

1 40 Corp. advised that “a defective City of Wells sewer line caused the sewage to backup into
2 Plaintiffs’ basement.” (*Id.* (emphasis omitted)). On October 24, 2011, Plaintiffs contacted
3 Defendant Jolene M. Supp, the City Manager, and requested that the City clean up the mess and
4 compensate Plaintiffs for the damage to their residence and personal belongings. (*Id.*). Supp
5 declined both requests, so Plaintiffs cleaned up the raw sewage in their basement. (*Id.*).
6 Defendants also did not take action to fix the defective sewer. (*Id.*).

7 On November 3, 2011, more raw sewage “physically invaded” Plaintiffs’ basement from
8 the same defective sewage line (the “second incident”). (*Id.* at 6). Plaintiffs contacted Supp and
9 she again declined to compensate Plaintiffs and clean up the sewage. (*Id.*). The City still has not
10 corrected the problem with the sewer. (*Id.*). As a result of the incident, and because the
11 ventilation lines for the house are drawn from the basement, Plaintiffs’ entire house smells like
12 sewage. (*Id.*). Plaintiffs are deterred from cleaning up the sewage themselves because they are
13 worried the sewer will just leak again. (*Id.* at 7). They also allege that the sewer is a public
14 improvement, and “[t]he disposing, transporting, and treating of raw sewage” concerns the whole
15 community. (*Id.*). They allege that Plaintiffs have contributed more than their share to the public
16 undertaking, and the City should compensate Plaintiffs for their trouble. (*Id.*).

17 Plaintiffs sued the City and Supp on nine nominal causes of action: (1) declaratory relief
18 under 28 U.S.C. §§ 2201 and 2202; (2) civil constitutional claims under 42 U.S.C. § 1983; (3)
19 inverse condemnation under Article I § 8(6) of the Nevada Constitution (against the City); (4)
20 negligence; (5) intentional infliction of emotional distress; (6) trespass; (7) breach of implied
21 contract (against the City); (8) private nuisance (against the City); and (9) respondeat superior
22 (against the City). (*See id.* at 9–14). Defendants moved to dismiss. The Court dismissed the first

1 and ninth claims, as well as the second through eighth claims insofar as they arose out of
2 Defendants' failure to inspect the sewage pipes before the first incident, without leave to amend.
3 The Court refused to dismiss the second through eighth claims insofar as they arose out of
4 Defendants' failure to clean up the sewage, compensate Plaintiffs, and repair the sewage pipe
5 after the first incident. Defendants have now moved for summary judgment, and Plaintiffs have
6 asked the Court to reconsider the earlier dismissals.

7 **II. LEGAL STANDARDS**

8 A court must grant summary judgment when "the movant shows that there is no genuine
9 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
10 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*
11 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
12 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*
13 *id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported
14 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary
15 judgment, a court uses a burden-shifting scheme:

16 When the party moving for summary judgment would bear the burden of proof at
17 trial, it must come forward with evidence which would entitle it to a directed
18 verdict if the evidence went uncontroverted at trial. In such a case, the moving
party has the initial burden of establishing the absence of a genuine issue of fact
on each issue material to its case.

19 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
20 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
21 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
22 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by

1 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
2 element essential to that party's case on which that party will bear the burden of proof at trial.
3 *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden,
4 summary judgment must be denied and the court need not consider the nonmoving party's
5 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

6 If the moving party meets its initial burden, the burden then shifts to the opposing party
7 to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio*
8 *Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing
9 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
10 claimed factual dispute be shown to require a jury or judge to resolve the parties' differing
11 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
12 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
13 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
14 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
15 allegations of the pleadings and set forth specific facts by producing competent evidence that
16 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

17 At the summary judgment stage, a court's function is not to weigh the evidence and
18 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
19 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
20 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
21 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

22 ///

1 **III. ANALYSIS**

2 Defendants adduce the affidavit of Dennis Calton, a public works employee with the
3 City. Calton responded to the first incident with fellow employee Gus Villalobos. (*See* Calton
4 Dep. 11–13, Apr. 10, 2013, ECF No. 21-1, at 52). Upon using a “jet roter” to clear the line
5 downstream from Plaintiffs’ house, Calton discovered that “some shop towels and a rag like a T-
6 shirt or something” had been causing the blockage. (*See id.* 13, 16). Calton indicated that there
7 were twelve residences upstream from the blockage (seven single-family homes and one five-
8 residence apartment building), and there was no way to know which residence was the source of
9 the items simply from inspecting the blockage itself. (*See id.* 18, 26). Calton told Jody Van
10 Meter she could “put a back check in the system” and that “[t]hey are not a complete failsafe, but
11 a lot of times they will keep something from coming back in when the line does plug up.” (*Id.*
12 19, 21).

