sewer line causing damage to their residence. As soon as the City was made aware of the problem, it checked the line and cleared the blockage. Because the City routinely checked the lines, the court held that the city could not be held liable for an unexpected sudden event absent some proof of negligence.

In this case, the city was told repeatedly that there was a blockage in the side sewer lateral between the property line and the sewer lateral trunk. CP 8 Yet despite being aware of the situation, the city refused to take any steps to verify, investigate, or remedy the situation. CP 8

Appellants also don't seek backflow damages. It is the damages that flow from the City's breach of its duty to investigate and repair a known defect in the side sewer lateral that Appellants seek and therefore no negligence need be proven.

E. Review of decision to strike witness testimony is de novo.

The City erroneously asserts that review of the trial court's decision to strike is abuse of discretion. Respondent's Brief, page 14. This court decided in May 2015 that the de novo review standard applied to all trial court rulings made in conjunction with a motion for summary judgment. Thus this court stands in the shoes of the trial court in determining whether the eye witness testimony should be excluded. *Keck v. Collins*, 181 Wash.App. 67, 78-79, 325 P.3d 306 (Div. 3, 2014).

F. Testimony based on personal observation admissible.

The City argued that the plumbers' opinions are inadmissible. The plumber's job is to actively seek and investigated the location and cause of the plumbing problem. Appellants plumbers testified based on personal observation of what they found and the opinions they formed based on those personal observations. As noted in the City's brief, "where the opinion is based on the personal observations of the witness," it is admissible. Respondent's Brief, page 19 citing *State v. Farr-Lenzini*.

The City's expert, Mr. Holland, was not qualified to oppose the plumbers testimony. Mr. Holland held himself out to be an engineer. CP 27 Contrary to this, the evidence showed that Mr. Holland was not licensed as an engineer or even as an engineer in training in the State of Washington. CP 31 There was no other evidence that he was competent to testify or to contradict the testimony of the plumbers used by Appellants.

G. Mayor's testimony was improperly excluded.

The Defendant argues that the Mayor's testimony was inadmissible hearsay on what the investigation determined. Contrary to this, the Mayor's actual words were not what the investigation determined, but what the city decided following the investigation. As the Mayor of the city at the time, his statements about his determination following the investigation are not hearsay. Respondent's Brief, pages 16 & 17.

The City also argued that the Mayor McKay's comments on how the city interpreted and applied its ordinances is a legal conclusion and is therefore inadmissible and properly excluded. Contrary to this, the Mayor's statement is not a legal conclusion, it is a factual statement about how the city applied its own code in similar sewer situations. The testimony also demonstrates that this new interpretation advanced by the

City renders the ordinance open to multiple interpretations and thereby unenforceable.

H. Witness testimony did not contradict their deposition testimony.

The City argues that the witness testimony was contradictory and should be excluded. This issue was addressed in the briefing already and will not be addressed again.

III. CONCLUSION

This Court should reverse the trial court's decision to strike portions of the declarations of Plaintiffs' witnesses and reverse the court's order granting the City's motion for summary judgment and dismissing Appellants' case on the grounds described herein.

Respectfully submitted this the 3rd day of October, 2016.



Alicia M. Berry, WSBA no. 28849
LIEBLER, CONNOR, BERRY & ST. HILAIRE, P.S.
1141 N. Edison, Ste. C
Kennewick, WA 99336
Attorney for Appellants

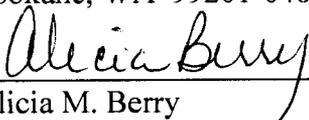
CERTIFICATE OF SERVICE

On October 3, 2016 I served the Brief of Appellants with

Appendix via first class mail, postage pre-paid to:

Mr. Kelly E. Konkright
Lukins & Annis PS
717 W. Sprague Ave., Ste. 1600
Spokane, WA 99201-0466

Renee Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201



Alicia M. Berry