

NO. 35159-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

**NORMA ACOSTA & GILBERT ACOSTA, individually and the marital
community comprised thereof,**

Appellants

V.

THE CITY OF MABTON, a municipal corporation,

Respondent.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

Assignments of Error.....2

Issues Pertaining to Assignments of Error.....2

 No. 12

 No. 23

 No. 3.....3

III. STATEMENT OF THE CASE 4

A. The City of Mabton’s Sewer Backup Flooded the Lower Level of the Acosta’s Home.....4

B. The City of Mabton Was Not Doing Routine Preventative Maintenance on its Sewer System6

C. The Cause of the Backup: Grease and Other Contributing Factors.....12

D. The Acosta’s Damages: Physical Pain and Suffering, Mental Anguish, Loss of Life’s Pleasures, Loss of Use of Home, and Property Damage24

 1. *The Acosta’s Home is Contaminated and the Entire Home and the Contents Therein Must Be Remediated*24

 2. *Physical and Emotional Injuries*26

E. Procedural History.....27

IV. ARGUMENT28

A. Standard of Review.....28

B. Genuine Issues of Material Fact Regarding the City of Mabton’s Duty and Breach and the Causation of the Acosta’s Damages Exist, Preventing the Summary Adjudication of the Acosta’s Negligence Claim Against the City of Mabton.....30

 1. *A Reasonable Jury Could Find That the City of Mabton Failed to Maintain its Sewer System, Breaching Its Duty Owed to the Acostas*32

2. <u>A Reasonable Jury Could Find that the City of Mabton’s Breach Caused the Acosta’s Damages</u>	39
C. <u>A Reasonable Jury Could Find That the City of Mabton is Liable for Negligent Infliction of Emotional Distress</u>	43
D. <u>A Reasonable Jury Could Find That the Sewage Intrusion in the Acosta’s Home from the City of Mabton’s Sewer System Constitutes Private Nuisance for Which the City is Liable</u>	46
V. CONCLUSION	48

TABLE OF AUTHORITIES

Table of Cases

<i>Albertson v. State through Dep’t of Soc. & Health Servs.</i> , 191 Wn. App. 284, 361 P.3d 808 (2015).....	39
<i>Bales v. City of Tacoma</i> , 172 Wash. 494, 20 P.2d 860 (1933)	46
<i>Biggs v. Nova Servs.</i> , 166 Wn.2d 794, 213 P. 3d 910 (2009).....	29
<i>Boyer v. Tacoma</i> , 156 Wash. 280, 286 P. 659 (1930)	34
<i>Colbert v. Moomba Sports, Inc.</i> , 132 Wn. App. 916, 135 P.3d 485 (2006), <i>aff’d</i> , 163 Wn.2d 43, 176 P.3d 497 (2008)	43, 44
<i>Gaines v. Pierce County</i> , 66 Wn. App. 715, 834 P.2d 631 (1992).....	31
<i>Grundy v. Thurston Cnty.</i> , 155 Wn.2d 1, 117 P.3d 1089 (2005).....	46
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 735 P.2d 675 (1986), <i>review denied</i> , 108 Wn.2d 1008 (1987)	28
<i>Hawkins v. Diel</i> , 166 Wn. App. 1, 269 P.3d 1049 (2011)	44
<i>Hayes v. City of Vancouver</i> , 61 Wash. 536, 112 P. 498 (1911).....	34
<i>Jacobsen v. State</i> , 89 Wn.2d 104, 569 P.2d 1152 (1977)	29, 30
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	31

<i>Kempton v City of Soap Lake</i> , 132 Wn. App. 155, 130 P.3d 420 (2006) ...	32
<i>Kilbourn v. City of Seattle</i> , 43 Wn.2d 373, 261 P.2d 407 (1953).....	47
<i>Klinke v. Famous Recipe Fried Chicken, Inc.</i> , 94 Wn.2d 255, 616 P.2d 644 (1980).....	28
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P. 2d 299 (1975)	29, 30
<i>Mostrom v. Pettibon</i> , 25 Wn. App. 158, 607 P.2d 864 (1980)	29
<i>MW v. Dep' t of Soc. & Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	28
<i>Nejin v. City of Seattle</i> , 40 Wn. App. 414, 698 P.2d 615 (1985).....	33
<i>Pepper v. J.J. Welcome Constr. Co.</i> , 73 Wn. App. 523, 871 P.2d 601 (1994).....	31
<i>Peterson v. King Cty.</i> , 45 Wn.2d 860, 278 P.2d 774 (1954).....	47
<i>Pruitt v. Douglas Cty.</i> , 116 Wn. App. 547, 66 P.3d 1111 (2003)	31
<i>Tombari v. City of Spokane</i> , 197 Wash. 207, 84 P.2d 678 (1938)	34
<i>Vitucci Importing Co. v. City of Seattle</i> , 72 Wash. 192, 130 P. 109 (1913).....	33, 37, 38
<i>Youker v. Douglas Cty.</i> , 178 Wn. App. 793, 327 P.3d 1243 (2014).....	29
<i>Vanderslice v. Philadelphia</i> , 103 Pa. 102 (1883)	33, 34

Statutes

RCW 7.48.010	46
RCW 7.48.020	46

Regulations and Rules

CR 56	28, 29
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I. INTRODUCTION

This is a case about the Respondent, City of Mabton, failing to properly maintain its sewer system. Appellants Norma and Gilbert Acosta own a home that is located at 525 B Street in Mabton, Washington. On January 12, 2015, the City of Mabton's sewer backed up as a result of Mabton's failure to properly maintain its sewer system, causing water and raw sewage to flood the lower level of the Acosta's home. All of the contents of the lower level of the Acosta's home were partially submerged in raw sewage, which filled the lower level up to the first stair riser, approximately three inches. As a result, the Acostas have experienced damage to their personal and real property and Mrs. Acosta has suffered physical and emotional injuries.

The Acosta's home is still contaminated. Furthermore, there remains a strong sewage-related odor in the lower level of the home, and to a lesser extent, the main and upper floors. The Acosta's entire home and the contents therein must be remediated.

Mrs. Acosta has suffered from anxiety, depression, and dermatitis as a result of the sewage intrusion and contamination. Her doctor has deemed the Acosta's home in Mabton an unhealthy environment; thus, Mrs. Acosta has been unable to live in her home, with her husband, Mr. Acosta, for long periods of time since the January 12, 2015 sewage

backup. It has been very difficult for Mr. and Mrs. Acosta to live apart from each other. They have been married for forty-two years and this sewage backup and subsequent separation has completely disrupted their lives.

Based on the foregoing, the Acostas filed suit against the City of Mabton, setting forth claims of (1) negligence, (2) negligent trespass, (3) negligent infliction of emotional distress, and (4) private nuisance. The trial court improperly dismissed the Acosta's claims on summary judgment. Therefore, the Acostas respectfully request that this Court reverse the trial court order granting the City of Mabton's Motion for Summary Judgment.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting the City of Mabton's Motion for Summary Judgment, thereby dismissing the Acosta's claim for negligence.
2. The trial court erred in granting the City of Mabton's Motion for Summary Judgment, thereby dismissing the Acosta's claim for negligent infliction of emotional distress.
3. The trial court erred in granting the City of Mabton's Motion for Summary Judgment, thereby dismissing the Acosta's claim for private nuisance.

Issues Pertaining to Assignments of Error

1. Case law provides that only engaging in responsive maintenance does not meet a municipality's duty to exercise reasonable care in

the repair and maintenance of its sewer system. The Acostas submitted deposition testimony and documentary evidence setting forth that: (1) city employees only cleaned portions of the sewer lines when they were alerted to a backup or problem before the January 12, 2015 backup; (2) no city employee saw a ball blocking the line on January 12, 2015; (3) city employees saw a large amount of grease blocking the line on January 12, 2015; (4) the amount of sewage backed up into the manholes indicated that the backup had been there for a while; (5) sewer backups tend to occur in the lines on 6th Street and B Street near the Acosta's home; (6) in addition to grease and the city's failure to maintain the sewer system, the design of the sewer system near the Acosta's home caused the backup; and (7) the Acostas experienced physical and emotional injuries as well as property damage. Did the Acostas establish genuine issues of material fact for every element of their negligence claim? (Assignment of Error 1).