13 Defendants also adduce the affidavit of Jason Pengelly, the public works supervisor for
14 the City. (*See* Pengelly Dep. 12, Apr. 10, 2013, ECF No. 21-1, at 62). Pengelly was on leave
15 during the first incident, but Calton had verbally reported it to him. (*Id.* 20–21). Pengelly
16 responded to the second incident himself and found a blockage similar to the blockage Calton
17 had reported from the first incident, i.e., “[h]eavy duty paper shop towels, like the ones you can’t
18 even tear.” (*Id.* 21, 24). The blockage was not a remnant of the first incident, but rather new
19 material, because no foreign material from the first incident could have survived the jet roter,
20 which creates pressure of 1500–2000 pounds per square inch. (*Id.* 22). The foreign material
21 would have caused a blockage even if the pipe had been bigger; it would simply have taken a bit
22 longer to clog. (*Id.*). There were only three houses and one apartment complex upstream from
23

1 the blockage, so the culprit must have put the material into the line from one of those residences.
2 (*Id.* 25).

3 Defendants have satisfied their initial burden on summary judgment to show that there
4 was no deliberate indifference or negligence on their part, negating any constitutional, IIED, or
5 negligence claim. Nor was there any intent to invade Plaintiff's property, negating a trespass,
6 takings, or condemnation claim. Nor was the sewage backup the result of any voluntary action
7 by the City on its own land adjacent to Plaintiffs', negating a nuisance theory. Defendants have
8 provided evidence negating any intentional act by them causing any damage. The evidence
9 shows that the second incident was caused by one of Plaintiffs neighbors, or perhaps even by
10 Plaintiffs, but there is no evidence it was caused by Defendants. At most, Plaintiffs can accuse
11 Defendants of negligence in failing to continuously inspect and maintain the sewer lines, but, as
12 Defendants have noted, they are immune from claims based upon such allegations pursuant to
13 Nevada Revised Statutes section 41.033. A person may not sue a municipality or its employees
14 for:

15 (a) [f]ailure to inspect any building, structure, vehicle, street, public
16 highway or other public work, facility or improvement to determine any hazards,
deficiencies or other matters, whether or not there is a duty to inspect; or

17 (b) [f]ailure to discover such a hazard, deficiency or other matter, whether
18 or not an inspection is made.

19 Nev. Rev. Stat. § 41.033(1)(a)–(b). Municipalities in Nevada are immune from suit for a failure
20 to inspect sewer systems in order to discover obstructions or other deficiencies. *See Fischmann v.*
21 *City of Henderson*, 556 P.2d 923, 924 (Nev. 1976) (holding that the City of Henderson was
22 immune from suit for failing to inspect sewage lines after raw sewage leaked in to the plaintiff's
23 house); *Schroeder v. Ely City Mun. Water Dep't*, 910 P.2d 260, 261–62 (Nev. 1996) (holding

1 that the City of Ely was immune from suit for failing to maintain a sewer when sewage leaked
2 into the plaintiffs' businesses). The Court previously noted that in *Fischmann* and *Schroeder*,
3 the plaintiffs sued after only a single incident of flooding, *see Fischmann*, 556 P.2d at 923;
4 *Schroeder*, 910 P.2d at 261, but that here, Plaintiffs allege that Defendants did not fix the
5 problem after the first flooding, thereby causing the second incident. The Court therefore
6 permitted the second through eighth claims to proceed to discovery insofar as they were based
7 upon the second incident, because it was possible Plaintiffs could show Defendants actually
8 caused the second incident through actions for which they would not be immune, e.g., by causing
9 a clog in the line itself or through some other affirmative action causing the second flooding.
10 But the only evidence adduced indicates that Defendants fixed the problem after the first incident
11 and that the second incident was not caused by any intentional act or even negligence on
12 Defendants' part, except insofar as Plaintiffs argue that Defendants were negligent in not
13 inspecting the sewer lines to keep them free of obstructions, which claim is barred by section
14 41.033.

