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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONALD and KATRINA SIMMONS, husband and wife,

Appellants,

v.

CITY OF OTHELLO

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case concerns damage to Appellants' private sewer line (hereinafter referred to as "lateral line") connecting Appellants' property to the City of Othello's (the "City") public main sewer line. Even though there is no evidence that the City's public main line had any problems or contributed in any way to the Appellants' issues with their lateral line, Appellants nonetheless continue in their efforts to hold the City responsible for damage to their lateral line which serves only their private property.

In March 2014, Appellants' lateral line became obstructed. The City's public works staff inspected the City's public main sewer line in the area where the Appellants' lateral line connects to the public main line. During this inspection, the City's staff confirmed that the public main line was flowing freely and free of obstruction.

Appellants hired plumbers to excavate their lateral line and determine the source of the problem. During excavation, the plumbers discovered that Appellants' private/lateral line had failed in a section of the line before it reached the City's public main line and several feet underneath the City's alley right-of-way. Appellants replaced their private/lateral line. As part of that process, the City agreed to install a new connection (referred to as a "saddle") to the public main sewer line. The

City provided the saddle connection and installed it at no cost to Appellants.

Thereafter, Appellants filed a lawsuit alleging that their lateral line failed because the City negligently maintained its public main sewer line. After filing this lawsuit, Appellants also asserted that the City was liable for all resulting damages to Appellants and their property based on their false assertion that the City either (a) owns the portion of the lateral line that failed, or (b) had a duty under the Othello Municipal Code to repair the same.

On summary judgment, the Superior Court found that Appellants failed to present any evidence upon which a reasonable juror could conclude that the City was liable to Appellants.

Here, there was no question of fact that: (1) the City did not own or have exclusive control over Appellants' lateral line, (2) the City did not have a duty to repair the sewer line that failed, and (3) the City was not negligent with respect to its maintenance of the public sewer, the design and/or construction of Appellants' lateral line, or the fact that garbage trucks drove over the right-of-way several feet above Appellants' lateral line. The City was therefore entitled to summary judgment dismissal. This Court should uphold the trial court's summary judgment dismissal.

II. RESPONSE TO ASSIGNMENT OF ERRORS

1. The Superior Court correctly granted the City's Motion to Strike portions of the declarations of several of Appellants' witnesses which contained inadmissible testimony pursuant to CR 56.
2. The Superior Court correctly granted summary judgment dismissal in favor of the City because there are no genuine issues of material fact and the City was entitled to summary judgment as a matter of law.

III. RESPONSE ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. The Superior Court correctly determined that portions of Appellants' plumbers' testimony were inadmissible pursuant to CR 56.
2. The Superior Court correctly determined that portions of the former Mayor McKay's testimony were inadmissible pursuant to CR 56.
3. The Superior Court correctly determined that there were no genuine issues of material fact.
4. The Superior Court correctly determined that the City had no responsibility to maintain Appellants' lateral sewer line and that the City did not act negligently with respect to Appellants' lateral sewer line.

IV. STATEMENT OF THE CASE

A. Othello's Public Main Sewer Line.

The City's public sewer system consists of an off-site waste treatment plant and a series of sewage collection pipes (public main sewer lines) underneath public rights-of-way through the City. *Clerk's Papers* ("CP") 226. Private landowners connect to the public sewer system by

running lateral lines from their property to the nearest public main sewer line. *Id.* Each lateral line is connected to the public main line by a coupling. *Id.* The two types of coupling used are a “bell connection” or a “saddle connection.” Both types of couplings sit on top of a hole drilled in to the public main line and into which the private lateral line is inserted. *Id.* The end of the lateral line inserted into the coupling is generally a bent section of pipe commonly referred to as a “sweep.” *Id.* There is no dispute that the sweep, all pipe leading to the sweep, and the coupling are part and parcel of the lateral line. *Id.*; *see also CP 162.* Indeed, Appellants’ witnesses Arthur Gonzalez and Rodney Heist admitted the same. *CP 157, 162, 184.*

Since 1955, the Othello Municipal City Code has defined the “public sewer” as:

[a] sewer in which all owners of abutting properties have equal rights, **and** is controlled by public authority.

Ordinance No. 164, codified at Othello Municipal Code (OMC)

12.04.050, CP 124-125 (emphasis added). Under this definition, the public sewer only consists of those collector lines which meet **both** of the following criteria: (1) it must be a line to which all abutting landowners have equal rights, and (2) it must be controlled by public authority. OMC 12.04.050.

Pursuant to OMC 12.12.110 and Appellants' own expert witness, Len Harms, P.E., landowners abutting Appellants' rental property do not have any right – much less equal rights – to use or connect to any portion of the lateral line extending from Appellants' property to the public main line, or the coupling connecting the lateral line to the public main line. *CP 145-146, 150, 165.* Moreover, the City has no authority to remove, alter, or obstruct the lateral line or the coupling between the Appellants' lateral and the City's public main sewer line. Only the property owners – not the City – use this pipe and place material into the same. *CP 226.*

Accordingly, no portion of the lateral line or the coupling associated with Appellants' property fall within the definition of “public sewer.”

B. Factual Background Regarding Issues with Appellants' Lateral Line

Appellants' rental property, located at 138 S. 10th Avenue in Othello, Washington, was constructed in 1957. *CP 129.* Fifty-seven years later, on March 28, 2014, the lateral line connecting Appellants' rental property to the public main sewer line backed up. *CP 143.* Prior to this date, beginning in 2010, Appellants frequently had problems with slow drains at this property. *CP 141.* However, Appellants never reported any sewer issues to the City until just a few days before it backed up in March 2014. *CP 139-140.* At that time, Appellants only notified Othello staff

that the residence had slow drains, and they requested the City to identify the point at which their lateral line connected to the City's public main line. *CP 227*. Appellants did not inform the City at that time that they believed the problem might be with the lateral line underneath the alley. *CP 147*.

City staff accurately informed Appellants that the City does not have records identifying the locations at which lateral lines connect into the public main sewer line. *CP 227*. The City did check the public main line upstream and downstream from the Appellants' rental property to determine whether the public main sewer line was contributing to Appellants' slow drains. *Id.* City staff confirmed that sewage was not backed up in the public main line, that sewage was flowing freely in the public main line, and that the public main line was not contributing to Appellants' issue. *Id.* City staff communicated this information to Appellants and indicated that the problem was likely with Appellants' lateral line from their property or an issue elsewhere inside the Appellants' property. *Id.*

After speaking with City staff, Appellants tried to clear the line by hiring Reliable Rooter to run a "snake" with a spinning four (4) inch blade through the line. This occurred on March 19, 2014, before Appellants' sewer completely backed up in their line. *CP 142, 170-172*. The snake

exited out the side of the pipe in that area where the lateral line runs underneath the City's right-of-way and became stuck in the lateral line. *CP 172*. According to the plumber who snaked the line (Vince Enriquez of Reliable Rooter), it is possible that the Reliable Rooter snake punctured through the side of the lateral line within the right-of-way due to the age of the lateral line. *CP 173-174, 178*. It is also possible that the ground underneath the lateral line naturally settled over the source of 57 years and caused the line to break. *CP 173*. According to Mr. Enriquez, all sewer pipes will degrade over time and will eventually fail even with just normal use. *CP 173-176*.

