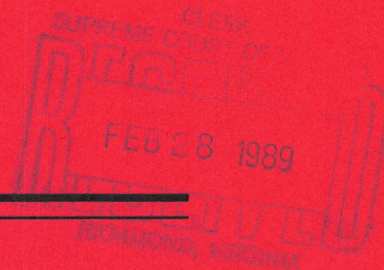


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 880382

TOWN OF VINTON,

Appellant,

v.

ROGER BRYANT, et al.,

Appellees.

JOINT APPENDIX

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Susan W. Spangler
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TABLE OF CONTENTS

	<u>Appendix Page</u>
Motion for Judgment filed 8/19/85	1
Exerpts from Proceedings before the Honorable G.O. Clemens heard on 4/30/87.....	4
Testimony of Linda C. Bryant.....	5
Testimony of Carolyn Puryear.....	15
Testimony of Ted Huddleston.....	18
Testimony of Cecil Stacy.....	42
Testimony of James A. McClung.....	60
Jury Instructions Given 1, 2, 3, 4, 5, 6, 7, 8, 10 filed 4/30/87.....	84
Jury Instructions Refused A, B, C filed 4/30/87.....	93
Final Order entered 3/4/88.....	96
Assignments of Error.....	99

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

ROGER BRYANT and
LINDA BRYANT,

Plaintiffs

v.

TOWN OF VINTON, VIRGINIA,
A Municipal Corporation,

Defendant

MOTION FOR JUDGMENT

File No.: _____

SERVE: Frank G. Selbe, III, Esq.
Attorney for the Town of Vinton
Stott & Selbe
101 South Jefferson Street
Roanoke, Virginia 24011

COMES NOW, the Plaintiffs', Roger Bryant and Linda Bryant, and moves for judgment against the Defendant, Town of Vinton, Virginia, a municipal corporation, on the grounds and in the amount as hereinafter set forth:

1. The Defendant is, and for many years has been, authorized and empowered by the laws of Virginia, including Title 15.1, and by its predecessor comparable title, to create a stormwater and sanitary sewer system for the Town of Vinton, Virginia, its inhabitants and property owners.

2. The Defendant, Town of Vinton, Virginia, did accept its responsibility and duty to construct, maintain and operate an adequate and sufficient system of sanitary sewers, storm sewers, drains and culverts by Ordinances duly passed; whereby, among other provisions, the jurisdiction and control of this Town Council was extended over the entire Town sewer system, stormwater, sanitary or combined.

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Law Offices
Welch
and
Jefferson
Rocky Mount,
Virginia

3. From time to time since accepting its responsibility and duty to construct, maintain and operate an adequate and sufficient system of sanitary sewers, Defendant, Town of Vinton, has had a duty to maintain, operate and develop an adequate and sufficient sanitary sewer system for the inhabitants and property owners of the Town of Vinton, Virginia.

4. Notwithstanding its duty to maintain and operate a sanitary sewer system adequately and sufficiently and in violation of such duty, the Defendant has been negligent and careless and has violated its magisterial duties in countless respects, including those specifically set forth as follows:

(a) It failed to inspect the sewer system.

(b) It failed to properly clean out the sewer system so as to prevent the clogging of the system.

(c) It failed to properly maintain the sewer system so as to prevent the system from becoming clogged.

(d) It failed to prevent the overloading of the sewage system so as to prevent the system from being clogged.

(e) It failed to install the proper valves to prevent the sewage from backing-up in the sewer system to the home of the Plaintiffs'.

(f) It failed to take the necessary and proper steps to prevent the sewer line from becoming clogged.

(g) It permitted sewer lines to become obstructed with grease and other debris.

5. As a direct and approximate result of the breach of duties, negligence and careless of the Town, as aforesaid, the Plaintiffs' suffered damages to personal property and real estate

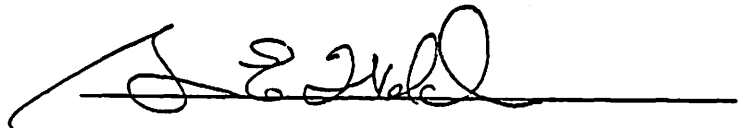
located at 1462 Abbey Circle, Vinton, Virginia, on January 10, 1985, when the sewer line to the Plaintiffs' residence became clogged and backed-up into the home of the Plaintiffs'.

6. Plaintiffs' gave legal notice to the Defendant of the damages to Plaintiffs' property, as required by Section 8.01-222 of the Code of Virginia, 1950, as amended, by filing a written statement of the nature of their claim and of the time and the place at which damages alleged to have occurred with the Town Attorney and the Mayor of Vinton, Virginia on March 18, 1985.

WHEREFORE, Plaintiffs', Roger Bryant and Linda Bryant demand judgment against the Defendant, Town of Vinton, Virginia, in the amount of \$5,000.00 and their costs in their behalf expended.

ROGER BRYANT and
LINDA BRYANT:

By Counsel:



COUNSEL:

Bruce E. Welch, Esq., p.q.
WELCH AND JEFFERSON
126 South Main Street
Rocky Mount, Virginia 24151

Law Offices
Welch
and
Jefferson
Rocky Mount,
Virginia

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1. What is the purpose of the study?
2. What are the research questions?
3. What is the significance of the study?
4. What are the limitations of the study?
5. What are the conclusions of the study?

Defendant

received and

Filed for the Clerk's Office
Circuit Court, Boone County
Vs. MAP 14 1988, 12
Tested before me, JOHN C. STUBBS, Clerk
Charles Dine W. Webb, Deed Clerk

1 first witness.

2 MR. ANDERSON: I call Mrs. Linda Bryant
3 please.

4
5 LINDA C. BRYANT

6 was called as a witness and after having first been duly
7 sworn to tell the truth, the whole truth, and nothing
8 but the truth, was examined and testified as follows:

9
10 DIRECT EXAMINATION

11 BY MR. ANDERSON:

12 Q Would you please tell the ladies and
13 gentlemen of the Jury your name?

14 A Linda Carolyn Mercer Bryant.

15 Q Mrs. Bryant, you are married to
16 Roger Bryant?

17 A Yes, sir.

18 Q And that was your husband sitting there
19 next to you?

20 A Yes, sir.

21 Q How long have you been married?

22 A 12 years in June.

23 Q How many children do you have?

24 A Two daughters, 9 and 5.

1 Q I want to direct your attention to
2 January 10, 1985. You live as far as the address of
3 that home there in the town?

4 A 1462 Abbey Circle, Vinton.

5 Q And were you employed on January 10,
6 1985?

7 A Yes, sir.

8 Q How were you employed?

9 A I am a registered nurse and I have been
10 in charge of the Hospice Program at Roanoke Memorial
11 since 1981.

12 Q If you would in your own words describe
13 to the ladies and gentlemen of the Jury what you found
14 on the morning of January 10 at your home on Abbey
15 Circle when you opened the basement door.

16 A Okay, I was opening the door to let the
17 cats up from the basement and smelled the odor and went
18 down to explore that and in the utility room of our
19 basement from the drain there was an inch or two of fowl
20 smelling, meshy looking water backing up into the
21 utility room.

22 Because I had a daughter to get to
23 school and one to the babysitters I went and called my
24 neighbor Carolyn Puryear, who was not working at that

1 time, to come and see if she could come up and let the
2 plumber in.

3 I called Ted Huddleston a plumber in the
4 Chamblissburg area to see if he could come and he said
5 he could be there at 9:30 so I went on to work with my
6 neighbor there to let the plumber in. Do you want me to
7 go on?

8 Q Just continue.

9 A By the time I left the home the utility
10 room was covered with the liquid and, you know, the
11 utility room drains down so I guess by that time it was
12 about two inches deep then and there were some pieces of
13 solid matter starting to go come up there.

14 I went on to work because I had meetings
15 and things scheduled that morning and Mrs. Puryear
16 stayed at home with the plumber. We communicated back
17 and forth frequently on the phone during the morning and
18 finally she just said you better come on home it is
19 getting pretty bad so at that time I called the Town of
20 Vinton.

21 I think it was about 11:45 at that time.
22 I have those notes there but I forgot to bring them up
23 here. I spoke with Mr. Cooper who answered the phone at
24 the dispatch office and told him there was a problem in

1 my basement, that the plumber was there, and the plumber
2 said it was not a problem in our lines.

3 I spoke with the plumber and he had
4 placed a hundred foot of the router snake down into all
5 of our lines. He had to tear out a piece of paneling in
6 our basement den to get into the main drain of our
7 plumbing and he could not locate a blockage in our line
8 and so he encouraged me to call the Town of Vinton which
9 I did.

10 Mrs. Puryear was still there and we kept
11 communicating back and forth on the phone that it was
12 getting worse so finally at 2:00 I left work and came
13 home and got there about 2:15 and the whole basement was
14 covered at that time with soft solid feces and water and
15 apparently before I got there the Town of Vinton had a
16 work crew that had arrived and - -

17 MRS. SPANGLER: I would object unless
18 she is testifying to her own personal knowledge.

19

20 BY MR. ANDERSON:

21 Q Go ahead.

22 A When I got there at 2:15 I inquired with
23 Mrs. Puryear and she will tell you about that event. It
24 was obvious to me that the carpet was ruined and the

1 water had soaked into the paneling a couple of inches
2 and as I said the soft feces was on the floor there.

3 I made a couple of phone calls, my
4 husband was out of town, trying to locate him to get
5 some suggestions. Several neighbors came in and
6 suggested that I take pictures and things like that but
7 I did not do that.