2. After the City of Mabton's sewer backed up into the Acosta's home, Mrs. Acosta suffered from depression and anxiety. Lincoln Westfall, MD, concluded that Mrs. Acosta's emotional injuries were caused by the sewage intrusion in her home on a more probable than not basis. Mrs. Acosta's emotional distress was medically diagnosed as Major Depressive Disorder and Generalized Anxiety Disorder. Additionally, Mrs. Acosta's emotional distress is corroborated by medical evidence and objective symptomology. Did the Acostas establish genuine issues of material fact for every element of Mrs. Acosta's negligent infliction of emotional distress claim? (Assignment of Error 2).
3. The sewage intrusion in the Acosta's home left an odor—that still remains—that is offensive to the senses. Initially, Mrs. Acosta was confined to her bedroom because of the sewage contamination and odor in her home. The sewage intrusion and resulting contamination is injurious to Mrs. Acosta's health. Mrs. Acosta has dermatitis, which was caused by the sewage contamination in her home. Mrs. Acosta's doctor, Lincoln Westfall, MD, has concluded that Mrs. Acosta's home is not a healthy environment. Mrs. Acosta has not lived at home for long periods of time since the sewage backup on January 12, 2015, because the resulting contamination has been injurious to her health. Did the Acostas establish genuine issues of material fact for all elements of their private nuisance claim? (Assignment of Error 3).

III. STATEMENT OF THE CASE

A. The City of Mabton's Sewer Backup Flooded the Lower Level of the Acosta's Home

On January 12, 2015, Mrs. Norma Acosta found raw sewage and water in the lower level of the Acosta's home in Mabton, Washington. CP 414-15. The water was dark, had a stench of sewage, and had fecal matter and toilet paper fragments in it. CP 414-15. As a result, all of the contents of the lower level of the Acosta's home were partially submerged in raw sewage, which filled the lower level up to the first stair riser, approximately three inches. CP 415. The floors, carpets, baseboards, insulation, washer, dryer, freezer, hot water heater, furniture, and personal property were damaged or destroyed by the sewage. CP 415.

Mrs. Acosta immediately notified the City of Mabton about the sewage intrusion in her home. CP 415. In response, two city employees, one being Noe Trujillo, went to the Acosta's home to observe the damage. CP 415. Mr. Trujillo advised Mrs. Acosta to go to City Hall to make a claim. CP 415.

Mrs. Acosta went to City Hall that afternoon. CP 415. At City Hall, Yolanda Pena, a City Clerk, gave Mrs. Acosta the claims form. CP 415. Ms. Pena also provided Mrs. Acosta with a yellow sticky note containing the name "ServiceMaster" and a telephone number. CP 415.

As Ms. Pena gave Mrs. Acosta the sticky note, she explained that this was the City's provider and that Mrs. Acosta should call them as soon as possible to get someone out to her home. CP 415.

That same day, Mrs. Acosta called ServiceMaster, using the telephone number from the yellow sticky note, and Jeff Davis arrived at her home around 5:00 p.m. CP 415. Mrs. Acosta signed a contract with ServiceMaster with the understanding that the City of Mabton would pay for ServiceMaster's work. CP 415. Jeff Davis wrote "City Insurance" on the contract that Mrs. Acosta signed. CP 415.

ServiceMaster worked on the Acosta's home for approximately one week. CP 416. At that point, a ServiceMaster employee advised Mrs. Acosta that they had to stop working because they were unable to contact an adjuster to authorize the removal of the pool table in the lower level of the Acosta's home and to obtain other needed tools. CP 416. Since then, no one from ServiceMaster has returned to the Acosta's home and the remediation work has not been completed. CP 416.

After months of no progress, Mrs. Acosta attended a Mabton town council meeting to voice her frustrations about the sewage backup in and contamination of her home. CP 416. At that meeting, Mayor Mario Martinez responded to Mrs. Acosta, saying:

A lot of times we have grease problems. Everybody knows

that. We know that when it does get backed up, it is...it ends up right there for whatever reason. That's where it ends up in the system...it's on B Street and Sixth...near Sixth Street. And that's for whatever reason where everything tends to end up and it starts to back up from there.

CP 416.

B. The City of Mabton Was Not Doing Routine Preventative Maintenance on its Sewer System

During the year or two leading up to the January 12, 2015 backup, the maintenance performed on Mabton's sewer lines was responsive rather than preventative. CP 297-98, 301, 318, 321-23, 328-29, 354-56, 362, 366-72. As is laid out in the deposition testimony below, prior to Mr. Martinez becoming mayor, city employees used to (1) jet rod the entire gravity sewer system once or twice a year; and (2) deposit a chemical into the sewer lines to melt the grease, allowing it to pass through the sewer system towards plant. CP 297-98, 301, 318, 321-23, 326-29. However, after Mr. Martinez became mayor, city employees were instructed to do other things rather than focus on routine sewer maintenance; maintenance they knew they should have been doing. CP 297-98, 301, 318, 321-23, 328-29. Instead, city employees cleaned the sewer lines only when called out by residents reporting a backup. CP 367-68.

During his deposition, Noe Trujillo, a former City of Mabton Public Works employee, testified regarding the lack of jet rodding and

routine maintenance once Mr. Martinez became mayor as follows:

Q. How often would you do jetting or cleaning out of the sewer lines?

A. Well, we used to do it, years ago, before we got another boss, that's Mario, we used to do it twice or once a year. I'm talking about four years ago we were pretty much still doing that and I did that for, like, eight, nine years, because I worked with the other guys and that's how they were doing it.

But things change, so we weren't doing it twice, we had other projects, so he was focusing on other stuff. So that kind of eliminated us jet rodding pretty much the whole town yearly, you know. But yeah, we used to focus on at least do it once a year, the whole town.

Q. Okay. When did Mr. Martinez become mayor?

A. I really probably would say like three years ago.

Q. What did Mr. Martinez change?

A. Well, he was trying to focus on many other stuff, cleaning weeds, town, and stuff, but, you know, basically things that we knew we had to do, they were pretty much putting aside.

CP 297-98.

Q. And is there anything that the City does to prevent the grease from causing sewer backups?

A. Well, years ago there was chemicals we used to throw, they used to call it Fireball or Heatball, something like that, that that kind of, it, you throw it in there and it melts the grease so it let's the grease go further towards the sewer plant. It takes some time. It breaks it up. But they haven't, I don't think they have been doing that for a few years.

Q. Do you remember when they stopped doing that?

A. I would say three years ago, maybe, three or four years ago.

CP 326-27.

Q. Were there procedures or requirements for you to jet rod the areas of the sewer lines where grease was prone to discharge?

A. ... Years ago when I started there, it was Tury and Frank Tijerina, they were there for years, they showed me to pretty much jet rod once or twice a year the whole system. So that's what we were doing. But it kind of got stopped, I would say, two, three years ago to do the whole town. I mean, we did jet rod, but it was here and there.

Q. Were you jet rodding in response to backups?

A. Pretty much.

Q. So more responsive rather than preventative?

A. Yeah.

MR. HARPER: Object to form.

Q. So would jet rodding be the only way that you would clean the sewer systems?

A. Yeah. Well, like I said, it did help a lot. I mean, we weren't getting much plugs, or major big plugs like that.

Q. When you were jet rodding the whole system?

A. Right.

Q. Okay.

A. And throwing that Fireball. I mean, that did help a lot, it melted a lot of the grease and, you know, made it go all of the way towards the sewer plant and didn't stick on the sewer lines.

CP 328-29.

Similarly, Michael Mendoza, another former City of Mabton

Public Works employee, testified about the lack of routine maintenance

during his deposition:

Q. Describe for me generally your knowledge of what the city did as maintenance for its municipal wastewater collection system.

A. As far as I know, I was not on any sort of maintenance on there. I know that's the point -- that's where

they wanted to get to is jet rod, you know, the whole town yearly or twice a year. To my knowledge, I don't -- I didn't get on any schedule with that.

Q. Was there an expectation or a policy, even if not written down, regarding Mabton's wastewater system maintenance?

A. I honestly don't remember. I know we were wanting to get to that point of, like I said, of routine maintenance. But it's, you know, two people working at the wastewater plant. That's actually a two point game person job yearly. So with taking care of that and doing all the other jobs and jet rodding, I don't think there was enough manpower.

