

FILED

JUN 28 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 343430

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

DONALD and KATRINA SIMMONS,

Appellants,

v.

CITY OF OTHELLO,

Respondent.

BRIEF OF APPELLANTS

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

TABLE OF CONTENTS

I. Introduction	1
II. Assignment of Errors	1
III. Issues Pertaining to Assignment of Errors.....	1
IV. Statement of the Case	2
V. Argument	5
A. The Superior Court Improperly Struck Portions of the Declarations of former Othello Mayor, Shannon McKay and Appellants’ plumbers.....	5
1. Mayor McKay.....	5
a. Mayor did not speculate.....	6
b. Mayor offered no hearsay statements.....	7
c. Mayor was person in charge over City.....	8
d. Mayor never commented on the law.....	8
2. Plumbers: Enriquez; Heist; Gonzalez	9
a. Unqualified expert testimony.....	9
b. Expert’s extensive experience provides foundation.....	10
c. No conflict between depositions and declarations.....	11
B. The Superior Court failed to recognize issues of fact which precluded granting summary judgment.....	12
C. The Superior Court applied the wrong law.....	13
1. Othello had no municipal code regarding repairs	13
2. City’s misuse of terms confused the court.....	13
3. Where the municipal code is silent, common law applies	16

D. Assigning the duty to property owners to maintain lines under public roadways is not logical or supportable..... 17

V. Conclusion 19

TABLE OF AUTHORITIES

Cases

Blomster v. Nordstrom, Inc., 103 Wash.App. 252, 260, 11 P.3d 883 (Div. 1, 2000)	11
City of Seattle v. Heatley, 70 Wash.App. 573, 578, 854 P. 2d 658 (1993)	9
FDIC v. Uribe, Inc., 171 Wash.App. 683, 688 ¶16, 287 P.3d 694 (Div. 3, 2012)	13
Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 201 (1998) ...	5
Hays v. City of Vancouver, 61 Wash. 536, 112 P. 498 (1911)	16
In re Welfare of Young, 24 Wash.App. 392, 396, 600 P.2d 1213, 1215 (Div. 3, 1979)	10
Keck v. Collins, 181 Wash.App. 67, 78-9, 325 P.3d 306 (Div. 3, 2014)	5
Kempter v. City of Soap Lake, 132 Wash.App. 155, 158-9, 130 P.3d 420 (Div.3, 206)	17
Larson v. Georgia Pac. Corp., 11 Wash.App. 557, 524 P.2d 251 (1974)	10
Pruitt v. Douglas County, 116 Wash.App. 547, 558, 66 P.3d 1111 (2003)	17
Riley v. Andres, 107 Wash.App. 391, 398, 27 P.3d 618 (2001) .	13
State v. Blake, 172 Wash.App. 515, ¶16, 209 P.3d 769.	9
State v. Collins, 152 Wash.App. 429, 436, 216 P.3d 463 (2009)	9
State v. McPherson, 111 Wash.App. 747, 762, 46 P.3d 284 (Div. 3, 2002)	10

Other

CR 56(e) 6

Merriam-Webster’s Learner’s Dictionary, on line at
<http://www.merriam-webster.com/dictionary/speculative>..... 7

RCW 35A.12.100..... 5

Othello Municipal Code 12.04.050..... 16

Othello Municipal Code 12.04.070..... 15

Othello Municipal Code 12.12.040..... 15

Othello Municipal Code 12.16.290 (Prior to amendment). 13

Othello Municipal Code 12.16.290 (Effective October 2014). 14

I. INTRODUCTION

For over 100 years Washington Courts have held that a municipality is required to maintain the sewer system that it requires residents to connect to. This issue here is and what is not part of the sewer system and what authority do municipalities have to create ordinances that limit their responsibility to maintain the sewer system.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in granting the City's Motion to Strike portions of the declarations of Plaintiffs witnesses. CP 424-427
2. The Superior Court erred in granting summary judgment in favor of the City. CP 424-427

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court improperly determined that the testimony of the plumbers was inadmissible?
2. Whether the Superior Court improperly determined that the testimony of the former mayor of Othello inadmissible?
3. Whether the Superior Court erred in determining that there were no material issues of fact?

4. Whether the Superior Court erred in determining that the City had no responsibility to maintain the sewer line under the publicly owned alley?