After the snake became stuck in Appellants' lateral line on March 19, the property continued to demonstrate slow draining lines, but did not become completely blocked until more than a week later on March 28, 2014. *CP 143*.

Upon learning of the occlusion, the City again checked the public main line to determine if it was a source of the problem. *CP 227*. As before, the sewage was not backed up and was flowing freely along the entire block in which Appellants' property is located. *Id.* Appellants then hired Art Gonzalez of Double A Plumbing to excavate the lateral line to determine the source of the blockage. Rod Heist of Tee Pee Septic ran a camera with a tracer in the lateral line to determine its location on

Appellants' property. *CP 181*. Initially, Mr. Heist identified a broken section of the lateral line just inside Appellants' yard. *CP 183*. Then, during excavation on Appellants' property, Double A Plumbing broke through the lateral line before it reached the alleyway. *CP 155*. After Double A Plumbing broke the lateral line, Mr. Heist ran another camera in the line. Mr. Heist determined that the lateral line was blocked in the alleyway **before** the line reached the City public main line. *CP 182-183*.

At that point, Appellants and Double A Plumbing asked the City to excavate the line in the alleyway and repair the line. *CP 154*. Because the City had previously determined that the City public main was free of obstruction, and OMC 12.16.290 stated that the excavation and pipe installation was Appellants' responsibility, the City declined to perform this work. *CP 227-228; see also CP 157*. The City issued a right-of-way permit to Double A Plumbing to enable them to excavate the lateral line in the alley.

When Double A Plumbing uncovered the source of the blockage in the lateral line within the alley, Reliable Rooter's snake was protruding several feet out of the side of the lateral line at or near the lateral line sweep that eventually entered the connection to the City's public main. *CP 144, 156, 161*. From pictures taken at the time, a break is clearly visible in the lateral line. *CP 144, 161, 167*. Both Appellants and Mr.

Gonzalez testified that the break occurred before the pipe ever reached the City's public main sewer line. *CP 136-137, 162*. Mr. Gonzalez testified that the blockage existed only at the source of the break; i.e., the area where the lateral line enters the lateral line sweep. *CP 158-159, 162*. Mr. Gonzalez specifically admitted that the sweep is part of the lateral line. *CP 162*. Mr. Gonzalez further testified that there was no indication or evidence that the City's public main sewer line was blocked or obstructed in any manner. *CP 159*. After the blocked lateral line was uncovered, Mr. Heist also viewed the pipe. Per Mr. Heist, all he could observe was the lateral line, and only the lateral line was blocked. He did not see any part of the City's public main sewer line. *CP 184*. This corresponds with Mr. Gonzalez's testimony that the only line he uncovered, and the only line that was blocked, was the lateral line. *CP 161*.

The City agreed to complete the excavation down to the City's public main sewer line and install a new saddle connection for the new lateral line that would need to be installed. *CP 138, 140, 228*. The City completed the excavation, provided the saddle, and installed the same at no cost to Appellants. *CP 228*. Thereafter, Appellants' contractor installed the lateral line from the saddle connection to the residence.

C. Procedural History

On February 3, 2015, Appellants filed a Complaint against the City. Therein, Appellants alleged that “the City of Othello failed to properly maintain the sewer line and that failure to properly maintain the sewer line caused [Appellants’] damages.” *CP 3*. In response to the City’s discovery requests, Appellants more specifically claimed that “the City took no action to maintain, service, and repair the sewer line in the public property connecting to [Appellants’] residence.” *CP 204*. Appellants proceeded to claim that, as a result of the failure to maintain, service, or repair the lateral line, the connection to the public main sewer line “disintegrated over time based on age and/or misuse resulting in the sewage backing up into [Appellants’] property.” *Id.*

During the discovery process, Appellants disclosed Leonard Harms, P.E., as an expert witness. Mr. Harms, who is an engineer, testified during his deposition that it was impossible for him to determine whether heavy trucks caused the lateral line in the alley to break because there simply was not enough information to make that determination. *CP 130-131*.

On Appellants’ summary judgment motion, Appellants argued for summary judgment solely on the basis that (1) as a matter of law, the City allegedly had a duty to repair and/or maintain the sewer line from

Appellants' property before it connected to the City's public sewer, and (2) the City did not repair the section of sewer line before it connected to the City's public sewer. Nowhere in their summary judgment pleadings did Appellants argue that the City acted negligently by allowing garbage trucks to drive down the alley behind Appellants' home. *CP 106-110*. In response, the City argued that there was no evidence upon which a trier of fact could conclude that (1) the City negligently designed or constructed any sewer line, (2) that the City's maintenance program constituted negligence, or (3) that the City failed to fulfill any duty to undertake remedial measures. *CP 328-351*.

On the City's motion for summary judgment dismissal, the City argued that (1) Appellants could not create a genuine issue of material fact that the City acted negligently or had absolute control over the conditions that led to the obstruction, and (2) as a matter of law, the City does not own the lateral line connecting Appellants' property to the public main sewer line and cannot be held strictly liable for damages caused by the lateral line. *CP 233-254*. In response, Appellants argued that (1) the City owned Appellants' sewer line at issue, and (2) that there was evidence of negligence on the part of the City, including constructive knowledge with respect to problems with aging infrastructure and the impact heavy traffic had on the aging infrastructure. In support of their argument, Appellants

tried to introduce the declaration testimony of former Mayor Shannon McKay, Arthur Gonzalez, Jr., Vincent Enriquez, and Rodney Heist, who testified as follows:

- (i) **McKay:** “During my term as mayor, a homeowner by the name of Mr. Crosier had a sewage backup into his basement. Upon investigation it was determined that his connection between his house line and the main sewer line had been broken in the alley. Based on the municipal code, we concluded that the City of Othello was responsible for repairing the connection between the residence and the main line but we were not responsible for repairing the line from the house to that connection.” *CP 81-82.*
- (ii) **Gonzalez:** “Based on what I observed of the pipe and the location of the break, the only cause I could find for the sewer line to break was the operation of the heavy garbage trucks over the sewer line over the course of many years. There was nothing the Simmons could have done to cause this damage. If they pipes had been improperly installed when the house was built, they would have broken long before this time just from normal soil settling.” *CP 95.*
- (iii) **Enriquez:** “From past experience I know that new sewer lines don’t typically break on their own unless they are not compacted correctly when originally installed and the pipe breaks in settling. Older lines, like the ones in Othello don’t usually break unless they are subject to wear and tear from tree roots or there is heavy equipment operating over sewer lines. Heavy equipment such as garbage trucks operating over the ground for many years continually push down on the lines and can cause problems even in lines that are up to 10 feet below ground. Since I saw no trees in the alleyway beside the residence and encountered no roots in any of my visits to the Simmons residence, in my experience, the only other activity that could be the cause of the break would be the garbage truck operations going on over top of the sewer line.” *CP 85.*

- (iv) **Heist:** “The only plausible explanation for the condition of the line was the repeated pounding it received from the heavy garbage trucks driving over it. This was also not the only line in Othello that I have found damaged from operation of heavy equipment.” *CP 88.*

In response to the Appellants’ argument regarding the garbage trucks, the City introduced testimony from Kurt Holland, an engineer with over 20 years of experience. Mr. Holland testified:

The design of a municipal sewer system is a complex matter that requires the services of an engineer using established engineering standards accepted in the profession.