CP 354-55.

Q. So is it fair to say in the year leading up to January 12, 2015, the maintenance plan for the sewer was basically reactive to problems?

MR. HARPER: Object to form.

A. Yes.

CP 367.

Q. (By Mr. Kroontje) You indicated you were trying to get back in the time frame -- I want to make sure I understand the time frame. But you were discussing kind of an attitude that we'd like to get back to doing preventive maintenance. Is that --

MR. HARPER: Object.

Q. -- an accurate summary of your testimony?

MR. HARPER: Object to form.

A. Yeah, I'd say so.

Q. (By Mr. Kroontje) Okay. When was that discussion of trying to get back to an effective preventive maintenance program? When were those discussions being had?

MR. HARPER: Object to form.

A. Dates I'm not sure.

Q. (By Mr. Kroontje) Would it have been after the Acosta

incident or before or both?

A. Probably both.

CP 369-70.

Q. And you can't point to any items in Exhibit 3 that were, in fact, done as part of a collection system procedure at the City of Mabton prior to July 12, 2015?

A. No.

Q. No, you can't identify any of those items that were actually being done, correct?

A. Not on a routine, no.

Q. It was only being done after a flood event happened or a backup event --

A. A call.

Q. -- happened, correct?

A. Yeah.

CP 372-73.

When city employees stopped doing the routine jet rodding of the entire sewer system, more sewage backups occurred. CP 321-23. Mr. Trujillo testified during his deposition regarding the increase in sewage backups when routine maintenance was not being done:

A. Yeah. I mean, it kind of starts freezing up and a lot of the stuff builds up on their lines, and if you don't get those jet rodded, obviously it's going to pile up, build up and it's going to sit there.

Q. When you learned about this Acosta flood, had you already jet rodded in front of their house, a line in front of their house?

A. Not that I remember. I mean, like I said, we weren't jet rodding for at least a year or so, a year or two, because we had other things, our boss had other things on his mind than jet rodding.

CP 300-01.

A. But if they would jet rod, like I said, at least once or twice a year, they would eliminate that problem. Because, like I said, there is a lot of stuff in there, a lot of grease, and if they continue jet rodding, they would eliminate those problems.

CP 318.

Q. So are you saying that you did not do that major jet rodding for the whole town that once a twice a year when he [Mr. Martinez] became mayor?

A. At least for a year or two, yeah. I mean, we did jet rod, but we weren't actually doing it where we used to start to get everything cleaned out towards the whole system. We were jumping up and down. So that does kind of create things like that.

Q. What do you mean "create things like that"?

A. Well, if you're jumping from one side to the other, if you're up on a high spot and you unplug a major line, obviously it's going to plug down towards the bottom somewhere. One way or the other, it finds its way.

Q. So you're saying that's not as an effective way to clean?

A. No. I think -- I mean, what I know, when the guys were there, I mean, there were some guys that were there before I was and they were there before at least 10, 15 years, they were running, they were jet rodding and that's the way they showed me, we have to start from the highest point towards the bottom to pull everything down towards the sewer plant. But if you're jumping from one side to the other, it's kind of tough to clean some lines because you're not even going through those lines, you're just jumping from one side to the other.

Q. So in those one or two years that you didn't do the major jet rodding of the entire system did more sewage backups occur?

A. I would say so, yeah.

CP 321-23.

C. The Cause of the Backup: Grease and Other Contributing Factors

The source of the sewage backup that flooded the lower level of the Acosta's home was from the City of Mabton's sewage system, which experienced a blockage not related to the Acosta's usage. CP 166. Grease is a known frequent cause of backups in Mabton's sewer system. CP 318, 326, 328, 352, 416. It is also known that backups tend to occur in the sewer line near the Acosta's home. CP 416.

In this case, Mr. Trujillo and Mr. Mendoza observed a large amount of grease blocking the sewer line near the Acosta's home on January 12, 2015. CP 303, 314–15, 320, 348–49, 353, 375. In his deposition, Mr. Trujillo stated:

Q. Okay. Mr. Trujillo, I'm going to hand you what's been marked Exhibit 2 to your deposition.

A. I see grease.

Q. Okay. Let's get you to describe that so that everybody has a better sense of what that is. What are you looking at there, Mr. Trujillo? What does that picture show you?

A. It's a manhole with water and grease, if I'm correct.

Q. Do you know what manhole that was?

A. I almost would say that was on Washington and Sixth Street, if I'm right.

Q. You think the photograph marked Exhibit 2 is Washington and Sixth, looking into the manhole of Washington and Sixth; is that your understanding?

A. Yeah. Yeah. Uh-huh.

Q. Okay.

A. I mean, the manholes all look alike but, I mean, focusing where I was working at, I remember.

Q. Yeah. I understand. Okay. Do you know why this photograph was taken?

A. Well, they wanted to catch the grease. They want to show what was in our line, on our system. And that's why we used to focus on jet rodding once or twice a year. I liked jet rodding, pretty much I would like jet rodding from September, October, and November, because that's when the grease was building up and broke it through.

Next time we used to try to jet rod was, I would say it was March, April, and May, there was times that we would try to clean that out. But there was changes. So at least we would try to do it once a year and then all of a sudden we kind of didn't do it for, like, at least a year or so. And I think that's what caught it. And I'm pretty sure if you go back in there and you look at the lines and you'll catch a lot of grease, because I don't think they were jet rodding at the time. I don't think they have the time to do it. And they're focusing on different stuff instead of doing maintenance, what they should be doing, obviously.

CP 314–17.

Q. Do you know what caused the sewer to back up?

A. I really don't know, but I would think it would be grease.

Q. And why would you think that?

A. Because there was a lot of grease when we went down towards the sewer plant and we did see a lot of grease going towards the manholes.

Q. Going towards which manholes?

A. The manhole we were working on on [sic] the line.

CP 320.

Similarly, Mr. Mendoza testified during his deposition about grease blocking the line near the Acosta's home on January 12, 2015:

Q. (By Mr. Harper) Now, Mr. Mendoza, where do you think the plug was when you were responding to the Acosta backup? And if there was more than one plug, you can certainly tell me there was more than one plug.

A. I don't remember there being more than one plug. But I think the main backup was on Washington.

Q. Gotcha. The main backup was at Washington and --

A. If I remember correctly.

Q. -- 6th is your best recollection?

A. Right.

Q. Okay. All right. What was the backup caused by?

A. A lot of grease.

CP 347-48.

Q. Now, if you would just, Mr. Mendoza, tell me what you remember doing from, you know, the time you got on the scene at the backup.

A. Just remember checking a few manholes. And they were full of sewer. So they were backed up. And as we went on up to check other manholes -- up on Washington, I think, is where we started jet rodding. And if I remember correctly, it took awhile to break that. So that just had a lot of grease built up. And I just remember just jet rodding it for a while until finally it broke.

CP 349.

Q. And what I handed you has been marked as Exhibits 2, 3 and 4 to Mr. Trujillo's deposition. Do you see those little yellow exhibit stickers?

A. Yes.

Q. Gotcha. Let me just ask you what you see. What's the photograph there on Exhibit 2 consist of?

A. It looks like grease buildup.

Q. Where do you see the grease actually in the photo?

A. The manhole.

Q. I'm with you there.

A. Center.

Q. Yes. Point to the grease chunks. It's those kind of light tan, light brown colored --

A. Looks like big oysters.

Q. That's one way to put it. I'm with you. It kind of does look like oysters.

Do you know what manhole this is a photograph of?

A. Probably guessing, one of the ones on 6th or Washington.

CP 353.

This sewer backup was very significant in terms of the quantity of backed up sewage. CP 351. According to Mr. Mendoza, “[a]s far as backed up in gallons...this [backup was] probably one of the bigger ones.”

CP 351. Several manholes near the Acosta’s home were filled with sewage. CP 351. These facts signaled to Mr. Mendoza that the backup had “been going on a while.” CP 351.