IV. STATEMENT OF THE CASE

Donald and Katrina Simmons are the owners of a single family residence in the City of Othello, Washington. CP 50-76; 77-80 Beside their home is an unpaved alley that runs the length of the entire block. The alley is owned by the City of Othello. The alleyway is used twice a week by garbage trucks weighing approximately 40,000 pounds to collect refuse. CP 9-49; 77-80

In March of 2014, the Simmons began experiencing sewer problems in their home. They hired a plumber to come investigate and to clean out the line. CP 50-76 The plumber discovered that the problem was outside the Simmons residence and a snake was run from the clean out towards the city main. The snake became lodged in the blockage and was not removable. CP 83-86; 91-99 Because of the amount of snake run, the plumber advised the Simmons that the problem lay outside of their property line in the City lines. CP 83-86; CP 50-76

Rodney Heist of Tee Pee Septic was hired to run a camera and a locator through the Simmons sewage line to locate the source of the problem. He first ran the camera towards the Simmons residence and

discovered no blockage. Next he ran the camera towards the city main and He discovered that the line was collapsed under the City owned alleyway near the main line. CP 87-90; 91-99 After examining the surroundings, Heist determined that the most likely cause for damage to a pipe buried this deep was the heavy vehicle traffic of garbage trucks operating over the unpaved alleyway. Heist had also encountered this issue behind one or more houses in Othello underneath the alley traversed by the heavy garbage trucks. CP 87-90

The Simmons notified the City of Othello of a blockage in the city line. The City of Othello checked the main sewer line in the alley and found no blockage. The Simmons were informed that the City line was clear and that the Simmons would have to repair the break. CP 50-76

The Simmons hired a contractor capable of excavating deeply buried sewer lines, obtained a right of way permit and borrowed traffic control devices from the city to block off the alley. CP 50-76; 91-99

Art Gonzalez of Double A Plumbing was the contractor hired to excavate and repair the broken line. In the course of the excavation, Gonzalez encountered the water main and active gas lines that were bubbling. Excavation around these utilities required digging carefully by hand to ensure that nothing was damaged. CP 50-76; 91-99

When Gonzalez uncovered the location of the broken line, he

discovered that the entire area was saturated with debris. The volume was such that he knew the line had been slowly failing for a long time before it finally collapsed entirely. Once the debris had been removed, the broken pipe was revealed. The break had occurred in the connection between the line servicing the Simmons residence and the City main. CP 50-76 Gonzalez notified the city that the connection point was broken and needed to be fixed. He also advised the Simmons that the only possible cause he could identify for the slow degeneration of the connection over time was the operation of the heavy garbage trucks over the sewer line. CP 91-99

The City initially refused to repair the broken connection, but after further communications from the Simmons or their contractor, the city decided to repair the connection. CP 50-76; 77-80; 91-99 The City insisted that Plaintiffs excavate further and that the Simmons rent and install shoring material in the hole to protect the City workers from a cave in while they repaired the connection. CP 50-76; 77-80; 91-99

When the city finished installing the connection to the main line, the Simmons had to have a new line installed from the residence to the connection point because the old line would no longer connect with the connection provided by the City. CP 50-76; 91-99

The Simmons brought this suit to recover the monies they incurred

diagnosing and excavating the city connection and other expenses. CP 50-76 Both parties brought motions for summary judgment and the City brought a motion to strike the declarations of Plaintiffs plumbers and the former Mayor. The lower court granted the City's motions and struck portions of the declarations of Appellants' witnesses, granted the City's motion for summary judgment, and dismissed Appellants' case.

V. ARGUMENT

A. The Superior Court improperly struck portions of the declarations of former Othello Mayor, Shannon McKay and Appellants' plumbers.

The issue in this case is who has responsibility to repair the portion of the sewer line that was broken. It appears that the Superior Court's attention was misdirected non-issues resulting in an erroneous ruling on what witness testimony was admissible.

Review of a summary judgment is de novo and when a motion to strike is made in conjunction with a motion for summary judgment, review is de novo. *Keck v. Collins*, 181 Wash.App. 67, 78-9, 325 P.3d 306 (Div. 3, 2014); *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 201 (1998).

1. Mayor McKay

Shannon McKay served as Mayor for the City of Othello from 2005 to 2009. As mayor, he had authority over all department heads

within the City. RCW 35A.12.100. In that capacity, he gave testimony regarding the City's position regarding the need for load restrictions and that the City's pattern and practice was to excavate and repair broken connections. CP 81-82 The City argued that this testimony was inadmissible under CR 56(e) on the basis that it contained inadmissible hearsay, lacked adequate foundation, was speculative and contained improper legal conclusions. CP 314-327 The rule provides in pertinent part as follows:

(e) Form of Affidavits; Further Testimony; Defense Required. 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 therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

CR 56(e).

a. Mayor did not speculate.