In order to determine whether a garbage truck driving over a gravel alley could have caused a sewer line or coupling to break 8 to 10 feet underground, an engineer would need to know (1) the type of soil and energy absorbing/dispersing qualities of the soil above the lateral line; (2) subsurface water levels; (3) calculations of the force created by the weight, number, and frequency of vehicles driving in the alley; (4) specifications of the piping; (5) the weight of the soil above the lateral line; and (6) an analysis of existing adjacent sewer laterals that had not failed. Using this information, the engineer would need to run a number of calculations to determine whether the force created by the vehicles was strong enough to overcome the structural integrity of the pipe and/or coupling. Even with this information and conducting these calculations, it would be nearly impossible to determine with any degree of confidence whether a garbage truck driving down a road could cause an underground sewer line to fail.

CP 379-380. Respondents did not present any expert witness testimony to contradict Mr. Holland’s testimony.

The trial court properly excluded the above statements of Mr. McKay, Mr. Enriquez, Mr. Heist, and Mr. Gonzalez on the grounds that their testimony constituted hearsay, contained inadmissible legal conclusions, exceeded the scope of lay testimony, lacked an adequate foundation, was impermissibly speculative, and conflicted with prior testimony.

After reviewing all of the pleadings and hearing oral argument of counsel, the trial court denied Appellants' motion for summary judgment, and granted the City's motion for summary judgment dismissal. This appeal followed.

V. ARGUMENT

A. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY FROM THE DECLARATIONS OF APPELLANTS' WITNESSES

1. Standard of Review for Evidentiary Rulings

Normally, the Court of Appeals reviews a trial court's evidentiary rulings for an abuse of discretion. *Peralta v. State*, 191 Wn.App. 931, 951, 366 P.3d 45 (2015); *Mut. Of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn.App.702, 728, 315 P.3d 1143 (2013). Under the abuse of discretion standard, which is highly deferential to the trial court, the reviewing court will overturn the trial court's ruling on the admissibility of evidence only if its decision was manifestly unreasonable, exercised on

untenable grounds, or based on untenable reasons. *Mut. of Enumclaw Ins. Co.*, 178 Wn.App. at 728.¹

The trial court properly excluded testimony from several of Appellants' witnesses pursuant to CR 56(e), which provides in relevant part:

Supporting and opposing affidavits **shall** be made on personal knowledge, **shall** set forth such facts as would be admissible in evidence, and **shall** show affirmatively that the affiant is competent to testify to the matters stated herein.

CR 56(e) (emphasis added). The party opposing a motion for summary judgment may not rely on mere speculation, denials, opinions, or conclusory statements, but rather must set forth specifics indicating material facts for trial. *See e.g., Bowers v. Marzano*, 170 Wn.App. 498, 505, 290 P.3d 134, 138 (2012).

Where an affidavit contains inadmissible evidence, the Court should strike the affidavit (or the offending portion of the affidavit) from the record. *See e.g., Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (trial court properly excluded portions of expert affidavits which contained inadmissible evidence). "A court may not consider inadmissible evidence when ruling on a motion for summary judgment."

¹ The Supreme Court has held that evidentiary rulings made in conjunction with a summary judgment motion are reviewed *de novo*. *See Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

King County Fire Prot. Dist. No. 16 v. Hous. Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Appellants challenge the Superior Court's decision to strike portions of the Declarations of former Othello Mayor Shannon McKay, as well as the Declarations of Enriquez, Heist, and Gonzalez. For the following reasons, the Superior Court did not err when it excluded portions of these witnesses' Declarations as inadmissible.

2. **Testimony of Former Mayor McKay was Properly Excluded because it was Hearsay, Lacked an Adequate Foundation, was Overly Speculative, and Contained an Improper Legal Conclusion**

The McKay Declaration contained the following statements:

During my term as mayor, a homeowner by the name of Mr. Crosier had a sewage backup into his basement. Upon investigation it was determined that his connection between his house line and the main sewer line had been broken in the alley.

CP 81. His Declaration also contained the statement that “[B]ased on the municipal code, we determined that the City of Othello was responsible for repairing the connection between the residence and the main line . . .”.

CP 81-82.

The Superior Court correctly excluded these statements because they contained hearsay statements, lacked an adequate foundation, were speculative, and contained improper legal conclusions.

i. Hearsay

Hearsay is an oral or written assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801. Hearsay evidence is not admissible unless it fits under a recognized exception to the hearsay rule. ER 802; *State v. Athan*, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). Hearsay statements which do not fit under a recognized exception to the hearsay rule must be excluded from supporting affidavits pursuant to CR 56(e). *See e.g., Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.App. 787, 792, 150 P.3d 1163, 1165 (2007).

The McKay Declaration asserts that an investigation determined the “connection” in Mr. Crosier’s line broke in the alley. However, McKay did not conduct the investigation or participate in it, and thus his statement was actually based upon statements made by other unidentified individuals regarding the cause and location of Mr. Crosier’s backup. In other words, McKay was trying to offer an assertion of a third party as his own statement. Since the statement was offered to prove the truth of the matter asserted (i.e., that the connection broke in the alley), this statement constitutes hearsay. Furthermore, it did not fall within any of the recognized exceptions. The fact that McKay’s testimony concerned an investigation allegedly performed by City employees during his tenure as

mayor does not change the fact that he is still attempting to offer someone else's assertion as his own. Accordingly, this statement constituted inadmissible hearsay.

ii. Lacking an Adequate Foundation

As a general rule, a witness must testify on the basis of facts or events that the witness has personally observed. *See* ER 701 (requiring that lay witness's testimony be based on personal knowledge); *Hedlund v. White*, 67 Wn.App.409, 836 P.2d 250 (1992) (holding that trial court properly excluded testimony about the cost of draining silt from a slough, where the witness had no personal knowledge and lacked the qualifications of an expert). CR 56(e) specifies that affidavits must be based upon personal knowledge. CR 56(e); *see also Moore v. Hagge*, 158 Wn.App. 137, 157, 241 P.3d 787 (2010).

McKay's statement regarding the cause of Mr. Crosier's sewage backup was also inadmissible because McKay lacked an adequate foundation to testify regarding the investigation. As already noted, McKay did not assert that he personally investigated or oversaw the investigation at Mr. Crosier's house, or that he determined where the break in the line occurred. The fact that he was Mayor at the time of the investigation did not convey upon McKay the necessary personal knowledge to testify to the cause or location of the break under ER 701.

iii. Speculative

Under Evidence Rule 701, a lay witness may testify to opinions or inferences only when they are (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific, technical, or other specialized knowledge within the scope of ER 702. ER 701. Thus, in order to be admissible under ER 701 (and therefore admissible under CR 56(e)), a lay person's opinion must be "rationally based." *State v. Fallentine*, 149 Wn.App. 614, 624, 215 P.3d 945 (2009) (holding that with respect to a witness opinion, there must be a "substantial factual basis supporting the opinion"). Furthermore, when analyzing the admissibility of lay opinion testimony, the courts consider whether there is a rational alternative answer to the question addressed by the witness's opinion because in such a circumstance the opinion poses an even greater potential for prejudice. *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999), *superseded on other grounds by statute* (noting that the areas where courts have consistently upheld the admission of lay opinions are speed of a vehicle, degree of sobriety in a driving while intoxicated case, the value of one's own property, and the identification of a person from a videotape – in short, all areas where the opinion is based on the personal observations of the witness).