8 My father came by, he is now deceased,
9 but he also said well do not worry about it when they
10 come they will take care of this, so I started crying I
11 guess at that point and called the Town of Vinton again
12 and said please somebody come and help me clean this
13 stuff up and I probably - - I do not know what the words
14 I used were.

15 I called them and I said I have two
16 small children and I can't stay here tonight, come and
17 help. So sometime later that afternoon a crew of
18 personnel from the Town of Vinton arrived and they were
19 very nice and they came in the back basement door which
20 comes to the outside at ground level and walked through
21 the basement with me and as they walked through with me
22 they said we thought this was just in your utility room,
23 we better go call Mr. Stacy, so a gentleman went back at
24 that time and made a phone call to his supervisor about

1 the situation.

2 Sometime later then Mr. Stacy and a tall
3 gentleman which I recognize here today, I think his name
4 is McClung, came and walked through the basement also
5 and saw the damages.

6 It was just a couple weeks after
7 Christmas and it was in my children's playroom, the
8 carpet was this commercial gray carpet, and all their
9 new games and toys were strewn about the floor of the
10 playroom and I had sorted laundry and there was some
11 laundry on the floor in the utility room.

12 There was not much furniture down there
13 at all so the carpet was my concern and the children's
14 belongings and then the fact that there were all these
15 germs.

16 Being a registered nurse I was very
17 concerned about that. Mr. Stacy and Mr. McClung were
18 polite and they walked through the house and Mr. Stacy
19 said what would you like for us to do - -

20 MRS. SPANGLER: Your Honor, I would
21 propose an objection.

22 THE COURT: And I don't have any
23 problems with the objection. We just want you
24 to not try to comment on what anybody from the

1 Town of Vinton may have said to you. You are
2 doing fine, just keep telling the ladies and
3 gentlemen the factual things that took place.

4 THE WITNESS: I asked for help with the
5 clean up because I couldn't stand the thought of
6 staying in the home. The whole house was
7 inundated with odor and all the windows and
8 doors were open at that time and it was just
9 intolerable and it was wintertime and I could
10 not sleep on the street so I asked for help with
11 the clean up and Mr. Stacy said we will take
12 care of that tomorrow and then Mr. McClung said
13 I think we can take care of it tonight.

14
15 BY MR. ANDERSON:

16 Q Let me ask you this, Mrs. Bryant: Who
17 was the plumber, do you remember the name of the plumber
18 that you called?

19 A Mr. Ted Huddleston.

20 Q Is that the plumber who was there that
21 day when you arrived?

22 A He had already left when I arrived
23 because he had worked five and a-half hours and there
24 was nothing he could do.

1 Q Had you talked with him on the phone?

2 A Yes, sir.

3 Q When was it that you and your husband
4 and family moved into this home?

5 A In 1984. We were in Goodview, Virginia
6 in 1981. We had only been there about seven months I
7 guess. At that time then Mr. Stacy and Mr. McClung left
8 and the original people began to help with the clean up
9 and two gentlemen came back later.

10 The feces was shoveled out and swept out
11 and the liquid was swept out with the broom and two
12 other gentlemen came back later after the other crew
13 left with a wet/dry vac thing and they suctioned the
14 water out and emptied that out in the backyard about 30
15 some times.

16 They had to empty that water out and
17 then they put down some solution, I believe it was
18 Cherry-D solution, to get rid of the odor and then they
19 left.

20 My children spent the night a way from
21 home that night.

22 Q Now, your house was on dead-end circle?

23 A Yes.

24 Q And you were the last house?

1 A No, we were the third house at the top
2 of the street. There were a number of houses below us
3 going down to the dead-end circle.

4 MR. ANDERSON: Okay, thank you, answer
5 any questions Mrs. Spangler may have.

6

7

CROSS EXAMINATION

8

BY MRS. SPANGLER:

9 Q At the time you moved in the house you
10 moved in in 1984?

11 A Yes.

12 Q I had noted that you moved in 1981 and I
13 think that was your house in Goodview?

14 A Yes, ma'am.

15 Q So you moved from there to this house in
16 1984?

17 A Yes.

18 Q When you got back from work at 2:15 had
19 the clog already been removed?

20 A Yes.

21 Q And the Town of Vinton did come that
22 night and help and they came the next day and helped
23 clean up?

24 A I think they came to the backyard and

1 used a preparation where the water and feces had been
2 swept out to the back to try to eliminate any problems
3 that might be there.

4 Q Had you had any problem with the sewer
5 back up before this in that house?

6 A No, we had only been there about seven
7 months.

8 MRS. SPANGLER: I have no further
9 questions.

10 MR. ANDERSON: I have no redirect, Your
11 Honor.

12 THE COURT: Thank you, ma'am, very much.
13 If you will have a seat back over there.

14 (The witness was excused from the
15 Stand.)

16
17 THE COURT: Call you next witness.

18 MR. ANDERSON: We will call
19 Mrs. Carolyn Puryear.

20
21 CAROLYN PURYEAR
22 was called as a witness and after having first been duly
23 sworn to tell the truth, the whole truth, and nothing
24 but the truth, was examined and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. ANDERSON:

3 Q Mrs. Puryear, I am Tony Anderson and I
4 represent Mr. and Mrs. Bryant and I want to direct your
5 attention if I can to January 10, 1985. I believe you
6 were the neighbor of Mr. and Mrs. Bryant?

7 A Yes, sir.

8 Q And we are here today over the issue of
9 the back-up problem they had with the sewage and if I
10 could get you to tell the Jury what you recall about
11 that on January 10, 1985.

12 A Okay, let me think a minute. About 8:00
13 that morning Linda called me and said she had called a
14 plumber, she had some problems in the basement, and I
15 have a key to the house and could I let him in, so when
16 he arrived he was told to notify me.

17 I went up and opened the front door and
18 let him in and I went downstairs with him and we found
19 at that point the water and sewage was only about half
20 way across the basement or partially across the basement
21 and he thought it was a problem within their house and
22 he started checking.

23 He had to take off a piece of paneling
24 to get to the stop valve, I do not remember what its

1 called, anyway he pulled that out and checked it and
2 everything seemed in order so he decided to call the
3 Town of Vinton to check.

4 By the time they got there I would say
5 it was probably 1:00 and the whole basement was covered
6 with water and sewage about a couple inches deep all the
7 way across.

8 I had called Linda a couple times and
9 told her what was going on and at that point she decided
10 it was time to come home and check on it and she did.

11 Q Do you remember if Mr. Huddleston was
12 the plumber that was there on this day?

13 A Yes, sir; he was.

14 Q Were you also there or did you remain
15 there when some employees from the Town of Vinton came
16 on the scene?

17 A Yes, I did.

18 Q Would you remember who they were?

19 A The first ones I think was just the crew
20 and I am not sure which of those - - there was several
21 of them. I am not sure who came first. I know
22 Mr. Stacy did come and I think Mr. McClung came.

23 Q Did you actually see any of the crew
24 members or employees of the Town of Vinton doing any

1 work to try to solve the problem or find the clog?

2 A Yes, I did; after some hesitation. I
3 think they discussed it quite a bit with Mr. Huddleston
4 first and came inside and then they went out to the
5 street and looked there down in the manhole.

6 MR. ANDERSON: Thank you for coming
7 today, would you answer any questions
8 Mrs. Spangler might have.

9 MRS. SPANGLER: I have no questions.

10 THE COURT: Thank you very much,
11 Mrs. Puryear. You are excused. You may leave
12 or you may sit in the courtroom.

13 MR. ANDERSON: There is a possibility
14 that I might use this witness in rebuttal.

15 THE COURT: Sorry about that, he just
16 changed your mind, you have to wait back
17 outside. Please do not discuss with the other
18 witnesses anything that has been asked of you in
19 the Courtroom.

20 (The witness was excused from the
21 Stand.)

22
23 THE COURT: Call your next witness.

24 MR. ANDERSON: Indulge me one moment

1 please, ladies and gentlemen.

2 (Discussion off the Record.)

3

4 MR. ANDERSON: Thank you. We would call
5 Mr. Ted Huddleston.

6

7 TED HUDDLESTON

8 was called as a witness and after having first been duly
9 sworn to tell the truth, the whole truth, and nothing
10 but the truth, was examined and testified as follows:

11

12 DIRECT EXAMINATION

13 BY MR. ANDERSON:

14 Q You are Mr. Ted Huddleston?

15 A Yes, sir.

16 Q And how are you employed,
17 Mr. Huddleston?

18 A I am a plumber and pump installer.

19 Q How long have you been in the plumbing
20 business?

21 A 17 years.

22 Q Did you get most of your experience and
23 know how from on-the-job training or have you attended
24 any vocational classes or courses in the field of

1 plumbing?

2 A Just on-the-job training.

3 Q They tell me that is about the best way
4 you can get it.

5 A I believe so.

6 Q During those 17 years that you have
7 worked as a plumber have you had occasions to go to
8 homes and work on sewage systems that are stopped up or
9 would not drain properly?

10 A Yes, sir.

11 Q Or having back-up problems?

12 A Yes, sir.

13 MR. ANDERSON: Judge, at this time I
14 would like to offer him as an expert in the
15 field of plumbing subject to any voir dire
16 Mrs. Spangler may have.