Speculative is defined by Webster's Dictionary as "based on guesses or ideas about what might happen or be true rather than on facts."

Merriam-Webster's Learner's Dictionary, on line at <http://www.merriam-webster.com/dictionary/speculative>. Here, Mayor McKay provided evidence regarding the City's pattern and practice of: 1) repairing the connection unit between the private residence line and the city main; and 2) of imposing load limits because the City believed that the garbage trucks and other equipment operating along the roadways were damaging the infrastructure. CP 81-82 As the officer in charge of the city, there is nothing speculative in the Mayor's statements and the court improperly excluded them.

b. Mayor offered no hearsay statements.

The City argued that Mayor McKay's testimony regarding the results of investigation of a broken sewer connection which occurred while he was mayor was hearsay. In support of this argument, the city argued without citing any supporting facts that Mayor McKay did not participate in the investigation. CP 314-327

Hearsay is a statement made by someone other than the declarant. ER 801. Here, Mayor McKay offered no statements. As the officer in charge of the City of Othello, Mayor McKay gave testimony regarding the opinions formed by the city as a result of an investigation performed by departments he supervised. Thus the court improperly determined his testimony was hearsay.

c. Mayor was person in charge over City.

The City argues that Mayor McKay's testimony lacks foundation because he didn't personally investigate the Crosier sewage break. CP 314-327 The argument assumes that the Mayor is giving testimony regarding the scene. Here the mayor is not testifying regarding the scene of the events but the opinion that the City reached as a result of the investigation performed by his subordinates. McKay is not required to prove that he personally investigated the sewer lines in the City of Othello to be able to testify regarding the opinions held and the pattern and practice of the City to repair connection points and to impose load limits

d. Mayor never commented on the law.

The City argued that Mayor McKay's testimony about the City's interpretation of its ordinances regarding responsibility to maintain the sewer lines was a legal conclusion. CP 81-82; 314-327 The testimony establishes a pattern and practice by the city demonstrating the state of mind of the City regarding how the ordinance was to be interpreted and applied. Furthermore as the governing officer of the City charged with the enforcement of the ordinances, how he interprets and applies them is relevant evidence that should not have been excluded.

//

2. Plumbers: Enriquez; Heist; Gonzalez

The City sought to have portions of the declarations of the plumbers who were on site and investigated the sewage problem stricken as inadmissible expert testimony, lack of foundation, speculative and conflicting with prior testimony. 317-327

a. Unqualified expert testimony.

The City asserts that the testimony of the plumbers regarding potential causes of the sewage break were admissible under ER 701. Lay persons are allowed to give opinions and make inferences under 701 that are based on the perception of the witness; helpful to determine a fact at issue; and not based on any specialized knowledge. Opinion testimony that is based on inferences from the evidence observed by the witness is not improper testimony, even if that testimony touches on the ultimate issue in the case. *State v. Blake*, 172 Wash.App. 515, ¶16, 209 P.3d 769 (Div. 1, 2012 citing *City of Seattle v. Heatley*, 70 Wash.App. 573, 578, 854 P.2d 658 (1993)), and *State v. Collins*, 152 Wash.App. 429, 436, 216 P.3d 463 (2009).

The Plumber's testimony was obtained at the expert's depositions on January 13, 2016 and motions for summary judgment were filed thirteen days later. CP 120-224 Had the court not dismissed Appellants' case, the plumbers would likely have been identified as expert witnesses to

address causation, especially in light of the City's allegation that the Simmons conduct or the conduct of the plumbers may have caused the backup on their property. An expert need only have sufficient training and experience to qualify as an expert. *State v. McPherson*, 111 Wash.App. 747, 762, 46 P.3d 284 (Div. 3, 2002). "Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications to the weight, rather than the admissibility, of his testimony." *In re Welfare of Young*, 24 Wash.App. 392, 396, 600 P.2d 1213, 1215 (Div. 3, 1979) citing *Larson v. Georgia Pac. Corp.*, 11 Wash.App. 557, 524 P.2d 251 (1974).

The deposition and declaration testimony before the court demonstrated that each plumber had extensive experience and training in the field of plumbing and part of their job was to diagnose causation for purposes of remedying and preventing future events.

b. Expert's extensive experience provides foundation.

