COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2831 **Cir. Ct. No. 2007CV533**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MICHAEL GIDEO AND JONELLE GIDEO,

PLAINTIFFS-APPELLANTS,

V.

CITY OF CUMBERLAND AND COMMUNITY INSURANCE CORPORATION, C/O WISCONSIN COUNTIES ASSOCIATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County: JAMES D. BABBITT, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael and Jonelle Gideo appeal a summary judgment dismissing their nuisance claim against the City of Cumberland. The basis for their claim was a sewer backup into their basement. The Gideos argue

the circuit court erred when it concluded the City was not liable because it had no notice of the blockage that allegedly caused the backup. We affirm.

BACKGROUND

¶2 On February 25, 2007, a sewer operated by the City backed up into the Gideos' basement. The Gideos asserted the backup was caused by a blockage between the Gideos' sewer line and the main sewer line. The Gideos sued, alleging the sewer backup was a nuisance. They contended this nuisance was caused by the City's negligence in failing to adequately inspect the sewer lines for defects. The City moved for summary judgment, arguing it could not be liable for negligently creating a nuisance unless it had notice of the defect that allegedly caused the nuisance. The City contended it was undisputed it did not know there was a blockage until the backup occurred. The circuit court agreed and granted summary judgment in favor of the City.

DISCUSSION

¶3 Whether a circuit court properly granted summary judgment is a question of law we review independently. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). Summary judgment is appropriate when "there is no issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶4 The Gideos brought this suit as a private nuisance action. A private nuisance is the invasion of an interest in the use and enjoyment of land. *See* ***Metropolitan Sewerage Dist. v. Milwaukee***, 2005 WI 8, ¶24, 277 Wis. 2d 635, 691 N.W.2d 658 (citation omitted). However, this invasion of interest simply

refers to a type of harm suffered. No liability attaches unless that harm is caused by an underlying tortious act. ***Id.***, ¶25.

¶5 Here, the Gideos allege the underlying tortious conduct was the City's negligence in maintaining the sewer lines. Specifically, they allege the City should have conducted more frequent inspections so that it could prevent blockages such as the one here.

¶6 In ***Metropolitan Sewerage***, a sewerage district sued the City of Milwaukee for a nuisance allegedly created when one of the city's water mains collapsed. The sewerage district argued the city had an absolute duty to properly maintain its water mains and that the sewerage district therefore did not need to prove the city knew about the defective condition that led to the main's collapse. Our supreme court rejected this argument, pointing out that under the RESTATEMENT (SECOND) OF TORTS, "no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act—that is, unless he has knowledge or notice of the nuisance condition." ***Metropolitan Sewerage***, 277 Wis. 2d 635, ¶48 (quoting the RESTATEMENT (SECOND) OF TORTS § 824 (1977)).

¶7 The court then rejected the sewerage district's argument that the city should have conducted regular inspections so that it could discover defects such as the one that caused the collapse. The court noted the general rule is that, absent circumstances indicating a defect, a water distributor is not "negligent by failing to regularly dig up and inspect buried water mains." ***Id.***, ¶79 (citation and internal punctuation omitted). Rather, "a waterworks operator's duty to inspect and repair arises *after notice of a leak likely to cause damage*." ***Id***.

¶8 The same is true here. Just as in ***Metropolitan Sewerage***, the Gideos' nuisance claim is based on a failure to act. Therefore, the Gideos were

required to prove the City had notice of the defective condition. A sewerage operator—like a waterworks operator—is not obligated to dig up sewer lines for inspection unless there are circumstances indicating there is a defect.

¶9 The Gideos attempt to distinguish ***Metropolitan Sewerage*** on the basis that it pertained to water mains instead of sewer lines. They do not explain, however, why what the lines transport has any bearing on whether the operator has a duty to regularly dig them up for inspection. Nor do the Gideos present authority indicating a different standard of care pertains to sewerage operators. All they provide is an affidavit stating that the City "may have failed to exercise reasonable care in the maintenance of [its sewer system]." This conclusory pronouncement neither elucidates a standard of care nor indicates how such a standard was breached.

¶10 The Gideos also appear to argue that another case, ***Menick v. Menasha***, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), describes a sewerage operator's duties more accurately than ***Metropolitan Sewerage*** because ***Menick*** specifically concerned a sewer backup. The Gideos cite the ***Menick*** court's statement that a municipality has "no discretion as to maintaining the system so as not to cause injury to residents[,]" ***Menick***, 200 Wis. 2d at 745, and appear to insinuate this speaks to a city's standard of care in maintaining sewer lines. However, that is not the statement's context. ***Menick***'s discussion of discretionary and nondiscretionary decisions pertains to whether municipalities are

immune from liability for certain actions, not how they must discharge certain duties.[1]

¶11 Accordingly, we conclude the rule articulated in ***Metropolitan Sewerage*** applies here. The City had no duty to inspect the sewer line absent notice there was a defect likely to cause damage. Because it is undisputed the City had no notice of the sewer blockage, the circuit court properly granted summary judgment in favor of the City.

COSTS

¶12 The City also filed a motion to strike certain arguments in the Gideos' reply brief as frivolous and requested costs for the motion. We denied the motion to strike in a separate order. We now deny the motion for costs.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[1] In their appellate brief, the Gideos also attempt to locate a duty to regularly inspect buried sewer lines in various state statutes and administrative regulations, but none of the statutes or regulations they cite are on point. For example, they cite WIS. ADMIN. CODE ch. NR 113 (Sept. 2001)—this section does not apply to public sewerage systems. They also quote regulations pertaining to sewer application procedures, and a statute relating to department of natural resource's reporting requirements. Neither of these statutes or regulations, however, has any bearing on whether a City must regularly dig up and inspect its sewer lines.