Again, the McKay Declaration did not offer any facts demonstrating he personally inspected Crosier's sewage backup. Nor did it provide any factual basis supporting his statement that the connection had actually broken in the alley.

Likewise, there is no evidence from which it could be inferred that McKay was capable of forming an admissible opinion on his own in that regard. McKay's opinion regarding the cause of the sewage backup on Mr. Crosier's property was not rationally based on his own perceptions – but rather was based on hearsay relayed to him by other individuals. The Court properly struck this statement as too speculative pursuant to ER 701.

iv. **Improper Legal Conclusion**

An affidavit is to be disregarded to the extent that it contains legal conclusions. *Keates v. City of Vancouver*, 73 Wn.App. 257, 265, 869 P.2d 88 (1994) (witness declaration stating alleged conduct was “callously outrageous” was a legal conclusion that must be disregarded on summary judgment); *see also Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. 893, 899, 700 P.2d 1164 (1985) (holding that on summary judgment a witness could not properly testify to the meaning of certain statutes, whether they applied to the case, or whether the defendant violated the statutes). A conclusion of law is a statement that offers legal opinions on a legal issue. *Id.*

Under this general rule, the trial court will disregard opinions on questions of law. This includes opinions that simply amount to a legal conclusion that follows from applying the law to the facts. *See Tortes v. King County*, 119 Wn.App. 1, 13, 84 P.3d 252 (2003); *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. at 899.

McKay's statement that "[B]ased on the municipal code, we determined that the City of Othello was responsible for repairing the connection between the residence and the main line" is an inadmissible legal conclusion. Whether or not Othello's municipal code required the City to repair the connection between the residence and the main line is ultimately a legal conclusion for the Court to resolve. *See Keates*, 73 Wn.App. at 265; *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985). Under CR 56(e), McKay could not properly testify regarding the legal effect of the City's ordinance. *See Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. at 899 (holding that on summary judgment a witness could not properly testify to the meaning of certain statutes).

Moreover, even if McKay's statements were otherwise proper – which it is not – it is irrelevant. McKay only claims that Mr. Crosier's "connection" broke. In this case, Appellants' "sweep," not their "connection," broke. Per OMC 12.16.290, the City is obligated to install the coupling connection but nothing else. The fact the City installed a new

coupling for Mr. Crosier is not probative of whether the City was obligated to replace Appellants' "sweep" – which is an entirely different structure.

3. **Testimony of Appellants' Plumbers was Properly Excluded as Exceeding the Scope of ER 701, Lacking an Adequate Foundation, Being Too Speculative, and Conflicting with Prior Testimony**

On summary judgment, Appellants also submitted Declarations from several plumbers who had performed work at their property: Vincent Enriquez, Rodney Heist, and Arthur Gonzalez. The Court excluded portions of each of these declarations on multiple grounds. On appeal, Appellants contend that these witnesses' testimony was improperly excluded because all three plumbers had sufficient training and experience to qualify as expert witnesses, their experience as plumbers provided an adequate foundation for their opinions, and their testimony did not conflict with their previous deposition testimony.

The Court properly excluded testimony from each of these witnesses because (i) none of these witnesses actually witnessed Appellants' lateral line break as any vehicle drove down the alley, and (ii) none of them had the necessary background and training necessary to offer an expert opinion as to whether heavy trucks could have caused the lateral line located 10 feet underground to break. Moreover, both the Enriquez

Declaration and the Gonzalez Declaration contained testimony that impermissibly contradicted their previous testimony.

i. **The Enriquez Declaration Contained Inadmissible Testimony**

Mr. Enriquez, the owner of Reliable Rooter, has been a plumber for 20 years. He provided testimony as a fact witness who snaked the Appellants' clogged sewer lines several times. *CP 83*. The first full paragraph on page 3 of the Enriquez Declaration stated:

From past experience I know that new sewer lines don't typically break on their own unless they are not compacted correctly when originally installed and the pipe breaks in settling. Older lines, like the ones in Othello don't usually break unless they are subject to wear and tear from tree roots or there is heavy equipment operating over sewer lines. Heavy equipment such as garbage trucks operating over the ground for many years continually push down on the lines and can cause problems even in lines that are up to 10 feet below ground. Since I saw no trees in the alleyway beside the residence and encountered no roots in any of my visits to the Simmons residence, in my experience, the only other activity that could be the cause of the break would be the garbage truck operations going on over top of the sewer line.

CP 85.

The Court correctly excluded this paragraph because it (i) constitutes impermissible lay opinion beyond the scope of ER 701, (ii) Mr. Enriquez is not qualified to give expert testimony pursuant to ER 702 as to whether garbage trucks could cause the lateral line to break, (iii) it lacks an adequate foundation and is too speculative to be admissible, and (iv)

the testimony directly conflicts with Mr. Enriquez's prior sworn deposition testimony.

First, this testimony exceeds the scope of ER 701 lay witness opinion testimony because it went beyond opinions that were rationally based on Mr. Enriquez's perceptions of Appellants' sewer line several days after it broke. *See* ER 701.² He did not actually see the subsurface line break as a truck drove over it or personally observe any truck actually driving in the alley. Rather, Mr. Enriquez based his testimony solely on his assumption that garbage trucks can cause sewer lines to break. This testimony falls squarely within the province of an expert witness with scientific, technical, or other specialized knowledge, such as an engineer. *CP 379-380*. Such an opinion requires analysis of many different factors, including: (1) the soil type and energy absorbing/dispersing qualities of the soil above the lateral line, (2) subsurface water levels, (3) calculations of the force created by the weight, number, and frequency of vehicles driving in the alley, (4) specifications of the piping, (5) the weight of the soil above the lateral line, and (6) an analysis of existing adjacent sewer laterals that had not failed. *Id.* Thus, only an engineer can form such an opinion. *Id.* As admitted by Appellants' engineer expert witness, there

² A lay witness can only provide opinion testimony if the opinion is "(a) rationally based on the perception of the witness, ... and (c) not based on scientific, technical, or other specialized knowledge within the scope of ER 702."

was not sufficient information available to make any conclusion as to whether a garbage truck could have broken Appellants' sweep. *CP 130-131*.

On the record before the Superior Court, Mr. Enriquez did not have the education and experience required by ER 702 to opine whether a garbage truck could possibly break a sewer line 10 feet underground. The fact that Mr. Enriquez has general training in the field of plumbing is not sufficient training to offer such an opinion.³ Appellants did not identify Mr. Enriquez as an expert witness because they recognized he was not qualified to testify as an expert. Yet they tried to improperly introduce unqualified expert testimony through Mr. Enriquez's Declaration – which directly contradicted Appellants' expert witness testimony of Len Harms, P.E. *CP 130-131*.⁴ Mr. Enriquez's supposed expert testimony, which is not based on any scientific process or other accepted calculation, was properly struck from the record. See ER 702; see also CR 56(e) (affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein).

³ Indeed, Mr. Enriquez was never disclosed as an expert witness in response to the City's discovery nor did he prepare an expert report.