17 THE COURT: Would you like to ask
18 additional questions?

19 MRS. SPANGER: Your Honor, I have no
20 objection to his qualifications as a plumber for
21 purposes of working on home plumbing. I would
22 have an objection to him qualifying as an expert
23 on municipal sewer systems which is a totally
24 different field and I would like to have the

1 opportunity to cross examine on that if it
2 should become necessary.

3 THE COURT: All right, I think the Jury
4 will have an opportunity to reevaluate his
5 competency and I will give you an opportunity
6 to question him fully on your examination of him
7 and I will only say then that I will find him to
8 be qualified as an expert in the area of general
9 plumbing at this point. That is all I am able
10 to do.

11 MR. ANDERSON: Thank you.

12 MRS. SPANGLER: Thank you.

13

14 BY MR. ANDERSON:

15 Q Mr. Huddleston, I want to direct your
16 attention if I may to January 10, 1985, and ask you if
17 you recall an occasion where you worked on Roger and
18 Linda Bryant's home in the Town of Vinton?

19 A Yes, sir.

20 Q If you would, would you relate to the
21 ladies and gentlemen of the Jury what you found upon
22 your arrival and what actions you took while you were
23 there?

24 A Yes, sir. I was called out on a service

1 call and when I got there at Mrs. Bryant's home she was
2 at work but she had a neighbor to meet me and they had a
3 sewer back up.

4 I went in the basement and I started in
5 the basement door and it was about six inches of sewer
6 covering the floor, water back up, so I went back and
7 got my boots and went back through the house and I
8 looked for a clean out, which is the main sewer line
9 from the house to the street.

10 Well, I could not find one so the
11 neighbor called Mrs. Bryant at work and she told us
12 where it was and I had to cut some paneling out to get
13 to it so I did this and took the cap up and run the
14 sewer cable in and run it all the way to the street and
15 there was nothing in it so I pulled it back out and I
16 said well what the in world is wrong with this and stood
17 around there a few minutes and, you know, there is a
18 floor drain in the center of the basement, well in the
19 washroom, and water bubbled back up and I asked this
20 neighbor, she was upstairs, if she flushed the comode
21 and she said no and well I knew what the problem was,
22 that the water was coming from another house because
23 they live on an incline, there is a down grade, and what
24 was happening is in the main sewer line out under the

1 street was clogged up and the people up above was
2 flushing their comode see and the water was coming down
3 and coming back into Roger Bryant's home because it had
4 to level off. It couldn't go down the main chase.

5 So I said we need to call the Town of
6 Vinton and I was going to leave but they wanted me to
7 stay so they called the Town of Vinton and they came out
8 there and I took this gentlemen, I am pretty sure it was
9 him, in the basement and then he proceeded to find out
10 what was wrong out in the street and I stayed there and
11 they dug the manhole up and I even went down in there
12 with them and it was blocked and they undone it and all
13 the sewage went out.

14 Q Mr. Huddleston, you say that you ran a
15 cable through there?

16 A Yes, sir.

17 Q And you did not find anything?

18 A No.

19 Q Well, now what would that be an
20 indication of?

21 A It was clear. Their line from the
22 Bryant home to the street was clear.

23 Q And when you say their line was clear
24 you are referring to Mr. and Mrs. Bryant's home, there

1 was nothing within the sewage lines in their home?

2 A No.

3 Q And you watched them go down in there
4 and dig it up?

5 A Well, they had a manhole out there in
6 the street where you can go down into it and it was a
7 main sewer line that catches all the houses on the
8 street. It was a big obstruction there, grease or
9 whatever, and they knocked it out with a plunger and it
10 went on down. *L.*

11 Q How far down was that?

12 A I would say five foot under the street,
13 four to five feet.

14 Q Now, is that in your experience a common
15 event in those types of subdivisions, the way the sewage
16 systems are hooked up?

17 A Sure.

18 Q Is there anything unusual about that?

19 A No.

20 Q In your experiences in the Roanoke
21 Valley or County or Town of Vinton are they any
22 different than this?

23 A No.

24 Q Now, what was the reason that when they

1 got this clog as its been referred to out of the way
2 that the water flowed on out?

3 A Because it opened up the main line where
4 all the water could drain out.

5 Q Well I take it then that if that clog
6 hadn't of been there this water would not have backed up
7 into the Bryant house?

8 A That is right.

9 Q Now, you have a diagram with you today I
10 believe? *L.*

11 A Yes, sir. I made a little sketch of how
12 the houses was laying.

13 Q Is this the one you showed me right
14 before Court?

15 A Yes.

16 Q Could you hold that up if you would
17 and I know its hard for the ladies and gentlemen to see,
18 we will pass it in a minute so you can get a close-up
19 view - -

20 THE COURT: Have you looked at it?

21 MRS. SPANGLER: I have looked at it and
22 I have no objection.

23

24

1 BY MR. ANDERSON:

2 Q If you would just explain what you have
3 shown with that drawing.

4 THE COURT: If you want to you can come
5 up here.

6

7 BY MR. ANDERSON:

8 Q Go ahead.

9 A This is Abbey Circle, the street, and
10 you can see it's a downhill grade and you have got houses
11 up here, this is Mr. Bryant's home down below
12 (indicating).

13 This is his street and there is a main
14 sewer line in here and each one of these sewer lines
15 from these homes dump into it to take it on out. What
16 happened was that there was a clog down here stopped up
17 below Roger Bryant's home and from here on down
18 everything was working fine because it was open, the
19 main sewer (indicating).

20 All right, they have a floor drain right
21 here and when they flushed these comodes here, what I
22 assume happened, was this water come out and it couldn't
23 go anywhere and it had to level off and came in here and
24 went back through this line, the main four-inch sewer

1 line, coming out to empty into this main chase and it
2 backed into back in this home (indicating).

3 See all the water that they was using
4 would come down here and it couldn't go on out the main
5 line and it just backed in here (indicating). That is
6 the easiest way I know how to explain that.

7 THE COURT: Do you want that introduced
8 as Plaintiff's Exhibit Number One?

9 MR. ANDERSON: Yes.

10 (A drawing was marked as Plaintiff's
11 Exhibit Number One and entered into the Record.)

12

13 BY MR. ANDERSON:

14 Q Mr. Huddleston, when you were there at
15 the Bryant's home on this particular day do you recall
16 the Town of Vinton having to bring over some equipment,
17 some additional equipment?

18 A Yes.

19 Q I believe that was some digging
20 equipment?

21 A No, I do not think it was any digging
22 equipment. Well, I think they had to break the pavement
23 up to get a manhole out. There was several men there.
24 I would say five or six different men.

1 Q When you say that, do you mean they had
2 to have one of those machines that breaks up the
3 pavement to get the manhole out?

4 A Well, I do not remember that. I do not
5 know exactly how they got it up. Maybe they chissled it
6 up but they did get it up. I think they did have
7 difficulty locating where it was at.

8 Q What I am trying to find out is is it
9 something that you or I could just walk over and pick up
10 or something that the Town of Vinton needed to do.

11 A That is a maintenance job.

12 Q So based on all the things you have
13 testified here to today and based on your expert opinion
14 as a plumber you were able to reach a conclusion or come
15 to an opinion as to what caused the back up in the
16 Bryant home?

17 A Yes, sir.

18 Q And you said I believe that it was this
19 clog in the Town of Vinton's line?

20 A Yes, sir.

21 MR. ANDERSON: Thank you. Would you
22 answer any questions Mrs. Spangler might have.

23

24

1 CROSS EXAMINATION

2 BY MRS. SPANGLER:

3 Q Mr. Huddleston, are you a licensed
4 plumber?

5 A No, I don't have a Master's Card but I
6 have been in Bedford County and the surrounding areas
7 for 17 years.

8 Q What time did you arrive at the Bryant
9 home on January 10.

10 A I would say around 9:00.

11 Q What time after you arrived did you call
12 the town?

13 A Probably 45 minutes. I had this lady,
14 this neighbor, to call Mrs. Bryant. See I was going to
15 leave.

16 Q So you did not call directly, you told
17 the neighbor and then the neighbor called Mrs. Bryant
18 and as she testified you do not know if she called the
19 town?

20 A Well, she could have, I do not know. I
21 informed her and she went upstairs. I was in the
22 basement.

23 Q So you didn't call the town directly
24 yourself?

1 A I don't believe I did. I just told them
2 I couldn't do anything to help her, that I done all I
3 could do, and I was going to leave but they wanted me to
4 stay and wanted me to help these men find the problem.

5 Q Did you leave after they got the clog
6 unstopped?

7 A I stayed, yes. I believe it was five
8 and a-half hours is what I charged the Bryants from the
9 time I got there until I left. They got it open and it
10 went on down ~~fine~~.

11 Q And after they did that your job was
12 over so you left, you did not see what happened after
13 that?

14 A Oh, no.

15 Q Are you aware of any problems with this
16 particular line prior to this incident?

17 A No, I do not have anything - - I don't
18 know anything about it.

19 Q Did you yourself use a camera device or
20 any other device up inside the Vinton's line to check
21 that?

22 A No.

23 Q Were there rags in the grease that was
24 causing the problem?

1 A I didn't see any. It looked like a
2 white or creamy looking - - I guess its grease and
3 things that stop it up. Its hard, real chunky. I
4 think it would be grease and different things that cause
5 this build up. It probably took - - it could have took
6 - -

7 Q Have you ever worked with a town as far
8 as on their sewer system?

9 A No. Generally its always done from any
10 house. Usually you run a sewer cable through and get a
11 clog out and that is all there is to it.