In this case, Ms. Susan Evans, the Acosta’s expert, concluded on a more probable than not basis the following:

- (1) The City of Mabton knew of a history of backups in the sanitary sewer line in front of the Acosta residence prior to the January 12, 2015 sewage backup into the Acosta residence and did not take corrective measures before that time.
- (2) With the knowledge of a history of backups, the City of Mabton should have considered upgrades to the sewer lines, including the portion in front of the Acosta residence prior to plans dated 2016.
- (3) The City of Mabton knew of a history of grease that contributed to backups in the portion of B Street in front of the Acosta residence and did not take corrective measures...
- (4) The City of Mabton maintenance of the sanitary sewer piping is below standard guidelines for maintenance. The City should have been

performing elevated cleaning and inspection in areas of elevated risk and known backups including the sewer line in front of the Acosta residence.

- (5) It is implausible that an 8" diameter inflatable ball was in the photographs produced by the City of Mabton as a record of what blocked the line that led to the sewage backup into the Acosta residence.

CP 203.

Additionally, Ms. Evans concluded that it is implausible that a kid's basketball—described by Mr. Martinez as being mostly inflated and alleged by the City of Mabton to be the cause of the backup on January 12, 2015—could (1) enter the sewer system; and (2) even if it did, submerge itself in the sewer lines and travel downstream. CP 202, 265–68. A kid's basketball is eight inches in diameter. CP 202. This type of ball could not enter the sanitary system via the toilet or other plumbing fixture. CP 202. Moreover, it is implausible that the ball could be introduced through a manhole because manhole covers typically weigh between 90 and 150 pounds. CP 202. Even city employees must use a hook tool to remove the manhole cover. CP 286–87. Last, the sewer system is not combined with a storm water system; thus, large objects cannot be introduced to the sewer system by way of a storm drain or curb drain. CP 202.

Furthermore, no city employee saw a ball blocking the sewer line on January 12, 2015. CP 303, 377–78. For example, Mr. Trujillo stated during his deposition:

Q. Have you ever seen a ball plugging any line?

A. I did see one time once there, but I think that was somewhere in a different area.

Q. What kind of ball do you remember seeing?

A. It was just a, oh, I know it was a green ball. I don't remember if it was an inflated one or what, but it was a ball.

Q. All right. Do you remember approximately when you saw the ball you're referring to?

A. Well, I would say years ago. I would say probably seven years ago, maybe. But that was on the south side of town, and where Mr. Acosta, they live on the north side.

CP 304.

Mr. Mendoza also testified during his deposition about not seeing a ball blocking the sewer line near the Acosta's home on January 12, 2015:

Q. (By Mr. Kroontje) Now, was it just that at some point when you were working for the City of Mabton you saw a ball in the line?

A. Uh-huh.

Q. Did you ever actually see a ball blocking the line or was there just a ball in the manhole?

A. Just a ball in the manhole.

Q. You never saw any ball actually blocking a sewer line, correct?

A. Physically, no. It was just in the -- in the manhole itself.

Q. And the ball was not causing the sewer to be blocked, correct?

MR. HARPER: Object to form.

A. That I couldn't answer that. I'm not a hundred percent.

Q. (By Mr. Kroontje) Did you see a ball blocking the sewer or did you see a ball in a manhole at some point when you were working for the city?

A. Yeah, I saw it at some point.

Q. But you don't know if it was in relation to

January 12, 2015?

A. Correct.

CP 377.

Q. But you do know that you never saw a ball blocking the line?

A. Actually blocking it physically, no. It was --

Q. The best you can say is at some point during your time at the city you saw a ball

A. Yeah.

Q. -- in a manhole?

A. Right.

Q. But you cannot say that there was a ball blocking the line with respect to the January 12, 2015, incident?

A. Right.

MR. HARPER: Object to form.

CP 378-79.

Furthermore, the most comprehensive, contemporaneous report outlining the January 12, 2015 sewer backup does not mention a ball blocking the line. CP 374-75. One of the purposes of this report was to gather all of the pertinent facts with respect to what happened on January 12, 2015, and why. CP 374-75. Had there actually been a ball blocking the sewer line, Mr. Mendoza testified during his deposition that it likely would have been documented in this report written three days after the incident:

Q. (By Mr. Kroontje) Going back to Exhibit 2, do you have any reason to doubt the date of January 15, 2015, up on the top of the first page?

A. No.

Q. Is it the most comprehensive report of what happened

on January 12, 2015, as of January 15, 2015?

A. Yeah.

Q. Was one purpose of this document to gather all the most pertinent facts with respect to what happened and why?

A. Yes.

Q. Does this document that's Exhibit 2, dated January 15, 2015, say anything about a ball?

A. No. I didn't see it. That's what I was looking for.

Q. So is that because there was not a ball that actually caused the sewage backup?

MR. HARPER: Object to form.

A. Could be.

Q. (By Mr. Kroontje) It could be that there was no ball, correct?

MR. HARPER: Object to form.

A. Correct.

Q. (By Mr. Kroontje) You never saw a ball causing a backup of the sewer line, did you?

MR. HARPER: Object to form.

A. On this one, I don't know. I have jet rodded a line in the area that did have a ball and a cell phone.

Q. (By Mr. Kroontje) But with respect to this backup on January 12, 2015, flooding the Acosta home --

A. Uh-huh.

Q. -- there was no ball, was there?

MR. HARPER: Object to form.

A. I don't know.

Q. (By Mr. Kroontje) And you were there. Who would know better than you?

MR. HARPER: Object to form.

CP 374-76.

Q. (By Mr. Kroontje) And if there was a ball blocking the line, you would have put it in this report dated January 15, 2015, correct?

MR. HARPER: Object to form.

A. Probably so.

Q. (By Mr. Kroontje) So if there was a ball blocking the

line on January 12, 2015, we probably would have read about that ball in the report dated January 15, 2015?

MR. HARPER: Object to form.

Q. (By Mr. Kroontje) Correct?

A. Could be, yeah.

Q. You would expect that the description of the ball blocking the line would be in the report done three days later, correct?

A. I would think so.

CP 379.

In this case, Ms. Evans concluded that grease caused the sewer lines near the Acosta's home to back up:

A. You're talking about the backup into the Acosta residence?

Q. That's the backup I'm talking about.

A. The sewer system in front of their house backed up.

Q. Okay. What caused it to back up?

A. Well, at the very least, it was grease.

Q. How do you know grease caused it to back up?

A. It is -- was part of the Martinez, Mr. Martinez's deposition, but then also part of the Trujillo deposition and supported by photographs.

CP 257.

In addition to grease, Ms. Evans determined that there were several contributing factors that caused the backup on January 12, 2015:

Q. Okay. Is that your understanding of what caused the backup? That is to say, what the mayor testified to?

MR. KROONTJE: Object to form.

A. Well, it was certainly grease, but it was -- there was quite a number of factors. And again, all of the factors get spelled out during the course of my report.

CP 257.

A. Like the sizing and design of the sewer right in front

of the Acosta residence.

Q. Did that cause that backup?

A. It contributed to it.

Q. I understand that. I'm asking -- let me be a little clearer then. I'm trying to understand what the event was that itself caused the backup, if you know.

A. Oftentimes, it is not one event but a series of contributing factors.

Q. All right.

A. If the sewer had been a 20-inch sewer, having some -- having the same amount of grease in that line as what was in the line going in front of the Acosta residence would not have clogged the line. The fact that it was an eight-inch line, it did.

CP 258-59.

Q. You've testified that the cause of the backup at the very least was grease. You've also testified that sizing and design of the sewer in front of the residence was a role in causing the backup or played a role in causing the backup, and you mentioned the 8-inch line. Is there any other element of the design of the line that you think played a role in causing the backup?

A. Yes.

Q. Okay. What was that?

A. Downstream or immediately downstream at the immediate next intersection, there were four lines meeting at 90 degrees, three 8-inch and one 10-inch, and 90-degree elbows are going to have a lot more turbulence and restrictions on the ability of sewage to pass. And then additionally, the lack of jetting on a regular basis of the lines also contributed. I think that's the majority with, you know, subtle nuances to those items.