⁴ Appellants' expert witness - Leonard Harms, P.E., a licensed engineer - is actually qualified to testify as to whether the garbage trucks could have broken a line 10 feet below ground. Mr. Harms expressly stated during his deposition that it was impossible to determine whether the garbage truck traffic actually caused any damage. *CP 130-131*. Appellants unsuccessfully tried to get around this unfavorable expert testimony by presenting unqualified testimony on this issue from lay witnesses in violation of ER 701.

Mr. Enriquez's testimony was also properly excluded on the grounds that it was overly speculative and lacked an adequate foundation. Mr. Enriquez failed to demonstrate that he had personal eye witness knowledge of: (i) factors which caused line breaks in Othello in the past, (ii) whether garbage trucks could cause a lateral line 10 feet underground to break, and (iii) whether garbage trucks in fact caused Appellants' line to break. Likewise, he did not provide any factual basis to support his statements. In short, these statements were completely speculative and they were property excluded.

Finally, the Enriquez Declaration contained statements that conflicted with his prior testimony. A party cannot properly create an issue of fact by presenting a declaration, drafted by their legal counsel, that contradicts a witness's prior sworn deposition testimony. *Davis v. Fred's Appliance*, 171 Wn.App. 348, 357, 287 P.3d 51 (2012) (holding that a declaration cannot be used to create an issue of fact by contradicting prior sworn deposition testimony); *see also Robinson v. Avis Rent a Car Sys.*, 106 Wn.App. 104, 121, 22 P.3d 818 (2001) ("When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.").

During his deposition, Mr. Enriquez stated that it was possible that the Reliable Rooter snake punctured through the side of the lateral line within the right-of-way due to the age of the lateral line. *CP 173-174, 178*. He also stated that it is possible that the ground underneath the lateral line naturally settled over the course of 57 years and caused the line to break. *Id. at 173*. According to Mr. Enriquez, **all** sewer pipes will degrade naturally over time and will eventually fail even with just normal use. *CP 173, 175-176*.

However, Mr. Enriquez's Declaration directly contradicted this previous testimony by claiming that older sewer lines don't break unless they are subject to wear and tear from tree roots or heavy equipment operating over sewer lines, and asserting that the only cause of the break in Appellants' sewer line was the garbage truck operations. *CP 85*. Appellants could not properly create an issue of fact by presenting a declaration that contradicted Mr. Enriquez's prior sworn deposition testimony.

ii. The Heist Declaration Contained Inadmissible Testimony

Mr. Heist is the manager for Tee Pee Septic, a company that services sewer and septic systems. Mr. Heist is not an engineer. In his Declaration, Mr. Heist stated "the only plausible explanation for the

condition of the line was the repeated pounding it received from the heavy garbage trucks driving over it.” *CP 88*. The Heist Declaration also stated that this was not the only line in Othello that was damaged from operation of heavy equipment, as about 2-3 years prior Mr. Heist was called out to some other houses in Othello where sewer lines under the alleyway had collapsed. *CP 88*.

First, Mr. Heist’s testimony exceeded the scope of ER 701 lay witness testimony because there was no evidence that he actually saw the Appellants’ lateral line break as a vehicle drove down the alley. A lay witness cannot simply look at a pipe 10 feet underground and offer an opinion as to whether a truck driving above the ground broke the line. Mr. Heist’s opinion is merely an assumption, based on his observations at the property several days after the pipe had already failed.

Moreover, just as in the case of Mr. Enriquez, Mr. Heist was not qualified under ER 702 to give an expert opinion on what causes a lateral line to break, or what specifically caused Appellants’ lateral line to break in this instance. He also was not qualified to give an opinion as to what caused a different line to break 2-3 years prior in a totally different location. These are issues that only an engineer can properly offer an opinion on. *See CP 379-380*. However, Mr. Heist was not identified as an expert nor was any expert report ever provided. Like Mr. Enriquez, his

testimony also contradicts the expert testimony of Appellants' own engineering expert, Len Harms, P.E. *CP 130-131*. On the record before the Court, Mr. Heist did not possess the necessary education or specialized knowledge to be able to offer a competent expert opinion as to whether the garbage truck activity could have possibly caused Appellants' line to break.

iii. The Gonzalez Declaration Contained Inadmissible Hearsay

Mr. Gonzalez is the owner of Double A Plumbing, a company which performs light commercial, remodel, and new construction plumbing installation. *CP 91*. Mr. Gonzalez excavated Appellants' property after Reliable Rooter visited Appellants' property and the snake became lodged in the sewer line. *CP 92-93*. Mr. Gonzalez is not an engineer.

Mr. Gonzalez's Declaration read in relevant part:

Based on what I observed of the pipe and the location of the break, the only cause I could find for the sewer line to break was the operation of the heavy garbage trucks over the sewer line over the course of many years. There was nothing the Simmons could have done to cause this damage. If the pipes had been improperly installed when the house was built, they would have broken long before this time just from normal soil settling.

CP 95.

Similar to Mr. Heist and Mr. Enriquez, Mr. Gonzalez's testimony regarding the cause of the break in Appellants' sewer line exceeds the scope of permissible lay witness testimony under ER 701 because it goes beyond offering opinions that are rationally based on Mr. Gonzalez's perceptions. Mr. Gonzalez did not actually see the Appellants' lateral line break as any vehicle drove down the alley, and thus his testimony is not rationally based on his lay perceptions as required by ER 701. *See* ER 701.

Just like Enriquez and Heist, Mr. Gonzalez, who is not an engineer, was not qualified to give an expert opinion on what generally causes a lateral line to break, or what specifically caused Appellants' lateral line to break in this instance under ER 702. *See CP 379-380.* Indeed, with respect to Appellants' theory that garbage trucks caused their line to break, Mr. Gonzalez specifically testified "**I'm not a professional, I can't say that.**" *CP 371.* He was also not qualified to give an opinion as to whether the pipes would have broken much earlier due to normal soil settling if they had been installed improperly more than 50 years ago.⁵ On the record before the Court, Mr. Gonzalez did not possess the necessary

⁵ Just as in the case of Mr. Enriquez and Mr. Heist, Mr. Gonzalez was never identified as an expert, nor was an expert report ever provided with respect to Mr. Gonzalez in response to the City's discovery.

qualifications or background to offer this expert opinion testimony under ER 702.

Mr. Gonzalez's lay testimony was also inadmissible because it was overly speculative and lacked an adequate foundation. Mr. Gonzalez offered no facts demonstrating that he had personal knowledge that garbage trucks in fact caused the line to break, or any support for his supposed opinion that the garbage trucks caused the break. He also failed to provide any factual basis to support his claim that the pipes would have broken much earlier from normal soil settling if the pipes had been installed improperly. These statements were properly struck for lack of adequate foundation and for being too speculative to be admissible. ER 701; CR 56(e).

Finally, Mr. Gonzalez's Declaration improperly contradicted both his prior sworn testimony, as well as that of Len Harms, P.E. (Appellants' engineer expert witness). During his deposition, Mr. Gonzalez testified that it was unknown why Appellants' lateral sewer line broke, and that it was also unknown whether the line broke due to anything the City did or did not do. *CP 163*. However, in direct contradiction of that testimony, Mr. Gonzalez's Declaration stated "the only cause I could find for the sewer line to break was the operation of the heavy garbage trucks over the sewer line over the course of many years." *CP 95*.