12 Q Are you familiar with any rules or
13 regulations or anything that governs the municipalities
14 or towns as far as their sewer systems?

15 A No.

16 MRS. SPANGLER: I have no further
17 questions.

18 MR. ANDERSON: Judge, I have just a few
19 redirect if I might.

20

21 REDIRECT EXAMINATION

22 BY MR. ANDERSON:

23 Q You say this was hard chunks, this clog?

24 A I would say it was about four or five

1 inches thick.

2 Q And you started to say something about
3 chissling it out.

4 A Well, they took a sewer cable and
5 knocked it out, knocked it through, knocked a hole
6 through it and then of course that released all the
7 water, it just went out, just immediately.

8 Q In your experience have you seen these
9 types of clog before?

10 A No, I never did go under the street, its
11 not my job. When you left the homeowner's property, you
12 know, you turn it over to the town officials.

13 Q Well, would Mr. and Mrs. Bryant to your
14 knowledge have been responsible for where this clog was,
15 maintaining or keeping it clean?

16 A Oh, I would not think so, no.

17 Q Well, what has been your experience in
18 the past as to who would do that maintenance on this
19 part of the line where the clog was?

20 A Well, I would say the Town of Vinton,
21 you know, should keep it clean if they know about it.

22 MR. ANDERSON: Thank you, that is all
23 the redirect I have.

24 MRS. SPANGLER: No recross, Your Honor.

1 MRS. SPANGLER: Your Honor, at this time
2 I would move to strike the plaintiffs' evidence.
3 The plaintiff has not made out a prima facie
4 case and I have some authorities to show the
5 Court which is the Town of West Point case.
6 Opposing Counsel is familiar with the case.

7 ~~Your Honor, the fact that all they have~~
8 ~~shown is that there was a clog in the Town of~~
9 ~~Vinton's main and that that was the cause of the~~
10 ~~back up is not enough to impose liability on the~~
11 ~~town.~~

12 They have got to show that the town knew
13 or should have known of the clog or that there
14 was some other type of negligence and they just
15 have not shown one reason for the clog being
16 there. They have got to show why the clog was
17 there and my testimony would be of course you
18 can't go on that.

19 They had just cleaned this line seven
20 months ago and they haven't shown any duty that
21 has been breached. ~~The fact that there is a~~
22 ~~clog there in the Town of Vinton's main is it.~~
23 That is all they have shown and that is not
24 enough to take this case to the Jury and I have

1 some other authorities, too.

2 Also, I would like the Court to look at
3 the Jury Instructions under municipalities.
4 This standard is a similar standard that towns
5 have as far as their street repairs and they
6 have specific instructions that are model
7 instructions that are given on street repairs
8 that state that the town - - just the fact that
9 there is a defect in the street or that an
10 accident occurred because of a pot hole is not
11 enough in and of itself and this is the same
12 type of situation as the Town of West Point case
13 points out because it was a sewer back up in the
14 basement and in that case just like this case
15 there was a back up.

16 The plaintiff couldn't show why the back
17 up occurred, the Supreme Court said it could
18 have been relay failure, it could have been any
19 number of things that were not the fault of the
20 city, and the Court affirms, the Court sets
21 aside the Jury verdict in that case, and I do
22 not know what more to say other than they
23 haven't made out a prima facie case at all and
24 they can't make out the case because what

1 happened was that there was a clog because the
2 neighbors flushed grease down the disposal which
3 formed a clog and the town had no notice of it
4 and as soon as they got notice they came down
5 and fixed it.

6 THE COURT: Mr. Anderson?

7 MR. ANDERSON: Judge, may it please the
8 Court, certainly at this stage of the
9 proceedings we are not at a preponderance of the
10 evidence or an evidentiary state, we are
11 required and we must rebutt the evidence in
12 response to the town.

13 If you except Mrs. Spangler's theory
14 that they do not have a prima facie case she
15 will be exactly right every time because I will
16 not be able to show up in this courtroom and say
17 that this clog down here happened and it caused
18 it.

19 They showed that it happened and it was
20 caused but she says you have got to show that
21 the town knew about it and they should have
22 known about it and/or they failed to maintain
23 it. Well, the evidence so far has been from
24 the plumber who has over 17 years of experience

not correct
↑ 49

1 saying that the clog was in the Town of Vinton's
2 lines and they should have maintained it.

3 Counsel in the opening statement said
4 sometime around 1970 or 1971 the town took over
5 the maintenance of these lines. Certainly that
6 is a prima facie case and, arguably so, the town
7 has a duty to maintain and inspect these lines.

8 How in the world could you place the
9 burden on the homeowner to get down under the
10 street, under the manholes, and examine the
11 lines that are operated, maintained and in most
12 instances, well maybe not most instances, but in
13 some, installed by the town themselves who is
14 charged with that direct responsibility.

15 They receive payments for doing so in
16 the providing of those services of the
17 maintenance and the control. I mean so far
18 there has not been any evidence other than what
19 Counsel has proffered and I am sure if she has
20 proffered it it will come in that they had just
21 cleaned it five months ago and I assume the
22 expert testimony will be in these types of sewer
23 systems five months is an adequate cleaning but
24 still that is a matter of rebuttal.

1 That is certainly not anything to throw
2 a case out on a motion to strike. I mean the
3 case that is cited by the defendant, the Town of
4 West Point, is clearly a distinguishable case
5 from the one at the Bar right now.

6 That case was a new construction case,
7 brand new construction on that house. The
8 plaintiff in that case installed their own
9 sewage system. He is the one that put the pipes
10 in and I think that is probably what gave - -
11 this is high conjecture on my part, but I think
12 that is really what gave the Supreme Court the
13 problem.

14 They probably felt like in all honestly
15 that he installed his own defective sized pipe
16 and it was as much his fault as the town if the
17 town was at fault and that is just not the case
18 here.

19 The evidence at this point is clearly
20 that the Bryant's have done nothing wrong,
21 clearly there was a clog in the lines maintained
22 and serviced by the Town of Vinton, clearly it
23 was one big enough in the size in that it had to
24 be chissled out and gotten out with the sewage

1 cable, and I mean you must conclude certainly
2 that the Jury could conclude if the case stopped
3 at this point that the Town of Vinton failed to
4 properly maintain its sewage system in its
5 lines, hence the negligence, hence the recovery
6 by the plaintiff.

7 I think that particularly at this stage
8 of the proceedings that its a bear minimum of
9 prima facie case that the plaintiffs' have made
10 out against the town. Thank you.

11 MRS. SPANGLER: Your Honor, I think what
12 the plaintiff is arguing is basically res ipsa
13 loquitur, therefore liability. The Town of West
14 Point case stands for the proposition that more
15 has to be shown.

16 There has to be some evidence of
17 negligence and there have been cases and I can
18 if the Court takes a break present them to the
19 Court where there has been liability imposed on
20 municipalities and one situation that comes to
21 mind in particular is the town was called and
22 the town did not show up to fix or abate the
23 nuisance.

24 If the plaintiff could show or had shown

1 that we had breached our duty to maintain the
2 situation, that we had some knowledge, that we
3 had been warned that the situation was likely to
4 develop and didn't do anything, that would be
5 something but there is absolutely no evidence
6 that the town was negligent.

7 The clog obviously was caused by the
8 people up the street, caused by grease and stuff
9 being put into the system and the town has no
10 control over that. If the legislature thought
11 that they would impose guidelines on the towns
12 for clogs in the sewers, they can do so, but at
13 this point the plaintiffs just have not made out
14 their prima facie case.

15 I have told the plaintiffs all along I
16 feel sorry for them but its no ones fault, its
17 not either parties fault. It just happens.

18 THE COURT: Mrs. Spangler, very
19 obviously you feel that there is merit in your
20 motion and your interpretation of the West Point
21 case, your argument with the West Point case
22 indicates your interpretation thereof. I do not
23 read the West Point case to be as strong as you
24 read it to be.

1 In fact, my reading of the West Point
2 case indicates that the plaintiffs have
3 satisfied the test set forth therein. The
4 reason that the West Point case was decided the
5 way it was is I feel it was that the plaintiff
6 was not able to ascertain what caused the
7 accident or what happened.

8 It says the plaintiff must show why and
9 how the incident happened and the witness for
10 the plaintiff has indicated why it happened and
11 how it happened and under the discussion in the
12 West Point case it said that you must not
13 speculate.

14 The damage could have been caused by
15 circumstances which the town was not liable,
16 such as failure of the back-flow valve. We know
17 that that was not the situation, malfunction on
18 the line of the plaintiffs' property. The
19 testimony indicates that it wasn't on the
20 plaintiffs' property. Other conditions over
21 which the plaintiffs had no control such as
22 unexpected and unforeseeable equipment failure
23 in the pumping station.

24 We know that it was not unexpected or

1 unforeseeable failure in the pumping station so
2 I do feel like that the plaintiffs have born the
3 burden and as far as the motion to strike I
4 overrule your motion.

5 MRS. SPANGLER: Is it the Court's
6 opinion that the Town of Vinton is liable merely
7 because there is a clog in their line?

8 THE COURT: ~~I feel that the plaintiffs~~
9 ~~have made out that there was a clog in the line~~
10 ~~of the Town of Vinton and the Town of Vinton is~~
11 ~~responsible for maintaining that and I find that~~
12 ~~it very well may be, an explanation, that the~~
13 ~~town did not know anything about it but the~~
14 ~~evidence before me was that the clog was in the~~
15 ~~line, that the town was responsible for~~
16 ~~maintaining it, and it wasn't just a malfunction,~~
17 it was an actual clog of sewage disposal.