Q. Anything else that you consider in addition to that statement?

A. That there was a history of backups in that line in front of the Acosta residence.

- Q. A history of backups caused this backup?
- A. Well, and no corrective actions beyond dealing with the backup at that exact moment in time. And again, you know, they're detailed in this report.
- Q. Okay. Were any of those items that you've articulated, the grease, the sizing and design of the sewer line including the diameter, the presence of the downstream connections, the lack of jetting, the capacity of the system, the history of backups, were any of these factors sufficient in and of themselves? That is to say, independent of the other factors, to cause the backup?
- A. I'm not sure that I could state it that way.
- Q. How would you state it?
- A. That there was a change in the system in the last couple years that made a dramatic difference between the likelihood that things were going to back up.
- Q. What change in the system was that?
- A. The lack of regular maintenance or regular jetting.
- Q. Okay. When was the last time this line was jetted prior to the backup occurring?
- A. As I understood it, it was as needed when backup occurred as opposed to doing it regularly roughly twice a year, three times a year as had -- typically had been done up until several years prior.
- Q. What's your source for that testimony?
- A. Mr. Trujillo.
- Q. Anything else?
- A. Reviewing the maintenance records and just simply seeing that there was no jetting.

CP 259–62.

In summary, Ms. Evans opined that within the two years leading up to the backup on January 12, 2015, the lack of regular maintenance or jet rodding made “a dramatic difference” in the likelihood that the sewer lines would back up. CP 261. Ms. Evans concluded that the following

contributing factors caused the sewer to backup and flood the lower level of Acosta's home: (1) there was a known history of backups occurring near the Acosta's home; (2) city employees were not doing routine preventative maintenance on the sewer lines; (3) grease was being introduced into the sewer lines and not being controlled; and (4) just downstream of the sewer line near the Acosta's home, the ninety degree turns caused more turbulence, restricting the ability of sewage to pass this intersection and increasing the likelihood that grease would coagulate or join other clogs in the lines. CP 257-62, 268-70.

Ms. Evans also testified during her deposition about Mabton's standard of care in regards to its sewer system:

Q. Okay. On the aspect of the case regarding cleaning, is it your opinion that the standard of care required twice-per-year jet-rodding?

A. Once to twice a year.

Q. That's why I asked the question.

A. One to two times a year.

Q. One to two times per year of the entire system; is that correct?

A. Yes.

Q. And that's jet-rodding specifically.

A. It's cleaning, and the method that Mabton was using was jet-rodding.

CP 268-69.

Q. Are there other specific aspects of Mabton's role that in your opinion led to this backup that fell below the standard of care?

A. In addition to all of the other components we've

already talked about?

Q. Well, that's what I want to know. I mean, you've talked about a number of components. Those, I think we -- I think your testimony was those contributed to the backup. I'm trying to understand, now, something slightly different. What are the specific aspects that caused the backup for which Mabton is responsible and for which Mabton fell below the standard of care? If they're the same, then you can say they're the same, but I just need to understand that

A. They're the same.

CP 269–70.

Thus, Ms. Evans concluded that the standard of care required for cleaning the sewer system is cleaning the entire sewer system once to twice a year with some approved cleaning method—jet rodding being one of those approved methods. CP 268–69. Ms. Evans also concluded that Mabton fell below the standard of care in respect to all of the contributing factors—laid out in the previous paragraph—that caused the backup that occurred on January 12, 2015. CP 269–70.

D. The Acosta's Damages: Physical Pain and Suffering, Mental Anguish, Loss of Life's Pleasures, Loss of Use of Home, and Property Damage

As a result of the sewage backup and contamination of their home, the Acostas have suffered a loss of use of their home, property damage, and physical and emotional injuries.

1. *The Acosta's Home is Contaminated and the Entire Home and the Contents Therein Must Be Remediated*

Because of the sewage backup, the Acosta's home is unfit for

living. For over two years, the Acostas have been forced to live in a home contaminated with mold, sewage dust, and related contaminants. CP 162–65, 167–68. The Acostas turned off their central heating after the backup because they were concerned that the odor or contaminants would be spread throughout the house. CP 415. The Acostas have had to endure two winters with little or no heat. CP 415. Furthermore, there remains a strong sewage related odor present in the lower level of the home, and to a lesser extent, the main and upper floors. CP 167, 417.

The laundry room floor contains high levels of coliforms and Enterococcus bacteria. CP 168. Total coliform bacteria is associated with fecal contamination, either directly in sewage or in “black water” from contact with dead or diseased animals and their fecal matter. CP 163. Additionally, the settled dust concentrations from the Acosta’s home indicate the presence of fungal matter that is capable of causing disease. CP 168. For example, aspergillus niger is a fungal matter found present in the Acosta’s home that is often associated with infections such as lung, sinus, and sometimes ear. CP 168.

Because of the odor and contamination, Mrs. Acosta could not make use of her entire home after the sewer backup. CP 417. Until June 4, 2016, Mrs. Acosta was confined to her bedroom whenever she was home. CP 417. She would only leave her bedroom to get coffee, to burn

potpourri in the living room to mask the stench, or to make her meals. CP 417.

Ms. Evans concluded that the Acosta's entire home and the contents therein must be remediated. CP 169. Belfor Construction Services provided an estimate for the cost for required repairs, remediation, and content cleaning, which totaled \$91,465.44. CP 394–96. Moreover, Claims Dispute Resolution provided a replacement cost valuation of the basement contents, which totaled \$30,000.00 with an actual cash value of \$19,500.00. CP 710.

2. Physical and Emotional Injuries

As a result of the sewage backup and contamination, Mrs. Acosta suffered from major depressive disorder, anxiety, and dermatitis. CP 420. Lincoln Westfall, MD, concluded that Mrs. Acosta's injuries were caused by the sewage intrusion in her home on a more probable than not basis. CP 420.

Following the sewage backup, Mrs. Acosta starting experiencing anxiety. CP 416. Mrs. Acosta received mental health treatment at Group Health Everett Medical Center. CP 416. Ms. Birnberg Perry, LICSW, concluded that Mrs. Acosta was experiencing Major Depressive Disorder and Generalized Anxiety Disorder. CP 634–37. Mrs. Acosta has been taking prescribed medication for her depression and anxiety. CP 644–47.

In April 2016, Mrs. Acosta began to develop a rash on her arms, legs, and hip that causes irritation and difficulty sleeping at night. CP 416. Mrs. Acosta obtained treatment from several medical providers and consulted with an allergist for this rash (dermatitis). CP 417. Dr. Lincoln Westfall advised Mrs. Acosta that the contamination in her home was causing the rash. CP 417. Pursuant to Dr. Westfall's advice, Mrs. Acosta moved in with her sister, San Juanita Guerrero-Nelson, in Everett, Washington, on June 5, 2016. CP 417.

Mrs. Acosta moved back into her home in Mabton for three weeks in December. CP 417. After about one week of living at home in Mabton, Mrs. Acosta's rash reappeared. CP 417. Accordingly, Mrs. Acosta moved back in with Ms. Guerrero-Nelson in January 2017. CP 417.

It has been very difficult for Mr. and Mrs. Acosta to live apart from each other. CP 417. They have been married for forty-two years and this sewage backup and subsequent separation has completely disrupted their lives. CP 417.

E. Procedural History

On January 24, 2017, the City of Mabton filed its Motion for Summary Judgment in Yakima County Superior Court. CP 25. The Acostas filed their Opposition Response on February 13, 2017. CP 134. On February 16, 2016, the City of Mabton filed its Reply and CR 56(e)

and ER 702 Motion to Strike Reports and Testimony of Susan Evans. CP 728. On February 21, 2017, the Acostas filed their Opposition Response to Mabton's Motion to Strike. CP 786. The hearing for Mabton's Motion for Summary Judgment and CR 56(e) and ER 702 Motion to Strike Reports and Testimony of Susan Evans took place on February 22, 2017. RP 1–2. Judge Elofson ruled orally, denying Mabton's Motion to Strike on the record. RP 23–24. On March 3, 2017, Judge Elofson entered an order granting the City of Mabton's Motion for Summary Judgment, thereby dismissing the case. CP 807–10. On Monday, March 27, 2017, the Acostas filed their Notice of Appeal, appealing the trial court order granting the City of Mabton's Motion for Summary Judgment. CP 811–15.