As previously discussed, a party opposing summary judgment cannot create an issue of fact by producing a declaration that contradicts prior sworn deposition testimony. *Robinson v. Avis Rent a Car Sys.*, 106 Wn.App. at 121; *Davis v. Fred's Appliance*, 171 Wn.App. at 357. In light of Mr. Gonzalez's deposition testimony, Appellants could not properly rely on Mr. Gonzalez's statement that the only cause of the break in the sewer line was the heavy garbage truck activity to defeat the City's Motion for Summary Judgment.

For the foregoing reasons, the Superior Court properly excluded the testimony of Appellants' witnesses.

B. SUMMARY JUDGMENT DISMISSAL OF APPELLANTS' CLAIMS WAS APPROPRIATE

1. Summary Judgment Standard

Issues of law decided on summary judgment are reviewed de novo. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994). Under this standard of review, the appellate court performs the same inquiry as the trial court. *McDevitt v. Harbor View Medical Center*, 179 Wn.2d 59, 65, 316 P.3d 469 (2013). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

To avoid summary dismissal, the non-moving party must lay forth evidentiary facts that raise genuine issues of material fact. *Overton v.*

Consol Ins. Co., 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002). A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact. *Id.*; *see also Baldwin v. Silver*, 165 Wn.App. 463, 471, 269 P.3d 284 (2011). Additionally, “genuine issues of material fact cannot be created by a declarant who submits an affidavit that contradicts his or her own deposition testimony.” *Selvig v. Caryl*, 97 Wn.App. 220, 225, 983 P.2d 1141 (1999).

It is well established in Washington that “a city is not an insurer of the condition of its sewers. . . .”. *Kempter v. City of Soap Lake*, 132 Wn.App. 155, 160, 130 P.3d 420 (2006); *see Nejin v. City of Seattle*, 40 Wn.App. 414, 419, 698 P.2d 615 (1985). Accordingly, to survive summary judgment dismissal, Appellants had to prove there was a genuine issue of material fact that the City failed to exercise reasonable care in the maintenance of the public sewer. *Kempter*, 312 Wn.App. at 160-161. Alternatively, the Appellants had to demonstrate evidence upon which a reasonable juror could conclude the City had “absolute control over the conditions that led to the backflow. . . .”. *Id.* For the reasons set forth below, Appellants failed to demonstrate any genuine issues of material fact, and the City was entitled to summary judgment dismissal as a matter of law.

2. **Summary Judgment Dismissal of Appellants' Claims was Appropriate Because the City did not have Any Duty to Repair the Appellants' Sewer Line**

Appellants' claim in this case before the trial court was that the City was liable for damage to Appellants' sewer line either because (1) the City negligently damaged the line which resulted in damage to the remainder of the home, (2) the City had absolute control over the condition that caused the break and sewage backflow, or (3) the City owned that portion of the sewer line that failed, and was therefore obligated to incur all costs to repair the same and for subsequent damage to Appellants' home. As a matter of law, all three arguments were properly dismissed on summary judgment.

i. **There is no Evidence of Negligence**

To survive summary judgment on a claim of negligence, Appellants had to create a genuine issue of material fact on each of the following elements: (1) the City owed Appellants a duty of care; (2) the City breached that standard of care by failing to act as a reasonable person would under the circumstances; (3) that such breach was the proximate cause of injury to Appellants; and (4) damages. *Smith v. Washington State Dept. of Corrections*, 189 Wn.App. 839, 846, 359 P.3d 867 (2015); *Kempter*, 132 Wn.App. at 158 (citing *Miller v. Jacoby*, 145 Wn.2d 65, 74,

33 P.3d 68 (2001)); and *Cox v. Malcom*, 60 Wn.App. 894, 897, 808 P.2d 758 (1991).

Here, there is absolutely no evidence that the City breached any duty of care owed to Appellants, or that any breach of duty caused the blockage of Appellants' lateral line within the public right-of-way. The undisputed witness testimony was that:

- The City's public main sewer line was not blocked in any way. *CP 227.*
- There is no evidence that the City's public main sewer line was defective in any manner. *CP 135-136.*
- The blockage was in the lateral line sweep, and at least a couple of feet away from the City's public main line. *CP 161-162, 184.*
- The lateral line sweep is part of Appellants' lateral line. *CP 161-162, 184.*
- Lateral lines and connections to the City's public main line cannot be serviced, and maintenance cannot otherwise be performed thereon by the City. *CP 130, 166.*
- It is not within the industry standard for City sewer maintenance programs to provide for servicing/maintenance of lateral lines. *CP 131.*
- Appellants cannot identify a single thing that the City could have done differently that would have prevented the lateral line from failing. *CP 135, 161-162.*
- Appellants do not have any evidence that the lateral line connection to the City's public main sewer line was misused in any way. *CP 135.*

- From an engineering perspective, it is impossible in this case to conclude that the blockage in the lateral line was the result of anything the City did or did not do. *CP 132*.
- Appellants' expert witness, Len Harms, P.E., testified that it is impossible to determine whether garbage trucks driving down the alley could have broken the lateral line. *CP 130-131*.

Moreover, there is no evidence that the City failed to take appropriate action in providing a new connection to the City public main line for the new lateral line installed by Appellants. It is undisputed that the City installed a saddle coupling for Appellants' new lateral line to connect into. *CP 138, 140, 228*. It is also undisputed that the City did not charge Appellants for the cost of the coupling or its installation. *Id.* On this undisputed record, summary judgment dismissal of Appellants' claim for negligence was appropriate.

ii. There is No Evidence that the City had Absolute Control Over the Conditions that Led to the Backflow

Appellants also cannot create an issue of fact whether the City had “absolute control over the conditions that led to the backflow . . .”. As recognized in *Kempton v. City of Soap Lake*, to prove liability under this theory, Appellants must prove the three *res ipsa loquitur* criterion: “(1) that the injury-producing occurrence is not the kind that ordinarily happens without someone’s negligence; (2) that the injury was caused by some agent or instrumentality under the exclusive control of the

defendant; and (3) the injury-producing occurrence is not due to any action by the plaintiff.” *Kempton*, 132 Wn.App. at 159-160.

Here, there is no evidence that the obstruction in the Appellants’ lateral line would occur only as a result of negligence. Rather, the evidence shows that the lateral line which failed was 57 years old, and that service along the lateral line to the property had been experiencing “slow drainage” for several years prior to the complete blockage. *CP 129, 140 - 142*. Appellants’ witnesses admit that sewer lines do not last forever and can fail over time with normal use. *CP 173-177, 375-376*.

Most importantly, there is no evidence from which a jury could conclude that the injury (a broken lateral line, sewage backup, and attendant costs) was caused by an instrumentality under the exclusive control of the City. First, the testimony establishes unequivocally that the blockage occurred outside the City’s public main sewer line. *CP 136-137, 158-159, 161-162, 184*. Indeed, the blockage occurred several feet before the lateral line entered the City’s public main line. *CP 136-137, 158-159, 161-162, 184*.