18 MRS. SPANGLER: But just the fact that
19 there is a clog do you feel that that is enough
20 to go to the Jury without more? Just the fact
21 that there was a clog in the Town of Vinton's
22 line?

23 THE COURT: I find it is enough to keep
24 it from a motion to strike.

1 MRS. SPANGLER: Thank you, Your Honor.

2 THE COURT: Let the record show that
3 Mrs. Spangler takes exceptance to the Court's
4 ruling.

5 MRS. SPANGLER: Yes, sir.

6 THE COURT: Are you ready to present
7 your evidence?

8 MRS. SPANGLER: Yes, sir.

9 THE COURT: Bring the Jury back in.

10 (The Jury returned to the open Courtroom
11 and the following was heard in the presence of
12 the Court and Jury.)

13

14 THE COURT: We will now hear the
15 testimony from the defendant.

16 MRS. SPANGLER: Cecil Stacy.

17

18 CECIL STACY

19 was called as a witness and after having first been duly
20 sworn to tell the truth, the whole truth, and nothing
21 but the truth, was examined and testified as follows:

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DIRECT EXAMINATION

BY MRS. SPANGLER:

Q Mr. Stacy, you have been sworn haven't you?

A Yes.

Q Would you please state your full name
for the Jury?

A Cecil Stacy, utility manager Town of
Vinton.

Q And is that your current position?

A I have just been promoted to director of
public works Town of Vinton.

Q Could you tell us your address?

A 2819 Sample Avenue, Roanoke City.

Q How long have you worked for the Town of
Vinton?

A 18 years.

Q Could you tell the Jury something about
your experience with the Town of Vinton?

A Yes, I came to the Town of Vinton in
1969 and was a superintendent of the treatment plant at
the Town of Vinton and I think in 1974, 1975 I was
promoted to the superintendent of what is called water
and sewage which is responsible for the lines within
Vinton and the eastern part of the County.

1 This didn't happen in Vinton, this happened
2 in eastern Roanoke County so we are responsible for all the
3 water and sewer lines and the water systems in Vinton.

4 Q Tell the Jury about your educational
5 background.

6 A I took courses at Eastern Carolina and I
7 took courses at Virginia Western. I spent five years as
8 chief lab technician for Roanoke Water Treatment Plant
9 in Roanoke City, I have gone to five years of short
10 schools and two years advanced schools for waste
11 treatment, water treatment, at Virginia Tech and VMI.

12 Q I guess you are superintendent of water
13 and sewer at this time?

14 A Utility manager.

15 Q What were your job duties?

16 A The job duties is water bills, water
17 lines and sewer lines in the eastern part of Roanoke
18 County, maintenance on the lines, redo lines, new lines,
19 old lines and that type thing.

20 Q Mr. Stacy, is the water and sewer
21 department governed by statute, regulation or local
22 ordinance?

23 A Yes, we are covered by regulation of the
24 State Water Control and also State Health Department.

1 Q Would you say that your job is a highly
2 regulated industry?

3 A Right.

4 Q Are there any statutes, rules,
5 ordinances, regulations, anything that govern how often
6 a town has to clean out sewer lines?

7 A None that I know of.

8 Q When did the Town of Vinton assume
9 responsibility for this particular sewer line, the one
10 in Montgomery Village that is in question?

11 A I think the subdivision was put in in
12 1969 and probably 1970 and this street is about three or
13 four streets I guess as you go in Montgomery Village
14 subdivision.

15 We usually take over a line one year
16 after a developer or contractor puts the water, sewer
17 line in, and the reason we do that is because if there
18 is going to be a defect in the line usually it takes one
19 year and you will know about it and have the contractor
20 who put the line in be responsible and have them do
21 something about it so I guess we took over about 1971.

22 Q The Town of Vinton didn't put in this
23 particular line?

24 A No, this was done by a private

1 contractor.

2 Q Does the Town of Vinton have a policy
3 about routine maintenance?

4 A Yes, we do.

5 Q What is that policy?

6 A At the time that the Bryants had their
7 blockage we were trying to do a one-year complete circle
8 of the town and the county's sewer lines so I would say
9 we do 50 miles in one year and if you are not familiar
10 this is going from manhole to manhole and using a jet
11 machine with lots of water to clean out grease, rags,
12 dirt, whatever accumulates in the line.

13 Q Would that annual inspection include
14 cleaning and inspection of the party line involved in
15 the lawsuit?

16 A Yes.

17 Q When was the last time this particular
18 line was inspected or cleaned before this particular
19 incident?

20 A Five to six months before the blockage,
21 back in probably the summer, like July or August, in
22 that area.

23 Q Did your crew have occasion to be called
24 to the Bryant home on January 10, 1985?

1 A Yes, they were.

2 Q About what time was your crew called if
3 you recall?

4 A I was thinking it was about 11:00,
5 11:30, something like that.

6 Q Who responded to that call?

7 A We had two guys on call then. It was a
8 guy named Doug Chitum and Ashly Thomas.

9 Q Were you with them when they went out
10 there?

11 A No, I was not.

12 Q Were you subsequently called?

13 A Yes, I was called once when they got
14 down there and saw the situation.

15 Q And you went on to the Bryant home?

16 A Yes, I did.

17 Q What was happening when you got there?

18 A The plumber who testified before was
19 there and he said he ran a sewer machine or a tape from
20 the house out to the street and didn't hit anything so
21 he felt that the blockage was in the Town of Vinton so I
22 had my guys check a manhole in front of the Bryant's
23 residence down below like 20 feet below the residence
24 and we checked that one and had them check another one

1 above say two hundred feet above the Bryant's residence
2 and saw some water going through the bottom manhole
3 below, not a normal flow, some flow, and then went back
4 up to the manhole before them and it had four or five
5 feet of sewer in the manhole itself so I called on the
6 radio the Public Works Department and had two guys bring
7 what they call a sewer tape up.

8 Its got a black tape with a round ball
9 on it and I had them bring it up in the manhole below
10 the Bryant's house and that knocked the blockage loose
11 and unstopped it and then we called a crew to come in.
12 I talked to Mrs. Bryant and in the basement she did have
13 a mess, there is no doubt about that, there was sewage
14 in the basement which they did wash it down and
15 disinfected it.

16 They probably went out and rented a
17 wet/dry vac, that type of thing, and soaked up what we
18 could. We moved the washing machine and washed down the
19 basement and we put a deoderizer disinfectant down to
20 try to use that to help with the germs and the deoderant
21 problem.

22 Q Had there been any problems with this
23 line prior to January 10, 1985?

24 A No. That line was probably put in in

1 1970 so I guess we are talking about 1984, that is 14
2 years. We have never had a blockage. I went back and
3 looked at the records and we never had a blockage on
4 that street before this happened and there is no record
5 of any problem on that street so its not what you would
6 say a high priority sewer line.

7 We have some in the County or in other
8 parts where we clean out maybe say once a month, it is a
9 priority, to make sure it doesn't happen. This one here
10 was not on the ^{list}, it was a routine normal
11 maintenance.

12 Q What caused the clog?

13 A It is hard to say. I would say
14 combination of grease and rags. This is wintertime and
15 in the wintertime grease is not - - you put it down the
16 disposal and throw everything in the house in there and
17 grind it up and send it to the sewer line.

18 You are all right in the summer but in
19 the wintertime and colder temperatures, you know what
20 happenes when grease gets cold, it forms up and three or
21 four months or whatever that it probably builds up and
22 maybe a rag or maybe throw a stick in the manhole or I
23 really do not know and then all a sudden it just
24 happens. It happened this morning when we had the

1 problem.

2 If we got down there sooner maybe we
3 could have minimized the damage and got it unstopped and
4 they did what they are supposed to do by calling the
5 plumber and then the plumber had somebody call us but
6 sewer lines it is really difficult, it is underground,
7 and the only thing you see is a manhole in the street
8 and you really do not know what is going on down there
9 and that is the reason we take the jet machine and jet
10 it and and make sure it don't clog anything up.

11 We do not want anybody's basement
12 flooded and have problems like that if we can help it.
13 I live in a house, too, and I would not want anything in
14 my house, so we try to do everything we can. I think we
15 do to keep from this happening.

16 Q After this happened, Mr. Stacy, did you
17 get some equipment from the County to go in and look and
18 see if there was a defect?

19 A This happened and maybe we had a problem
20 there and we didn't know. We called Roanoke County and
21 they have a TV camera type outfit that goes through the
22 sewer line. We do not have one because it costs right
23 much money. They went through the sewer line.

24 MR. ANDERSON: I think I better

1 interpose an object if he is going to say they
2 went through the sewer line. I am going to have
3 to hold it and limit it to his personal
4 knowledge.

5 THE WITNESS: All right, I was there and
6 they ran the camera through the sewer line and I
7 watched the TV camera. It is a van type truck
8 and the camera went through the sewer line and I
9 watched it on TV and the sewer line was concrete
10 and there nothing wrong with that.

11 There was some grease on the side, even
12 after, there was a little bit more grease. We
13 are talking about an eight-inch line like that
14 and I will say grease was on there maybe an inch
15 and a-half, two inches thick, so when we brought
16 the machine up after running it we ran the jet
17 some more, seven or eight times, until we got
18 the grease out.