The City objected to the witness testimony as speculative because they testified that based on their experience as plumbers that sewer lines don't typically break on their own absent some other factor. CP 83-99 Some of those factors included inadequate compaction or repeated heavy equipment operation over lines. The detailed explanation of their experience and training is sufficient to provide the testimony regarding

causes of sewer line breakage. Their firsthand experience with the Simmons residence, the location of the line, and the visible surroundings was sufficient foundation for the Plumbers to opine as to probable causes for the damage that occurred to the connection between the Simmons line and the main.

c. No conflict between depositions and declarations.

The City claims that the plumbers' declarations contradict their deposition testimony. In Mr. Enriquez deposition, he testified in his deposition regarding hypotheticals. In his declaration, he testified about what actually occurred at the Simmons residence. In Mr. Gonzalez deposition, he testified that he didn't know if the bell had dropped or become separated but he could tell that movement of the soils had caused the problem with the line. This was not inconsistent with his declaration testimony regarding what he observed on site and that the only cause he could find to explain the break was the garbage truck operation overhead.

After reviewing all the evidence and the deposition testimony, if a declaration is not completely inconsistent or contradictory to a prior sworn deposition, it should not be stricken. *Blomster v. Nordstrom, Inc.*, 103 Wash.App. 252, 260, 11 P.3d 883 (Div. 1, 2000).

//

B. The Superior Court failed to recognize issues of fact which precluded granting summary judgment.

The only issue in this case is who has the responsibility to maintain the portion of the sewer line that was broken. Plaintiffs' plumbers all stated that the portion that was broken was the connection piece which connects the Simmons house line to the City sewer line. According to Art Gonzalez, the City eventually agreed to replace the broken connection but only after he had performed extensive excavation to uncover the problem. According to Mayor McKay, the pattern and practice of the City had been to excavate and replace these broken connections. The ownership of the location of the break was an issue in conflict that confused the superior court.

The City also asserted that Plaintiffs or their plumbers may have caused the breakage in the lines. This issue was disputed. Plaintiffs' plumbers all testified that there was no evidence of activities by the Plaintiffs that would have resulted in this break and that the snake run by Mr. Enriquez was insufficient to break a line but it can feed out through an existing break.

In addition, the City of Othello changed their ordinance after the events at issue here to provide that homeowners are responsible to make the repairs all the way to the main line. The Superior Court appears to

have gotten confused and assumed that was the ordinance in place at the time these events unfolded.

A motion for summary judgment should not be denied if the court is required to consider issues of credibility. *FDIC v. Uribe, Inc.*, 171 Wash.App. 683, 688 ¶16, 287 P.3d 694 (Div. 3, 2012), citing *Riley v. Andres*, 107 Wash.App. 391, 398, 27 P.3d 618 (2001). The testimony of Plaintiffs witnesses were sufficient to establish that the City had a practice of repairing the connection between the residential line and the main and that the Simmons were not responsible for the damage that occurred to the connection. Thus the testimony should have been considered in a light most favorable to Appellants and the matter not dismissed.

C. The Superior Court applied the wrong law.

1. Othello had no municipal code regarding repairs.

At the time the Simmons “connection” broke, OMC 12.16.290 read as follows:

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 267-311 According to the City's Corporate Representative, this OMC 12.16.290 only applied to new connections and not the repair of existing connections such as the Simmons made. CP 267-311 (Clements deposition at 170:24-171:9.) After the Simmons connection broke, the city amended the ordinance to make it applicable to repair situations and the City provided a copy of this new OMC to the Superior Court. The new OMC 12.16.290 reads as follows:

All new and replacement connections of lateral building sewer lines to the municipal sewer system shall be performed by a licensed and bonded contractor, under the supervision of the public works director. The contractor will be responsible for the purchase and installation of the riser, saddle or other connecting parts being attached to the municipal sewer line. As part of the new sewer line connection fee, the city shall furnish the saddle (on new connections only). 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. The city shall inspect and approve the connection before the contractor backfills the trench.

Emphasis mine. The revision clearly supports the testimony of the corporate representative that the city's code did not apply to repair situations and demonstrates that there was no code in effect.

2. City's misuse of terms confused the court.

The City's counsel repeatedly used the term "lateral line" to refer to everything from the main line to the Simmons' residence. The

municipal code doesn't define the term, "lateral line," but in the instances the term "lateral" is used, it always is referring to the public line being the between the main sewer line and the property line.

12.12.040 Mandatory sewer connection and compulsory charges.

The owner of each lot or parcel of real property within the city and within three hundred feet of a *sewer lateral* trunk line or shown on site septic system has failed or is inadequate for the present use, not already connected to the public sewer system of the city, upon which lot or parcel of property is situated any building or structure for human occupation or use for any other purpose, shall install suitable toilet facilities therein, and shall connect such facilities, together with all other facilities therein the use of which results in the existence of sewage as defined herein, but with the specific exception of industrial waste flows, with the public sewer system, at his own expense, within thirty days after mailing of a notice to so connect signed by the building official, to such user.