In addition, the blockage consisted of material coming exclusively from the Appellants’ property – not the City. As testified to by Mr. Gonzalez and Mr. Harms, the Appellants’ private residence was the only property connected to the lateral line that failed. *CP 129-130, 145-146*,

150, 165, 226. The only way to introduce material into any part of the lateral line is from Appellants' property. *Id.* How can the City be regarded as having absolute control over something when the only persons that have the ability to use the lateral line are the property owners? The fact of the matter is that the City has little to no ability to control how the Appellants use their lateral line.

Further evidencing the fact that the City does not have control over the lateral line to the exclusion of all others is the fact that Appellants hired two plumbers and a septic tank professional to insert snakes and cameras into the lateral line within the public right-of-way. *CP 141-142, 170-172, 181, 155.* If the lateral line were under the City's absolute control, Appellants would not have been able to access the lateral line under the right-of-way.

This analysis does not change even if the Court were to consider the portion of lateral line within the public right-of-way to be part of the public main – which it is not. Regardless of whether or not the lateral line within the right-of-way is part of the public main line, the City does not have exclusive control over lateral lines within the public right-of-way for reasons discussed above. As recognized by the Washington Court of Appeals and courts from other jurisdictions:

Any number of inappropriate objects may be, and are, forced into a public sewer system at any given time with potentially catastrophic results . . . In fact, it is this very public access to the sewer line which defeats the requisite degree of control and renders the doctrine of res ipsa loquitur inapplicable

Kempter, 132 Wn.App. at 160 (citing *City of New Smyrna Beach Utilities Commission v. McWhorter*, 418 So.2d 261, 264 (Fla. 1982)); *see also Hughes v. King County*, 42 Wn.App. 776, 782, 714 P.2d 316 (1986). The fact remains that the only property that can use the lateral line within the right-of-way is the Appellants' property, and that the only items placed in that line are placed there by Appellants and those people using Appellants' property – not the City. *CP 129-130, 145-146, 150, 165, 226.*

As a matter of law, Appellants have not created a genuine issue of fact as to their theories of negligence or res ipsa loquitur. Summary judgment dismissal is appropriate.

iii. As a Matter of Law, the City does not Own the Lateral Line Sweep that Failed

Since 1955, that portion of the sewer owned by the City – i.e., the “public sewer” – has been defined as:

[a] sewer in which all owners of abutting properties have equal rights, **and** is controlled by public authority.

OMC 12.04.050 (emphasis added), CP 124-25. This definition has not been modified since being enacted in 1955. Determination of whether any

given pipe falls within this definition is a question of law, particularly where, as here, the operative facts are not in dispute.

Under this definition, the public sewer only consists of those collector lines which meet **both** of the following criteria: (1) to which all abutting landowners have equal rights, **and** (2) is controlled by public authority. The lateral line extending from Appellants' property does not meet either of these criteria, much less both. Accordingly, the lateral line is not a "public sewer."

The evidence in this case unequivocally establishes that no landowner other than Appellants have the right to use the lateral line underneath the alley which runs from Appellant's residence to the City's public main line. Appellants' expert witness admitted that no other property owner has a right or ability to connect or otherwise use any portion of the subject lateral line. *CP 129-130, 145-146, 150, 165, 226.* Appellants both admit that (1) that portion of the lateral line in the alley is only used by the Appellants, and (2) abutting landowners do not connect to any part of the lateral line. *CP 145-146.* Appellants' contractor also admitted that the lateral line only serves Appellants' property. *CP 165.*

This testimony is in line with the Othello Municipal Code. Pursuant to OMC 12.12.110, landowners abutting Appellants' property do not have any right – much less equal rights – to use or connect to any

portion of the lateral line extending from Appellants' property to the public main line, or the coupling connecting the lateral line to the public main line.

In addition, the City has no authority to remove, alter, or obstruct the lateral line or the coupling. Only the property owners – not the City – use this pipe and place material into the same. *CP 129-130, 145-146, 150, 165, 226.* Accordingly, no portion of the lateral line or the coupling associated with Appellants' property fall within the definition of “public sewer.” As such, the City does not own the lateral line within the right-of-way.

iv. **As a Matter of Law, the City is not Obligated to Repair a Lateral Line Sweep or Coupling Connection to the Sewer Main**

Appellants also argue that the City had an obligation to undertake all repairs to the lateral line sweep that failed and is therefore liable for the costs Appellants incurred to repair the same. This is incorrect. The version of OMC 12.16.290 in effect in March and April 2014 clearly stated that:

12.16.290 Side sewer connection by public works department. Connections of building sewer lines to the municipal sewer system shall be performed by the public works department of the city, under the supervision of the utilities superintendent. The city shall furnish and install the riser, saddle, or other connecting section at the

municipal sewer line; provided however, that **all excavation, trench shoring, piping, bedding, backfill and restoration shall be performed by the applicant for such service** in a manner approved by the public works department of the city.

OMC 12.16.290 (emphasis added), *since modified, CP 217-222.*

This code provision is not restricted by its terms to only new connections. Rather, it plainly states it applies to “connections” without distinguishing between new connections and reconnections. The plain language of the ordinance in effect at the time of the events applies to all connections.

Under this OMC, the Appellants – not the City – were obligated to perform all excavation, trench shoring, piping, backfilling, and restoration. The only work the City was required to perform was installing the coupling on the City’s public main sewer line. It is uncontested that the City completed the work required by OMC 12.16.290. *CP 228.*

Even if the prior OMC only applied to new connections – which it does not – this does not mean the prior OMC requires the City to excavate and install a complete private sewer line, or even a sweep. Nothing in the language of OMC 12.16.290 requires such an action.

3. Appellants’ Arguments on Appeal Should be Wholly Rejected

On appeal, Appellants only argue for reversal of the trial court decision on the grounds that (1) an issue existed regarding who owned the sewer line that broke; (2) the trial court applied the wrong version of OMC

12.16.290 in regards to who was responsible for excavation, piping, and restoration for reconnection of private sewer lines; (3) the trial court was confused by the use of the term “lateral line”; (4) the common law required the City to replace the failed sweep; and (5) public policy – but no case law, statute, or ordinance – supports requiring municipalities to repair private sewer lines operated only by private landowners. This Court should reject each of Appellants’ arguments.

i. **As a Matter of Law, Appellants Owned the Sewer Line that Broke and were Responsible for Repairing the Same**

Determining who owned the lateral line sewer sweep that broke is a question of law – not fact – because it involves interpreting the Othello Municipal Code. *Eugster v. City of Spokane*, 115 Wn.App. 740, 745, 63 P.3d 841 (2003) (municipal code interpretation is a question of law). As discussed above, the City only owns that portion of the sewer to which all persons have equal access **and** which is controlled by the City. Here, it is undisputed that (1) under the Othello Municipal Code, Appellants are the only persons who could use the lateral line sewer sweep (OMC 12.12.110), (2) the Appellants are the only persons who actually used the sweep, and (3) that Appellants controlled the use of the lateral line sweep. *CP 129-130, 145-146, 150, 165, 226*. Accordingly, as a matter of law, the sweep was not the City’s “public sewer.”

Appellants also appear to argue that a question of fact exists whether the City owned the lateral line sewer sweep because there was evidence that the City had re-installed a coupling connection in the past. This argument should be rejected for several reasons. First, whether the City re-installed a coupling connection under different circumstances in the past has no bearing on whether Appellants' lateral line sewer sweep fell within the definition of "public sewer" under the Othello Municipal Code. The fact remains only Appellants had any right to use the sweep, and therefore it is not a "public sewer."