19 We had not had any problems since then
20 as far as backing up in this house and they were
21 on the first house above the stoppage. The
22 stoppage was here and the Bryants was the first
23 house and they were the first house that it
24 could have happened to. They took the bulk of the

1 sewage, nobody else did, because they were the
2 first house there.

3

4 BY MRS. SPANGLER:

5 Q Let me just correct one thing that you
6 said about not being any problems since then. Is that
7 right, hasn't there been some situation like some years
8 later, its not really related here, I don't want to
9 mischaracterize your testimony?

10 A *2* Yes.

11 Q Looking at the television did you find
12 anything wrong with the way the situation was installed?

13 A Nothing wrong at all. Like I said there
14 was a lot of grease built up on the walls and I imagine
15 if you go down there now there is probably grease
16 building up again.

17 Disposals are the worst thing in the
18 world for a sewer line and we have no regulation that
19 says you can't build a new house, new subdivision, and
20 not have that disposal, and Montgomery Village is a new
21 subdivision and as such has modern convenience.

22 Q What if anything could the Town of
23 Vinton have done to prevent this from occurring
24 entirely?

1 A I don't know of anything. We could have
2 flushed it out the day before and it still could have
3 happened, or a year before, and it might happen
4 tomorrow. I do not know anything except do a preventive
5 maintenance cleaning type thing and hope that you can do
6 it. You are going to have sewer back ups any where you
7 live.

8 Q Was the proper preventative maintenance
9 done in this situation?

10 A ~~I~~ Yes, we do as much or more than any
11 other jurisdiction I know of around here as far as
12 cleaning the sewer because we are a smaller
13 jurisdiction.

14 Q Are you familiar with what the other
15 local municipalities are doing as far as their
16 maintenance system?

17 A Yes, I am. I was utility manager and
18 when you are in this business you have meetings and
19 schools and seminars and you get together and you talk
20 it over. I would say our town as far as cleaning is
21 better than anybody in the valley.

22 Of course they might say no but of
23 course we are small and we have only got 50 miles of
24 sewer and that is not a lot of sewer.

1 Q Tell the Jury about your seminars and
2 training programs you go through.

3 A Well, any time you run a waste water
4 plant or a water plant or whatever in the State of
5 Virginia you have got to be certified so to get
6 certified you do like any where else, you go to school
7 and take a certification test.

8 All that has to be done and I have been
9 through all of them and that didn't prevent the clog of
10 course in Montgomery Village but I think we do as good a
11 job as anybody as far as maintenance.

12 Like I say it is just unfortunate it
13 happened and I feel for her and she was there by herself
14 when I got there and it was unpleasant.

15 Q Do you routinely help people clean up
16 their basement when this happens?

17 A Yes, we did with Mrs. Bryant. We will
18 have our guys work over if they have to, 8:00, 9:00 at
19 night, squeegee, a brush or take a water hose. We try
20 to do anything we can to help anybody that has been
21 through this because - - especially in Mrs. Bryant's
22 case because her husband was out of town so she was
23 there with a couple small kids so we tried to help any
24 way we can.

1 I know once its happened there is
2 nothing, no cure, except let's get this cleaned up and
3 hope it does not happen again.

4 MRS. SPANGLER: I have no further
5 questions.

6 THE COURT: Mr. Anderson?

7
8 CROSS EXAMINATION

9 BY MR. ANDERSON:

10 Q Who maintained these sewer lines in the
11 Town of Vinton on January 10, 1985?

12 A Well, like I say they do not rest in the
13 Town of Vinton.

14 Q Who maintains these lines in Roanoke
15 County, who serviced the Bryant's home on January 10.

16 A The Town of Vinton.

17 Q And included in this maintenance from
18 the Town of Vinton what would you typically do?

19 A We go from manhole to manhole and clean
20 sewer lines.

21 Q And I think you have testified that you
22 tried to do that on a 50 mile radius?

23 A We have 50 miles of sewer so a one-year
24 radius.

1 Q So the total sewer line that you are
2 responsible for maintaining is 50 miles?

3 A In eastern Roanoke County and the town.

4 Q How would that compare?

5 A Very small.

6 Q And you do it on a yearly basis?

7 A Yearly basis unless we have a problem
8 and if we have a problem we put it on a monthly schedule
9 and we put it on priority list where we go down there
10 and clean it more often because we might have a problem
11 and if you have a major problem of course you dig it up
12 and you go down and get a TV camera and find it and fix
13 whatever needs to be done.

14 Q I take it you had no major problems
15 prior to January 10, 1985?

16 A No.

17 Q You had not had any notification to get
18 this expensive equipment from Roanoke County and go down
19 in there and look at it had you?

20 A No.

21 Q And after you got this equipment and
22 went down there and looked at it you saw that there was
23 still some grease on the line?

24 A We are talking an eight-inch line and

1 you are talking about a-half inch. If you look at a
2 pipe there is nothing to block it there but little white
3 particles.

4 You can see it on the TV camera, there
5 was no block in the line after we TV'd it and it is just
6 that there was a disposal and disposals are going to
7 bring grease and stick because this is a party line.

8 Now on Abbey Circle we do it now about
9 every two months. We still haven't had a problem.

10 Q *L*. You are doing it every two months now
11 though aren't you?

12 A Yes.

13 Q Now, what is this about something in the
14 wintertime, you mentioned something about the wintertime
15 in your testimony. I do not understand what effect does
16 that have.

17 A All right, you take grease when it is
18 hot and its going to be liquid. You take grease and
19 pour it out and when it is cold its going to get
20 hard.

21 Q And cause a clog?

22 A No, because of the weather.

23 Q I mean but if its cold and you pour
24 grease in there and the weather is cold it is going to

1 clog?

2 A More chances of clogging.

3 Q More chances of clogging?

4 A Yes.

5 Q And of course it is cold in December,
6 isn't it?

7 A This happened in January.

8 Q It is cold in November sometimes, isn't
9 it?

10 A Could be.

11 Q And it had been five months since you
12 cleaned these lines hadn't it?

13 A Well - -

14 Q Excuse me, sir, be fair with me and
15 respond to my question. It had been five months since
16 you cleaned these lines?

17 A I said five months and we do it year
18 round so yes that is pretty recent.

19 Q Five months yes or no?

20 A I said right, yes, sir.

21 Q Do you have service records of those
22 cleanings, Mr. Stacy?

23 A Yes, we do.

24 Q Do you have those with you today?

1 A No, I have not. I wasn't requested to
2 bring it.

3 MR. ANDERSON: Thank you, that is all
4 the questions I have.

5 MRS. SPANGLER: I do have another
6 question I wanted to ask him.

7
8 REDIRECT EXAMINTAION

9 BY MRS. SPANGLER:

10 Q He had asked you something about the
11 camera thing. Explain to the Jury in a little bit more
12 detail the chronology here. I think you did that the
13 day after? Did you do the camera the day after the
14 incident?

15 A No, it was probably a couple weeks
16 after. What I did is I called Roanoke County and
17 requested the camera and of course they have got their
18 own responsibilities so I think it was two weeks before
19 they brought it down so I called about two weeks before
20 the TV camera came down.

21 Q And you didn't see any problems in the
22 camera that could have caused this problem?

23 A No.

24 Q It was just a grease build up from the

1 grease from disposals?

2 A Right.

3 MRS. SPANGLER: I have no further
4 questions.

5 MR. ANDERSON: That prompts no recross,
6 Your Honor.

7 THE COURT: Thank you very much.

8 (The witness was excused from the
9 Stand.)

10
11 MRS. SPANGLER: Your Honor, if we may,
12 this might be a good time to break for lunch. I
13 may or may not have further testimony and I
14 would like to talk to my client.

15 THE COURT: All right, suppose we break
16 until 1:00 then. Maybe if I could have Counsel
17 at a quarter to one.

18 Ladies and gentlemen of the Jury I would
19 admonish you know that you are not to go out and
20 conduct any independent research on your own
21 dealing with this particular case at hand.

22 In other words, don't go down in sewer
23 lines to see what it looks like inside.
24 Seriously, I do not want you to discuss this

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- JAMES A. McCLUNG

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. SPANGLER:

Q Mr. McClung, would you please state your full name?

A ~~James~~ James Alan McClung.

Q Mr. McClung, where are you currently employed?

A Currently I am employed with the Town of Vinton, soon to take a new position with the City of Roanoke beginning this coming Monday.

Q Can you tell the Jury briefly your educational background?

A I am graduated from Dabney Lancaster Community College, I have a diploma of Design Engineering from Virginia Commonwealth University and have had some training at Virginia Tech.

Q What about your prior job experience prior to coming with the Town of Vinton?

A City engineer, Covington, Virginia, five

1 years, also director of public works for six years.

2 Q In Covington?

3 A Yes, sir.

4 Q What do you could for the Town of
5 Vinton?

6 A Director of Public Works from 1983
7 through today.

8 Q What are your job duties expected to be
9 with the City of Roanoke?

10 A I will be manager of street maintenance
11 with the City of Roanoke.

12 Q Now, in your capacity as director of
13 public works in Covington and in your capacity in that
14 same position for the Town of Vinton are you familiar
15 with generally what standards there are for inspection
16 and cleaning of sewer lines?

17 A Yes.

18 Q First, what sort of plan did they have
19 in Covington?

20 A We really didn't have such a plan as far
21 as a routine maintenance schedule. We did it more or
22 less on an as-needed spot basis.