IV. ARGUMENT

A. Standard of Review

When reviewing a summary judgment order, appellate courts engage in the same inquiry as the trial court. *See* CR 56(c); *MW. v. Dep' t of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). The court considers factual questions de novo, considering the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party—the Acostas in this case. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256, 616 P.2d 644 (1980); *Halvorsen v.*

Ferguson, 46 Wn. App. 708, 712, 735 P.2d 675 (1986) review denied, 108 Wn.2d 1008 (1987). When evidence is considered as such, courts should not grant summary judgment “if reasonable people might reach different conclusions.” *Jacobsen v. State*, 89 Wn.2d 104, 108–09, 569 P.2d 1152 (1977) (citing *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)). “The trial court must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

Pursuant to CR 56(c), summary judgment is only appropriate “if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Biggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P. 3d 910 (2009). A material fact is one that controls the outcome of the litigation. *Youker v. Douglas Cty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). A genuine issue is an issue “upon which reasonable people may disagree.” *Id.* The burden is on the moving party, Respondent City of Mabton in this case, to prove that there is no genuine issue as to any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.

Jacobsen, 89 Wn.2d at 108. “Issues of negligence and proximate cause are not generally susceptible to summary adjudication.” *LaPlante*, 85 Wn.2d at 159. “A trial is absolutely necessary if there is a genuine issue as to any material fact.” *Jacobsen v. State*, 89 Wn.2d at 108 (internal citations omitted).

The City of Mabton did not and cannot meet its burden of proving no genuine issue of material fact exists as to the Acosta’s claims of Negligence, Negligent Infliction of Emotional Distress, and Nuisance. Furthermore, in responding to the City of Mabton’s Motion for Summary Judgment, the Acostas provided the trial court with substantial documentary evidence and deposition testimony that raise reasonable inferences to support their claims of Negligence, Negligent Infliction of Emotional Distress, and Nuisance. When considering the evidence and reasonable inferences in the Acosta’s favor, it is clear that summary judgment was improper and the trial court erred in granting the City of Mabton’s Motion for Summary Judgment.

B. Genuine Issues of Material Fact Regarding the City of Mabton’s Duty and Breach and the Causation of the Acosta’s Damages Exist, Preventing the Summary Adjudication of the Acosta’s Negligence Claim Against the City of Mabton

The deposition testimony of former Mabton city employees and Susan Evans and the expert reports of Susan Evans support the Acosta’s

negligence claim and present genuine issues of material fact that prevent the summary adjudication of the Acosta's claim for negligence. "The elements of negligence are duty, breach, causation, and injury." *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). A court must decide who owes the duty, to whom the duty is owed, and determine the nature of the duty. *Id.* at 243. Negligent trespass requires proof of negligence: duty, breach, injury, and proximate cause. *Pruitt v. Douglas Cty.*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) (citing *Gaines v. Pierce County*, 66 Wn. App. 715, 719–20, 834 P.2d 631 (1992)). Courts treat claims for trespass and negligence arising from a single set of facts as a single negligence claim. *Id.* (citing *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 546–47, 871 P.2d 601 (1994)).

Case law provides that municipalities have a duty to exercise reasonable care in the repair and maintenance of municipal sewer systems and only engaging in responsive maintenance does not meet this duty. The Acostas set forth deposition testimony and documentary evidence setting forth that: (1) city employees stopped doing routine maintenance during the year or two before the January 12, 2015 backup and only cleaned portions of the sewer lines when they were alerted to a backup or problem; (2) no city employee saw a ball blocking the line on January 12, 2015; (3) Mr. Trujillo and Mr. Mendoza saw a large amount of grease blocking the

line on January 12, 2015; (4) the amount of sewage backed up into the manholes near the Acosta's home indicated that the backup had been there for a while; (5) sewer backups tend to occur in the lines on 6th Street and B Street near the Acosta's home; (6) in addition to grease and the failure to maintain the sewer system, the design of the sewer system near the Acosta's home caused the backup; and (7) the Acostas experienced physical and emotional injuries as well as property damage as a result of the sewage intrusion and resulting contamination. Based on the case law, the deposition testimony, and the documentary evidence, a reasonable jury could find that (1) Defendant City of Mabton breached its duty owed to the Acostas, which (2) caused the Acosta's damages. As such, issues of material fact as to duty, breach, causation, and injury existed, preventing summary adjudication of the Acosta's claim for Negligence.

1. A Reasonable Jury Could Find that the City of Mabton Failed to Maintain its Sewer System, Breaching Its Duty Owed to the Acostas

In this case, a reasonable jury could find that the City of Mabton breached its duty owed to the Acostas by failing to maintain and inspect its sewer system. A municipality has a duty to exercise reasonable care in the repair and maintenance of municipal sewage systems. *Kempton v City of Soap Lake*, 132 Wn. App. 155, 158, 130 P.3d 420 (2006). As such, the existence of a defect in a sewer establishes prima facie negligence and

casts upon the city the burden of showing that it had exercised ordinary care in performing its duty of inspection. *Nejin v. City of Seattle*, 40 Wn. App. 414, 419, 698 P.2d 615 (1985) (citing *Vitucci Importing Co. v. City of Seattle*, 72 Wash. 192, 194, 130 P. 109 (1913)).

“It is the city’s duty to exercise ordinary care in causing an inspection” of its sewer system from time to time to ensure that needed repairs are made therein and obstructions removed therefrom. *Vitucci*, 72 Wash. at 194. Notice of a defect or obstruction in a sewer line is not an essential element of liability for damages when such a defect or obstruction would have been discovered by reasonable inspection—it being the duty of the city to use ordinary care in causing its inspection. *Id.* at 195. A municipality’s “duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed.” *Id.* (citing *Vanderslice v. Philadelphia*, 103 Pa. 102, 107 (1883)). Instead, a municipality’s duty “involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed.” *Id.* at 195–96 (citing *Vanderslice*, 103 Pa. at 107). “Where the obstruction or dilapidation is an ordinary result of the use of the sewer,

which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the city liable.””
Id. at 196 (citing *Vanderslice*, 103 Pa. at 107).

Moreover, a Plaintiff may recover for injuries suffered by a failure on the part of a municipality to provide a suitable outlet for its sewage system, or for drains or sewers lacking in capacity to carry off the natural drainage or sewage from the territory designed. *Hayes v. City of Vancouver*, 61 Wash. 536, 538, 112 P. 498 (1911). Thus, a city has breached its duty if a sewer line is improperly installed or if the line has insufficient capacity to handle the “sewage conducted into it.” *Tombari v. City of Spokane*, 197 Wash. 207, 212, 84 P.2d 678 (1938) (citing *Boyer v. Tacoma*, 156 Wash. 280, 286, P. 659 (1930)).

A city is held liable for inadequate sewers because:

[T]he property owner is required to connect with the sewer; that he is not permitted to dispose of his sewage in any other way than the one way provided by the city; that he has no power or authority to remove the cause, or to in any way remedy the defect from which his injury arises; that the city alone has the power and the means to remedy the defective sewer or to replace an inadequate sewer; that no person should be required to suffer an injury caused by an agency over which he has no control and over which the city has absolute control; and that if an injury is inflicted by such an agency, he should be properly compensated therefor.

Id. at 213.

In this case, the source of the sewage backup was from the City of Mabton's sewer system, which experienced a blockage not related to the Acosta's usage. CP 166. The City of Mabton alleges that a third party deposited a ball into the sewer system, which caused the backup that flooded the lower level of the Acosta's home. Furthermore, the City of Mabton argues that this third party's conduct was outside of its control. A genuine issue of material fact exists as to whether a ball was in the sewer line on January 12, 2015, and if this ball caused the sewer to backup, flooding the lower level Acosta's home.

Ms. Evans testified during her deposition that this ball could not have entered the sewer system through the toilet or other plumbing fixture or through the storm water system. CP 202. Additionally, Ms. Evans stated that it is unlikely a ball entered the sewer system through a manhole because manhole covers typically weigh between 90 and 150 pounds. CP 202. City employees use a hook tool to remove manhole covers. CP 286–87. It would be very difficult for a third party to deposit a ball into a manhole because of the challenge in lifting and removing the heavy manhole cover.