Moreover, the former mayor's testimony on this point is inadmissible and irrelevant. It is merely relaying inadmissible hearsay communicated to the ex-mayor by an unidentified third person. In addition, the ex-mayor's testimony was only that the City re-installed the connection – not that the City installed a lateral line or sweep. It is not probative of whether the City installed a sweep or of the City's legal obligations under OMC 12.16.290 or otherwise.

ii. The Trial Court did not Apply Revised OMC 12.16.290

Appellants claim that the trial court incorrectly applied OMC 12.16.290 as revised after Appellants' sewer line became blocked. This is false. The City did not cite or argue that revised OMC 12.16.290 applied.

The only ordinance the City cited and argued before the Court was the previous version of OMC 12.16.290, which stated:

12.16.290 Side sewer connection by public works department. Connections of building sewer lines to the municipal sewer system shall be performed by the public works department of the city, under the supervision of the utilities superintendent. The city shall furnish and install the riser, saddle, or other connecting section at the municipal sewer line; provided however, that all excavation, trench shoring, piping, bedding, backfill and restoration shall be performed by the applicant for such service in a manner approved by the public works department of the city.

CP 217-222 (emphasis added; see also Verbatim Report of Proceedings (RP) 41-42. As the City never argued that the revised OMC applied, and never presented the revised OMC to the Court for its consideration, there is no basis to believe that the Court relied on the revised OMC in ruling on summary judgment. Appellants' assertion to the contrary is nothing more than speculation.

Moreover, Appellants' assertion that Terry Clements – the City's Public Works Director – testified that the previous OMC 12.16.290 only applied to new connections is both false and irrelevant. As discussed above, the plain language of the previous OMC is that it applies to all “connections.” No language restricts it to new connections. What the Public Works Director “believes” is irrelevant to the meaning of the ordinance, just as what a Washington State employee believes an RCW to

mean is irrelevant to its meaning. *See Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2005) (statutory interpretation by employee of state Department of Labor and Industries was not entitled to deference). The trial court expressly noted this at the hearing. *RP 35, ln. 5-6.*

Lastly, Mr. Clements' declaration testimony does not state what Appellants assert. In the cited deposition excerpt, Mr. Clements did **not** state that OMC 12.16.290 only applied to new connections. He stated that (1) to the best of his knowledge, the City had only done new connections, and (2) his understanding was that revised OMC 12.16.290 had the same meaning and effect as prior OMC 12.16.290. *CP 171-174.*

In any event, the former OMC 12.16.290 only required the City to install the saddle coupling connection which connects the Appellants' lateral line (or building sewer) to the City's public main sewer line. All excavation, piping, trench shoring, and restoration was – by law – the Appellants' responsibility.

iii. The Trial Court was not Confused by the Use of the Term "Lateral Line"

Appellants speculate that the trial court was confused by the City's use of the term "lateral line" to refer to the entire sewer line extending from Appellants' building to the coupling on the City's public main sewer

line. Reviewing the verbatim report of proceedings, it is clear that (1) the City clearly explained that it was using the term “lateral line” to refer to the entire line between the main line and Appellants’ building, (2) the trial court understood what the City was referring to, and (3) concluded that no part of the entire line between Appellants’ building and the City public main sewer line – including the sweep that broke – came within the definition of “public sewer.” *RP 27-29.*

Nonetheless, using the terminology suggested by Appellants does not change the analysis of this case. “Side sewer laterals” – the term suggested by Appellants – are not owned by the City. This is because they do not fall within the definition of “public sewer.” Regardless of what terminology is applied to the sweep that broke, the fact remains that it is not a “public sewer” because nobody but Appellants had any right, much less equal rights, to use the same.

iv. Common Law did not Require the City to Maintain the Sweep that Failed

Appellants claim that former OMC 12.16.290 was silent as to whose responsibility it was to excavate and repair the sweep, and that the common law requires the City to repair the sweep. The Court should reject Appellants’ argument.

As discussed above, former OMC 12.16.290 did not distinguish between new connections and reconnections. Rather, it only referred to “connections” – which necessarily includes all connections, both new and replacement connections. There is no language within the ordinance from which the Court could conclude otherwise.

Moreover, none of the authorities cited by Appellants support the proposition that a municipality must replace a line extending from a residence to the public main sewer line. A municipality’s obligation to maintain a public sewer system does not extend to replacing parts of the system that are not owned by or under the control of the municipality. To hold otherwise would lead to absurd results. Just as the City is not required to “maintain” the interior plumbing of the Appellants’ building that ultimately connect to the public sewer, neither is it obligated to maintain other portions of Appellants’ private property.

Finally, all experts have testified that there is no way for a municipality to perform maintenance on lateral lines between the public main and private residences. *CP 130, 226-227*. It would be absurd to hold the City to a duty with which the expert witnesses agree the City cannot comply.

v. **Existing Public Policy does not Support the Appellants' Position**

Appellants argue that the Court should reject the Othello Municipal Code and hold the City liable for excavation, repair, and restoration of the failed sweep (which was not a “public sewer”), as well as all damages from the alleged backflow of sewage, because of an unidentified “public policy.” Appellants do not cite any legal authority for this position. The Court should reject Appellants’ argument.

Public policy is established by legislative bodies, including municipalities. Municipalities are authorized to pass ordinances for the regulation of their operations and the health and welfare of the community, including utility services, as long as the ordinances do not conflict with state or federal law. *See Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560-61, 29 P.3d 709 (2001). Here, the City passed an ordinance expressly defining “public sewer” to only include those portions of the sewer system that all members of the public have equal rights to use, and which are under the City’s control. Thus, there is valid controlling public policy in this case defining what parts of the sewer system are owned by the City.

The failed sweep between the City’s public main sewer line and Appellants’ building could only be used by Appellants (or persons using

Appellants' building). No other member of the public had any right to use the sweep, and no other member of the public used the sweep. Appellants do not challenge the constitutionality or validity of this ordinance/public policy on appeal. Rather, they ask the Court to ignore and disregard it, without providing any legal justification whatsoever. Appellants' position is untenable, and the Court should reject the same.

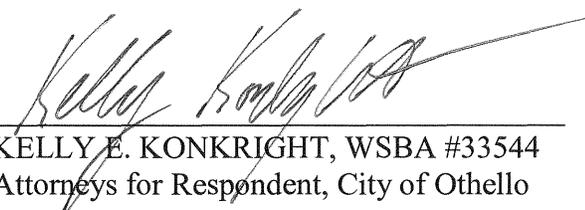
VI. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court find that the Superior Court did not err by granting the City summary judgment dismissal of all of Appellants' claims and that the Court affirm the Superior Court's ruling.

RESPECTFULLY SUBMITTED this 31st day of August, 2016.

LUKINS & ANNIS, P.S.

By


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Attorneys for Respondent, City of Othello

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Alicia Berry	<input checked="" type="checkbox"/>	U.S. Mail
Liebler, Connor, Berry, St. Hilaire	<input type="checkbox"/>	Federal Express
1141 N. Edison, Suite C	<input type="checkbox"/>	Hand Delivered
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