23 Q Are there any requirements that the
24 state has or the county or the city has, are there any

1 requirements that set forth exactly when maintenance
2 should be done on a sewer line on a routine basis?

3 A No standards that I am aware of.

4 Q Have you in the past served as a
5 statewide director or served in the statewide office in
6 relation to sewer systems?

7 A Yes, in 1982 I was President of the
8 Virginia, D.C., Maryland Chapter of the American Public
9 Works Association which has members from the utility
10 field and also ²directors of public works, city
11 engineers, managers, different types of people.

12 Q And were you able to compare the Town of
13 Vinton's system to other systems?

14 A Well, talking at meetings with these
15 other professionals I have found that the Town of Vinton
16 is head and shoulders above most all the other small
17 municipalities and even in comparison with the large
18 municipalities I think their maintenance program is
19 superior in my opinion.

20 Q Is there any other municipality or local
21 government entity that does a routine inspection and
22 cleaning more frequently than the Town of Vinton in this
23 valley, at least that you know of?

24 A Not that I know of. I think we are at

1 least equal.

2 MRS. SPANGLER: I have no further
3 questions of this witness.

4 THE COURT: Mr. Anderson?

5 MR. ANDERSON: Thank you, Judge, just
6 briefly.

7
8 CROSS EXAMINATION

9 BY MR. ANDERSON:

10 Q *L* Mr. McClung, as far as you know you say
11 they do them on an as-needed basis?

12 A No, that was in the City of Covington
13 when I was director of public works.

14 Q The City of Covington?

15 A Yes.

16 Q Now, what would happen if you knew for
17 example that during a certain time of year you would get
18 more build up than another part of the year in the
19 sewage lines, would that tend to make you think you
20 should clean that area more frequently than not?

21 A It would really depend if I got a
22 complaint. Are we speaking of when I was in Covington?

23 Q No, what you have testified to, your
24 general knowledge in Covington or in Vinton or now or

1 what you heard at all these meetings you went to.

2 A Could you state the question again?

3 Q Is there a time of the year you know you
4 are going to get the build up and blockage in the sewers
5 more than another part of the year, is that a fair
6 statement?

7 A Right.

8 Q I assume from that you would clean those
9 sewer lines more during the times of year you were going
10 to have blockage than during the time you were not, is
11 that correct?

12 A If you were on a preventive maintenance
13 schedule.

14 MR. ANDERSON: Thank you, that is all
15 the questions I have.

16 REDIRECT EXAMINATION

17 BY MRS. SPANGLER:

18 Q Mr. McClung, Mr. Stacy has testified
19 that the Town of Vinton had a once a year, tried to hit
20 once a year or did hit once a year, I am asking a
21 hypothetical question - -

22 MR. ANDERSON: Are you going to qualify
23 him as an expert?

24 MRS. SPANGLER: I would ask he be

1 qualified as an expert on municipal sewer
2 systems. Do you have any objection?

3 MR. ANDERSON: On the use of sewer
4 systems?

5 THE COURT: On municipal?

6 MRS. SPANGLER: Town, cities, what have
7 you, sewer systems he is an expert.

8 MR. ANDERSON: On design?

9 MRS. SPANGLER: On any aspect.

10 *L* MR. ANDERSON: I am not trying to be
11 hard to get along with, I don't mind him being
12 an expert in that if he is, but I just heard his
13 qualifications to be in design rather than on
14 any aspect.

15 THE COURT: Maybe you better go back
16 through that. I was somewhat confused on his
17 testimony whether he was talking about his
18 experience in Vinton or his experience in
19 Covington so maybe you better go back and let
20 the Jury know exactly what his background is.

21

22 BY MRS. SPANGLER:

23 Q Mr. McClung, I had asked you basically
24 to compare Covington and Vinton, go ahead and tell the

1 Jury a little bit more about your experience and
2 background.

3 A Okay, in 1971 I was appointed city
4 engineer of Covington. The city engineer
5 responsibilities were for design and insulation of
6 utilities, streets, things of that nature. I also was
7 in charge of our water filtration plant and our sewage
8 treatment plant as part of my job duties.

9 In 1976 I was promoted to director of
10 public works ~~for~~^{of} Covington which included all aspects of
11 municipal government and sewer line insulations, to
12 cleaning, to paving of streets, curb, gutters, sidewalks
13 and so forth and in 1983 I became director of public
14 works of Vinton and I held generally the same type of
15 responsibilities.

16 Q So you had design functions and you also
17 supervised maintenance?

18 A Right, I had office design
19 responsibilities and also field responsibilities; seeing
20 that the work was performed.

21 Q Did you supervise Mr. Stacy?

22 A Yes.

23 MRS. SPANGLER: Then I would move that
24 he be qualified.

1 THE COURT: Any other questions?

2 MR. ANDERSON: Judge, I do not think
3 that prompts any other questions. Again I was
4 not doubting this gentleman's qualifications, I
5 was unclear if it was design.

6 THE COURT: Based on that additional
7 information I do find him to be qualified as an
8 expert in the area of public supervision and
9 maintenance and design.

10 *A*

11 BY MR. SPANGLER:

12 Q Now, I would like to ask you a
13 hypothetical. Mr. Stacy has testified that prior to
14 this incident all the lines in Vinton were cleaned at
15 least once annually and then that this line was cleaned
16 five or seven months or so prior to the incident.

17 In your opinion does that meet the
18 standard of care for municipalities or towns?

19 MR. ANDERSON: I am going to object to
20 the form of that question. I think that goes
21 right to the ultimate issue as to the standard
22 of care.

23 THE COURT: Would you attempt to
24 rephrase the question that would not be

1 objectionable by Mr. Anderson?

2
3 BY MRS. SPANGLER:

4 Q Would you say that once a year routine
5 maintenance is consistent with what any other local
6 government entity is doing with their sewer systems?

7 A Yes.

8 MRS. SPANGLER: That is all the
9 questions I have."

10 *L* MR. ANDERSON: That prompts no further
11 redirect for me, Your Honor.

12 MRS. SPANGLER: At this time I have no
13 further evidence to present.

14 THE COURT: You may step down and you
15 may be excused or you may wait in the Courtroom.

16 (The witness was excused from the
17 Stand.)

18
19 THE COURT: Any other evidence in
20 rebuttal by the plaintiff?

21 MR. ANDERSON: Judge, we have no
22 rebuttal evidence.

23 THE COURT: Now, ladies and gentlemen of
24 the Jury this does complete the presentation of

1 you won't have to remember it.

2 I do not want you to imply or infer from
3 the fact that I wrote that figure in to mean
4 that I am in favor of one side or the other, it
5 is just simply so you would not have to remember
6 it. All right, if you will please go to the
7 Juryroom for your deliberation.

8 Let me keep the Instructions for a
9 minute or two and then we will bring them in.

10 (The Jury retired to the Juryroom to
11 consider its Verdict at 2:45.)

12
13 THE COURT: Now, we need to put on the
14 record now the discussion that we have had
15 pertaining to the Instructions. First of all
16 what I would like to do is to go through the
17 Instructions.

18 Its real difficult to handle this any
19 proper way, routine way, and I am going to take
20 the Instructions that were given and then I will
21 let Counsel give their position with regard to
22 the Instructions and then I have three specific
23 Instructions that were tendered by Counsel for
24 the defendant that were refused and we will go

1 over those but even those that were given have
2 been somewhat modified and there may be
3 objections to some of those.

4 The first Instruction dealt with just
5 simply the issue Instruction, simply stated that
6 the issue was whether the town was negligent and
7 was the negligence the proximate cause of the
8 plaintiffs' damages.

9 This Instruction actually was written up
10 and prepared by the Court which was a
11 modification of an Instruction which had been
12 tendered by the parties.

13 Does either party have any wish to
14 object to that Instruction for the record?

15 MR. ANDERSON: No objection.

16 MRS. SPANGLER: Your Honor, I would like
17 to object to it because I think that Instruction
18 B is more appropriate and follows the law of the
19 case more closely.

20 THE COURT: All right.

21 MRS. SPANGLER: I will elaborate on that
22 when we get to Instruction B.

23 THE COURT: Instruction Two was an
24 Instruction simply dealing with the burden of

1 proof that was tendered by Mr. Anderson and that
2 was given. I do not believe there was any
3 objection.

4 MRS. SPANGLER: No objection from me.

5 THE COURT: Instruction Three also was
6 an Instruction that was prepared and written
7 during the negotiations or the conference during
8 lunch break which simply is a definition of
9 negligence and it was attempted to be modified
10 to fit the situation of the presentation of the
11 evidence.

12 It was asked for by the plaintiff. Is
13 there any objection to Number Three on behalf of
14 the defendant?

15 MRS. SPANGLER: Yes, sir. Again I feel
16 that the Instructions that were tendered and
17 refused, Instructions A, B and C, covered this
18 better. I felt that what the plaintiffs' theory
19 of the case, what he is arguing from this, is a
20 negligent plan of sewer maintenance by the town
21 and that that would be his claim, and to that
22 extent would be barred by the Doctrine of Sovran
23 Immunity and I also have some other authorities
24 for that which I will cite in reference to A, B

1 and C.

2 THE COURT: Objection number three is
3 noted by the defendant. Instruction Four was an
4 Instruction dealing with proximate cause which
5 really as I understand Counsel had stipulated
6 that the damages that flowed from the situation
7 there is no question about that, it is just a
8 question of whether or not the Town of Vinton
9 was negligent.