Moreover, Mr. Trujillo and Mr. Mendoza testified during their depositions to not seeing a ball physically blocking the sewer line on January 12, 2015. CP 303–04, 377–78. Mr. Trujillo stated that the only

time he has seen a ball in the line was at a different time and a different part of town from the January 12, 2015 backup. CP 303–04.

Additionally, Mr. Mendoza testified during his deposition about the most comprehensive, contemporaneous report outlining the January 12, 2015 sewer backup, and how this report does not document a ball blocking the sewer line. CP 374–75. Mr. Mendoza stated that the ball probably would have been documented in this report if it has been the cause of the backup on January 12, 2015. CP 374–75. Instead, Mr. Mendoza and Mr. Trujillo have testified that a large amount of grease was in the sewer system, which caused it to back up near the Acosta’s home. CP 303, 314–15, 320, 348–49, 353, 375.

This sewer backup occurred in January. CP 414–15. During his deposition, Mr. Trujillo testified regarding the grease contamination in the sewer lines during the fall and winter months and the necessity of jet rodding during this time:

Q. Yeah. I understand. Okay. Do you know why this photograph was taken?

A. Well, they wanted to catch the grease. They want to show what was in our line, on our system. And that's why we used to focus on jet rodding once or twice a year. I liked jet rodding, pretty much I would like jet rodding from September, October, and November, because that's when the grease was building up and broke it through.

Next time we used to try to jet rod was, I would say it was March, April, and May, there was times that

we would try to clean that out. But there was changes. So at least we would try to do it once a year and then all of a sudden we kind of didn't do it for, like, at least a year or so. And I think that's what caught it. And I'm pretty sure if you go back in there and you look at the lines and you'll catch a lot of grease, because I don't think they were jet rodding at the time. I don't think they have the time to do it. And they're focusing on different stuff instead of doing maintenance, what they should be doing, obviously.

CP 314–17.

Consequently, the City of Mabton knew that it was likely that (1) grease was entering the sewer system; (2) grease coagulates during the winter months and tends to block the lines; and (3) backups tend to occur in the sewer lines near the Acosta's home. CP 314–17, 416. As such, this backup should have been anticipated and guarded against by occasional examination and cleaning. *See Vitucci*, 72 Wash. at 194–95.

Furthermore, the amount of sewage backup observed by city employees on January 12, 2015, indicated that the backup “had been there for a while.” CP 351. If Mabton had taken ordinary care in inspecting and cleaning the sewer lines, it would have discovered the obstruction.

However, Mabton did no such thing.

Instead, Mabton stopped the routine cleaning and inspecting of the sewer system in the year or two leading up to the January 12, 2015 backup. CP 297–98, 301, 318, 321–23, 328–29, 354–56, 362, 366–72. Mabton

knew that it should have been doing this maintenance work, but it did not expend the man power or time on this. CP 314–17. Rather, any cleansing of the sewer system occurred in response to reports of backups from residents. CP 367–68. This responsive cleaning did not meet Mabton’s duty of care owed to the Acostas. *See Vitucci*, 72 Wash. at 195.

Because during the two years leading up to the backup on January 12, 2015, Mabton stopped any regular maintenance or jet rodding, Ms. Evans testified during her deposition that the likelihood that the sewer lines were going to back up dramatically increased. CP 261. During this time period, Ms. Evans concluded that Mabton fell below the standard of care because (1) there was a known history of backups occurring near the Acosta’s home; (2) city employees were not doing routine preventative maintenance on the sewer lines; (3) grease was being introduced into the sewer lines and not being controlled; and (4) just downstream of the sewer line near the Acosta’s home, the ninety degree turns caused more turbulence, restricting the ability of sewage to pass this intersection and increasing the likelihood that grease would coagulate or join other clogs in the lines. CP 257–62, 268–70. Because Mabton’s conduct fell below the standard of care in maintaining its sewer lines, it breached its duty owed to the Acostas. Based on the foregoing case law, deposition testimony, and documentary evidence, genuine issues of material facts as to duty and

breach exist and a reasonable jury could find that the City of Mabton breached its duty owed to the Acostas.

2. *A Reasonable Jury Could Find that the City of Mabton's Breach Caused the Acosta's Damages*

Based on the case law, deposition testimony, and documentary evidence, a reasonable jury could find that the City of Mabton's failure to maintain its sewer lines caused the Acosta's damages. To be liable for negligence, a defendant's actions must also be the proximate cause of the plaintiff's injury. *Albertson v. State through Dep't of Soc. & Health Servs.*, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). Proximate cause has two elements: (1) cause in fact, and (2) legal causation. *Id.* at 296. The Acosta's property damage and physical and emotional injuries were caused by the City of Mabton's breach of its duty of care.

Ms. Evans concluded that grease and the following contributing factors caused the sewer to backup and flood the lower level of Acosta's home: (1) there was a known history of backups occurring near the Acosta's home; (2) city employees were not doing routine preventative maintenance on the sewer lines; (3) grease was being introduced into the sewer lines and not being controlled; and (4) just downstream of the sewer line near the Acosta's home, the ninety degree turns caused more turbulence, restricting the ability of sewage to pass this intersection and

increasing the likelihood that grease would coagulate or join other clogs in the lines. CP 257–62, 268–70. Ms. Evans testified to this effect in her deposition:

A. You're talking about the backup into the Acosta residence?

Q. That's the backup I'm talking about.

A. The sewer system in front of their house backed up.

Q. Okay. What caused it to back up?

A. Well, at the very least, it was grease.

Q. How do you know grease caused it to back up?

A. It is -- was part of the Martinez, Mr. Martinez's deposition, but then also part of the Trujillo deposition and supported by photographs.

Q. Okay. Is that your understanding of what caused the backup? That is to say, what the mayor testified to?

MR. KROONTJE: Object to form.

A. Well, it was certainly grease, but it was -- there was quite a number of factors. And again, all of the factors get spelled out during the course of my report.

CP 257.

Q. You've testified that the cause of the backup at the very least was grease. You've also testified that sizing and design of the sewer in front of the residence was a role in causing the backup or played a role in causing the backup, and you mentioned the 8-inch line. Is there any other element of the design of the line that you think played a role in causing the backup?

A. Yes.

Q. Okay. What was that?

A. Downstream or immediately downstream at the immediate next intersection, there were four lines meeting at 90 degrees, three 8-inch and one 10-inch, and 90-degree elbows are going to have a lot more turbulence and restrictions on the ability of sewage to pass.

And then additionally, the lack of jetting on a regular basis of the lines also contributed. I think that's the majority with, you know, subtle nuances to those items.

Q. Anything else that you consider in addition to that statement?

A. That there was a history of backups in that line in front of the Acosta residence.

Q. A history of backups caused this backup?

A. Well, and no corrective actions beyond dealing with the backup at that exact moment in time. And again, you know, they're detailed in this report.

Q. Okay. Were any of those items that you've articulated, the grease, the sizing and design of the sewer line including the diameter, the presence of the downstream connections, the lack of jetting, the capacity of the system, the history of backups, were any of these factors sufficient in and of themselves? That is to say, independent of the other factors, to cause the backup?

A. I'm not sure that I could state it that way.

Q. How would you state it?

A. That there was a change in the system in the last couple years that made a dramatic difference between the likelihood that things were going to back up.

Q. What change in the system was that?

A. The lack of regular maintenance or regular jetting.

Q. Okay. When was the last time this line was jetted prior to the backup occurring?

A. As I understood it, it was as needed when backup occurred as opposed to doing it regularly roughly twice a year, three times a year as had -- typically had been done up until several years prior.

Q. What's your source for that testimony?

A. Mr. Trujillo.

Q. Anything else?

A. Reviewing the maintenance records and just simply seeing that there was no jetting.

CP 259-62.

Q. Okay. On the aspect of the case regarding cleaning, is it your opinion that the standard of care required twice-per-year jet-rodding?

A. Once to twice a year.

Q. That's why I asked the question.

A. One to two times a year.

Q. One to two times per year of the entire system; is that correct?

A. Yes.

Q. And that's jet-rodding specifically.

A. It's cleaning, and the method that Mabton was using was jet-rodding.

CP 268–69.

Q. Are there other specific aspects of Mabton's role that in your opinion led to this backup that fell below the standard of care?