15 In response, Plaintiffs first argue that the Motion for Summary Judgment is untimely.
16 They are correct. The Scheduling Order indicated May 27, 2013 as the deadline for filing
17 dispositive motions, and Defendants filed the Motion for Summary Judgment on May 28, 2013.
18 Defendants do not have the benefit of the holiday rule, because the Scheduling Order specified
19 the date directly and did not require any computation. However, because the Motion is
20 meritorious, an extension to consider it is much more in the interest of judicial economy than to
21 strike it and require a trial. Accordingly, the Court grants a one-day extension.

1 As to the merits, Plaintiffs adduce several relevant pieces of evidence. First, Plaintiffs
2 adduce City Manager Jolene Supp's deposition transcript. (*See* J. Supp. Dep., Apr. 10, 2013,
3 ECF No. 23-1, at 5). Supp confirmed Calton's and Pengelly's testimony as to the cause of the
4 blockages and testified generally as to the sewer system but did not indicate any affirmative
5 actions taken by the City that could have caused the blockage. (*See generally id.*). Although
6 counsel questioned her repeatedly about the City's inspection and maintenance policies and the
7 sufficiency of the City's efforts to discover the culprit(s) who flushed the foreign material and to
8 inform residents not to flush foreign material, those questions were directed at discovering facts
9 that might lead one to conclude that the City was negligent in the way it maintained and
10 inspected the sewer lines. The City is immune from such claims.

11 Plaintiffs also adduce Calton's and Pengelly's deposition transcripts. They did not testify
12 as to any affirmative act taken by any agent of the City causing the blockage but only that they
13 failed to discover exactly who was flushing the foreign material. Jody and Ron Van Meter
14 testified consistently with Calton and Pengelly and did not indicate any affirmative action taken
15 by the City to cause the invasion. (*See generally* J. Van Meter Dep., Apr. 9, 2013, ECF No. 23-2,
16 at 4; R. Van Meter Dep., Apr. 9, 2013, ECF No. 23-2, at 17).

17 Plaintiffs have not satisfied their shifted burden to show a genuine issue of material fact
18 as to any of their claims. Plaintiffs adduce no evidence indicating that Defendants took any
19 affirmative action indicating any intent to cause the invasion or that Defendants were negligent
20 in any way for which they are not immune. At most, the evidence shows that Defendants failed
21 to continuously inspect the sewer line to keep it free of debris, and, again, Defendants are
22 immune from claims arising out of this kind of alleged negligence. The proper defendant in this
23
24

1 case is the party that flushed the foreign material, as there is no genuine dispute of fact that this is
2 what caused the blockage. There is no evidence adduced that the City or its agents flushed the
3 material, there can be no *res ipsa* inference where it is clear that the occupants of twelve private
4 residences had the ability to cause the blockage by flushing foreign material, and the City is
5 immune from claims based upon its failure to discover the foreign material. *See Fischmann*, 556
6 P.2d at 924 (“It appears clear to this court that the legislative intent was that political
7 subdivisions are not to be held liable to lawsuit for failure to inspect sewer systems in order to
8 discover obstructions or other malfunctionings and deficiencies.”).

9 **CONCLUSION**

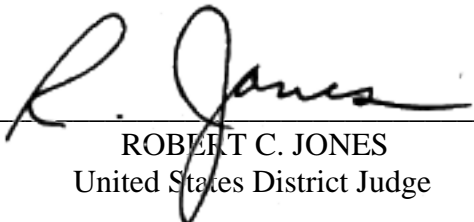
10 IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 21) is
11 GRANTED.

12 IT IS FURTHER ORDERED that the Motion to Reconsider (ECF No. 22) is DENIED.

13 IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

14 IT IS SO ORDERED.

15 DATED this 30th day of July, 2013.

16 
17 _____
18 ROBERT C. JONES
19 United States District Judge
20
21
22
23
24