Emphasis mine. CP 233-254 In the Othello Public Works Design Standards, the term "Side Sewer Lateral" is defined as that "portion of the sewer line...between the main sewer line and a property line or easement limit." CP 233-254 In contrast, the line from the property line to the house is defined in the code as the "building sewer" or "side sewer." The municipal code reads as follows:

12.04.070 Building sewer/side sewer.

"Building sewer" and "side sewer" mean the extension from the public sewer, commencing at the property line, to the owner's facility drainage system.

CP. 255-266

The City's failure to distinguish between the two sections commencing at the property line resulted in confusion for the court as the city argued that the "lateral line" was not part of the public sewer that the city is required to maintain.

The term "public sewer" is defined in OMC 12.04.050 as, "a sewer in which all owners of abutting properties have equal rights, and is controlled by public authority." The City's position was that no other property owner was connected to the same connection as the Simmons so it was not a public sewer line. The fact that others were not connected is not the test. The test is whether others could be connected.

As already noted, OMC 12.12.040 requires that everyone within 300 feet of a lateral line must connect to it. Just because no one else is currently connected to the exact same lateral line as the Simmons is irrelevant. By the City's own code, it is still a lateral line as it runs between the sewer main and the property line, and the City gets to choose who connects with it.

3. Where the municipal code is silent, common law applies.

As noted above, the version of OMC 12.16.290 in effect at the time of the break in the Simmons connection repair only applied to new connection installations and not repairs. The municipal code was otherwise silent on who had the duty to repair sewer lines at the time the

Simmons connection broke. In the absence of a municipal code transferring liability for repair between the main and the property line to the Simmons, the common law applies.

Since 1911, Washington Courts have held that a city which chooses to construct a municipal sewer system and then require its citizen's to connect to that system owes a duty to: 1) construct the system soundly; 2) reasonably inspect the system; and 3) maintain the system. *Hays v. City of Vancouver*, 61 Wash. 536, 112 P. 498 (1911); *Kempter v. City of Soap Lake*, 132 Wash.App. 155, 158-9, 130 P.3d 420 (Div. 3, 206) citing *Pruitt v. Douglas County*, 116 Wash.App. 547, 558, 66 P.3d 1111 (2003). Under the common law, the City of Othello has the duty to repair the sewer lines that run under the city owned alleyways and roads.

D. Assigning the duty to property owners to maintain lines under public roadways is not logical or supportable.

Case law lacks any definition of what the demarcation is between a private sewer line and the municipal sewer line. This is an issue of first impression that requires clarification by this court. The city urges this court to adopt a rule that everything outside of the main sewer line is the responsibility of the property owner but has produced no case law to support this application.

The Superior Court determined that a sewer line than runs to the sewer main, under publically owned property is a private sewer and must be maintained by the private property owners. Following the court's ruling to its logical conclusion will result in an absurd application that no one would want.

Imagine one of the residential homeowners or even DoughBoys being required to excavate North Division Street to repair the sewer line from their property line out to the City main line. To impose such a duty on homeowners or even small businesses would be more than most could bear. The costs would include traffic regulation; removal of blacktop, sidewalks, and landscaping; and maneuvering around gas and other utility lines. The number of contractors with appropriate licenses to perform each phase of the work that would be required would be cost prohibitive.

The result would also be placing an unjust burden on property owners who have no authority to control the use of the land over the sewer lines. The result would be to make property owners an insurer for every negative impact which the city, in its exclusive control, allows to occur on the street including jack hammers, heavy equipment, excavation to access other utilities, etc.

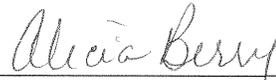
The extension being requested by the city to convert all sewer lines except the main line to private maintenance is also likely to increase

litigation as property owners seek to attach liability to others to avoid the heavy burden of making such repairs themselves. There is no basis in law or reason for the extension urged by the City and the Superior Court ruling should be overturned.

VI. CONCLUSION

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

Respectfully submitted this the 27th day of June, 2016.



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

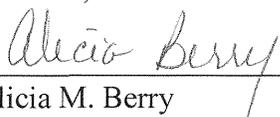
CERTIFICATE OF SERVICE

On June 27, 2016 I served the Brief of Appellants with Appendix

via first class mail, postage pre-paid to:

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

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



Alicia M. Berry