A. In addition to all of the other components we've already talked about?

Q. Well, that's what I want to know. I mean, you've talked about a number of components. Those, I think we -- I think your testimony was those contributed to the backup. I'm trying to understand, now, something slightly different. What are the specific aspects that caused the backup for which Mabton is responsible and for which Mabton fell below the standard of care? If they're the same, then you can say they're the same, but I just need to understand that

A. They're the same.

CP 269–70.

Ms. Evans also concluded that Mabton fell below the standard of care in respect to all of the contributing causal factors—laid out in the previous paragraph—that caused the backup that occurred on January 12, 2015. CP 269–70.

Furthermore, because of the sewage backup, Ms. Evans determined that the Acosta's home is contaminated and their entire home and the contents therein must be remediated. CP 169.

Additionally, Mrs. Acosta's physical and emotional injuries were caused by Mabton's breach. CP 420. Dr. Westfall concluded that Mrs. Acosta's dermatitis, depression, and anxiety were caused by the sewage intrusion on a more probable than not basis; this conclusion was made to a reasonable degree of medical certainty. CP 420.

Based on the foregoing deposition testimony and documentary evidence, issues of material fact as to causation and the Acosta's damages exist and a reasonable jury could find that the City of Mabton's breach caused the Acosta's damages.

C. A Reasonable Jury Could Find That the City of Mabton is Liable for Negligent Infliction of Emotional Distress

A reasonable jury could find that the City of Mabton's negligence caused Mrs. Acosta to suffer from depression and anxiety; a reasonable emotional response that is corroborated by objective symptomology. A negligent infliction of emotional distress cause of action also requires the four elements of negligence: duty, breach, cause, and damage. *Colbert v. Moomba Sports, Inc.*, 132 Wn. App. 916, 925, 135 P.3d 485 (2006), *aff'd*, 163 Wn.2d 43, 176 P.3d 497 (2008). Additionally, a defendant only owes

a duty to “foreseeable plaintiffs,” and plaintiff’s emotional response must be reasonable under the circumstances and be corroborated by objective symptomatology. *Id.* at 925–26 (internal citations omitted); *Hawkins v. Diel*, 166 Wn. App. 1, 14, 269 P.3d 1049 (2011) (internal citations omitted). To satisfy objective symptomatology, “a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence.” *Hawkins*, 166 Wn. App. at 14 (internal citations omitted).

However, “[i]t’s not necessary that there be any physical impact or the threat of an immediate physical invasion of the plaintiff’s personal security.” *Id.* (internal citations omitted). Furthermore, there is no “absolute boundary around the class of persons whose peril may stimulate the mental distress.” *Id.* (internal citations omitted). Instead, the reasonableness of the plaintiff’s reaction will typically be a jury question. *Id.* (internal citations omitted).

In this case, the Acosta’s offered deposition testimony and documentary evidence supporting the City of Mabton’s negligence; it is addressed in the previous section. Furthermore, Mrs. Acosta was a reasonably foreseeable plaintiff because Mabton’s sewer backed up into her home. Mrs. Acosta’s emotional response is a reasonable reaction—she has been forced to live in a contaminated home for over two years. CP

162–65, 167–68. A home that smells like sewage. CP 167, 417. A home with little to no heat during the winters. CP 415. A home that has caused Mrs. Acosta to break out in a rash all over her body. CP 416–17. A home that can no longer be Mrs. Acosta’s home at times because it is an unhealthy environment. CP 416–17.

Mrs. Acosta’s emotional distress was medically diagnosed as Major Depressive Disorder and Generalized Anxiety Disorder. CP 634–37. Additionally, Mrs. Acosta’s emotional distress is also corroborated by medical evidence and objective symptomology. CP 634–37. According to Ms. Birnberg Perry, LICSW, Mrs. Acosta is experiencing (1) Major Depressive Disorder as evidenced by depressed mood most of the day, markedly diminished interest or pleasure in all or almost all activities most of the day, psychomotor retardation, fatigue or loss of energy, feelings of worthlessness and excessive or inappropriate guilt, and a diminished ability to think or concentrate; and (2) Generalized Anxiety Disorder as evidenced by restlessness, keyed up, on edge, easily fatigued, and difficulty concentrating or mind going blank. CP 634–37. Mrs. Acosta has been taking prescribed medication for her depression and anxiety. CP 644–47.

Based on the foregoing evidence, a reasonable jury could find that the City of Mabton’s negligence caused Mrs. Acosta to suffer from

depression and anxiety; a reasonable emotional response that is corroborated by objective symptomology. Thus, genuine issues of material fact as to the Acosta's claim for negligent infliction of emotional distress exist and summary adjudication of this claim was improper.

D. A Reasonable Jury Could Find that the Sewage Intrusion in the Acosta's Home from the City of Mabton's Sewer System Constitutes Private Nuisance for Which the City is Liable

The deposition testimony and documentary evidence reveal genuine issues of material fact as to whether the sewage intrusion in the Acosta's home constitutes a private nuisance for which the City of Mabton is liable. An actionable nuisance is an unlawful act or a failure to perform a duty that "is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010; *Grundy v. Thurston Cnty.*, 155 Wn.2d 1, 7, 117 P.3d 1089, 1092 (2005); *see, e.g., Bales v. City of Tacoma*, 172 Wash. 494, 20 P.2d 860 (1933) (court found nuisance when mass of sewage emptying out of city storm sewer into a stream killed fish from plaintiff's fish hatchery). Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may sue for damages and for injunctive relief to abate the nuisance. *Grundy*, 155 Wn.2d at 7; RCW 7.48.020. "The allegation of facts establishing negligence does not foreclose the allegation

of facts establishing a resultant nuisance, for it is, of course, possible for the same act to constitute negligence and also give rise to a nuisance.”

Peterson v. King Cty., 45 Wn.2d 860, 863, 278 P.2d 774 (1954) (citing *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 382, 261 P.2d 407 (1953)).

In this case, a reasonable jury could find that the flooding of sewage in the Acosta’s home from the City of Mabton’s sewer system constitutes a nuisance. The case law and deposition testimony supporting a finding of a failure by the City of Mabton to perform its duty in relation to the maintenance of its sewer system, which caused the January 12, 2015 backup is outlined in Section IV.B above. This sewage backup has significantly interfered with the Acosta’s use and enjoyment of their property. CP 162–65, 167–68, 417. The odor from the sewage is offensive to the senses. CP 414–15, 417. Initially, Mrs. Acosta was confined to her bedroom because of the contamination and odor in her home. CP 417. Mrs. Acosta eventually learned that this sewage intrusion is injurious to her health, causing her to break out in a rash all over her body. CP 416–17, CP 420. Consequently, because of the contamination in the Acosta’s home, Mrs. Acosta has been unable to live in her home for long periods of time since the January 12, 2015 sewage backup. CP 416–17, CP 420. Therefore, the foregoing case law and evidence supports a finding that the sewage backup that flooded the lower level of the Acosta’s

home constitutes a private nuisance for which the City of Mabton is liable.

V. CONCLUSION

In this case, the trial court erred in granting the City of Mabton's Motion for Summary Judgment. The foregoing case law and evidence illustrates that genuine issues of material fact exist as to every element of the Acosta's claims for negligence, negligent infliction of emotional distress, and private nuisance. As a result, the order granting the City of Mabton's Motion for Summary Judgment should be reversed.

DATED this 23rd day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Maury A. Kroontje, declare as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the above captioned case.
2. I am the attorney of record for Appellants Norma and Gilbert Acosta. My business address is Kroontje Law Office, PLLC, 1411 Fourth Avenue, Suite 1330, Seattle, WA 98101.
3. On June 23, 2017, I caused the original **Brief of Appellants** to be filed in the Court of Appeals – Division Three and a true copy of the same to be served on the following party via the method(s) indicated:

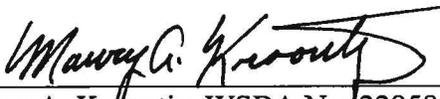
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- Via U.S. Priority Mail
- Via Facsimile:
- Via ABC Legal Messenger
- Via E-Service
- Via Hand Delivery
- Via Email: kharper@mjbe.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of June, 2017.



Maury A. Kroontje, WSBA No. 22958

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June 23, 2017 - 12:07 PM

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