10 MRS. SPANGLER: Well, the damages that
11 flow from the block of the line are stipulated,
12 you know, there may be an issue of proximate
13 cause to the extent of whether or not anything
14 that the town failed to do proximately caused
15 the block, but there is not a question of
16 whether or not the block caused the damages, if
17 that makes any sense.

18 THE COURT: I think that was what we
19 attempted to instruct the Jury. Instruction
20 Five is a standard Instruction dealing with
21 giving the Jury the basic Instruction on their
22 duty dealing with the weight of the evidence and
23 the credibility of the witnesses.

24 I believe that is a standard Instruction

1 and I don't believe there is any objections.

2 MRS. SPANGLER: No objection.

3 THE COURT: Number Six was tendered by
4 the defendant which simply says that the mere
5 fact that there had been an accident which is
6 truly not an accident but we generalized the
7 term to use accident here does not in itself
8 entitle the plaintiff to recover.

9 MR. ANDERSON: No objection.

10 MRS. SPANGLER: No objection.

11 THE COURT: Number Seven was tendered by
12 the defendant and after some discussion with the
13 Court the Court agreed to give the Instruction
14 because if under the defendant's theory of the
15 case that if the Jury feels that the Town of
16 Vinton did act reasonably and was not guilty of
17 negligence then in effect it would have been an
18 unavoidable accident and I did permit the
19 attorneys to argue that theory.

20 MR. ANDERSON: No objection to that,
21 Your Honor.

22 THE COURT: Number Eight was another
23 Instruction dealing with the weight to be given
24 to the testimony of an expert witness which was

1 asked for I believe by the plaintiff.

2 MR. ANDERSON: That is correct, Your
3 Honor.

4 MRS. SPANGLER: No objection.

5 THE COURT: Number Nine was the sympathy
6 Instruction which is standard and I do not
7 believe there is any objection to that and
8 Number Ten was the finding Instruction.

9 MRS. SPANGLER: I objected to that and
10 offered Instruction B instead which I felt was
11 the more appropriate Instruction under the
12 circumstances of this case.

13 THE COURT: Correct. Instruction B on
14 behalf of the defendant was tendered in place of
15 Instruction Number Ten and it was refused by the
16 Court and now Mrs. Spangler if you would like to
17 give your reasons. Let's go back because B and
18 C both go together. One is the finding
19 Instruction and the other is simply a definition
20 of duty.

21 MRS. SPANGLER: The town's duties. As
22 far as Instruction B relating to the town's
23 duties, I offered this, an Instruction that
24 provides that the town has a duty of ordinary

1 care to prepare or warn of a blockage.

2 I think that this Instruction adequately
3 characterizes the town's duty. I think the
4 town's duty with respect to sewers is analogous
5 to the duty that it has for streets and in
6 support of that I would point you to the Town of
7 West Point case. Did I give you that?

8 THE COURT: Yes, I have the Town of West
9 Point case, citation 224 Va. 625.

10 MRS. SPANGLER: And I would cite the
11 case of Chalkley versus City of Richmond and the
12 citation on that does not appear on this but I
13 can provide the citation later.

14 As to both B and C they were taken from
15 the model Instructions in Section 32 of the
16 V.M.J.I. I felt that the town's duty with
17 respect to the block in the sewer system was
18 basically they were negligent if they had either
19 actual notice or constructive notice of a
20 problem or if they were notified of a problem
21 and failed to appear then they would be
22 negligent but they would not be held liable for
23 mere blockage in the system without other
24 factors indicating negligence.

1 I also felt like that the plaintiffs'
2 theory of the case which he argued on closing
3 which pertained to the maintenance of the sewer
4 system I think he is challenging the Town of
5 Vinton's plan for sewer maintenance and under
6 the Chalkley case any claim for that would be
7 barred by the Doctrine of Sovran immunity and
8 just in conclusion I object to the Court's
9 failure to offer Instructions B or C.

10 I further object to the Court's failure
11 to offer Instruction A. I stated already that
12 it appears that the plaintiff was not arguing
13 that there was a defect in the sewer line.

14 I believe Instruction A is a correct
15 statement of the law in the Town of West Point
16 case and I feel it was error for that to have
17 been refused.

18 THE COURT: All right, Mr. Anderson, do
19 you want to respond?

20 MR. ANDERSON: Let me briefly respond
21 for purposes of the record. As to the proffered
22 Instructions and refused by the Court from the
23 defendant I think first of all that the
24 Instructions taken from the section in the Model

1 Instructions that deal with streets and highways
2 situation is not analogous to this situation and
3 are total and wholly inapplicable.

4 The reason just briefly stated for that
5 is that in those situations there are objective
6 facts that plaintiffs can be charged with
7 knowledge of and in the particular case we are
8 dealing with, sewers and sewer lines, there are
9 none.

10 You can't charge a constructive
11 knowledge situation or actual knowledge
12 situation to a landowner as to what is going on
13 underneath the paved street and I think that on
14 that theory alone that these Instructions are
15 inapplicable and were correctly refused by the
16 Court.

17 Additionally, if I were incorrect about
18 the analogous, the Instructions are confusing
19 and I think would have confused the Jury and
20 have been cumulative because almost every issue
21 raised or definition made are found and
22 contained in the Instructions already given by
23 the Court.

24 As to the applicability of the Town of

1 West Point case I do not think that case is on
2 point with this case or analogous. In that case
3 the holding and the theory of law was that the
4 plaintiff must proof more than a probability of
5 negligence, showing why and how the incident
6 happened.

7 In this case the plaintiffs' evidence
8 was on direct that this blockage occurred in the
9 lines maintained solely by the defendant. It
10 was the opinion of the plaintiffs' expert that
11 the blockage was there because of lack of proper
12 maintenance.

13 Defense evidence through the
14 representative of the Town of Vinton cooberated
15 that, inasmuch as he said in the cold weather
16 when grease goes down the sewer it is a known
17 fact that more blockage is going to occur, it is
18 going to precipitate at that time, and with that
19 fact known, and our position being with that
20 fact, and then the evidence of only being
21 cleaned 12 months or once a year, that that
22 would be negligent.

23 So you see the plaintiffs' position is
24 that we have more than a probability of

1 negligence here, we have actual facts that must
2 be decided by the trier of fact and if found
3 affirmatively to the plaintiffs' position would
4 support the theory and showing of negligence so
5 we think that the Town of the West Point case is
6 an inapplicable analogy and it is for those
7 reasons that we concur in the Court's ruling to
8 refuse A, B and C.

9 MRS. SPANGLER: Your Honor, now I would
10 like to by way of rebuttal to Mr. Anderson's
11 argument and also in support of my motion to
12 strike plaintiffs' evidence and to set aside the
13 verdict make the following points, I guess rely
14 on the Chalkley case, on the Model Instructions
15 under the municipality section, and on the Town
16 of West Point case.

17 In my opinion the Town of West Point
18 case stands for the proposition that this case
19 can't be submitted to the Jury without evidence
20 of negligence, it is not enough to state res
21 ipsa liquitur, it is not enough to show a block
22 occurred in this sewer line.

23 The plaintiffs have the burden of
24 showing that the town's negligence caused that

1 block. I think there was no such evidence in
2 this case.

3 ~~The only evidence~~ was that the block was
4 ~~there and the evidence has been~~ that the sewer
5 ~~system is not in the exclusive control of the~~
6 ~~Town of Vinton, that there are people who are~~
7 ~~putting foreign objects, grease, rags, into the~~
8 ~~sewer system and I think letting the case go to~~
9 ~~the Jury on these facts is to let them find in~~
10 ~~effect that. Just the fact of damages is as you~~
11 ~~know not enough to impose liability.~~

12 I think that is why I am arguing res
13 ipsa loquitur. To the extent that he is arguing
14 that the Town of Vinton has a duty to inspect or
15 clean the line more than once a year, that was
16 the town's plan, and I think that is clearly an
17 area that is subject to the discretion of the
18 sovran, the town, and that any claim based on
19 that theory is barred by the Doctrine of Sovran
20 Immunity. I think that covers everything.

21 MR. ANDERSON: Judge, I am not going to
22 take up any more time responding to Sovran
23 Immunity other than stand on what we stated in
24 Chambers.

1 THE COURT: I wanted to add that
2 basically with regard to these two Instructions
3 B and C that were refused, which is the theory
4 that the town proposed, that the town would have
5 had to have actual constructive notice of the
6 blockage and then have negligently failed to
7 take action after having received notice either
8 actual or constructive, I do not say that that
9 is not the general law in some instances.

10 If the evidence in this case had been
11 that a large animal had dropped down into the
12 sewer line and it had blocked the sewer line or
13 that an automobile part or something had blocked
14 it, automatically then I would have said that
15 this would be sound law, but the evidence that
16 developed both from the plaintiff and the
17 defendant was that that ~~was a build up of~~
18 ~~blockage, that the grease and other debris and~~
19 ~~rags and sticks generally accumulated over a~~
20 ~~period of time until a blockage took place.~~

21 As I perceive the defendant's theory the
22 blockage could be building up and building up
23 over a period of time and then during that split
24 second when the blockage became a complete

1 blockage and no sewage passed through, at that
2 point in time only would the town be charged
3 with having actual or constructive notice of the
4 blockage and I felt like that under the
5 circumstances and the facts of this case that
6 was not a proper Instruction as to the law and
7 for that reason I refused to grant it.

8 I do feel like that it was up to the
9 Jury to determine whether or not they felt that
10 the town's actions in the way in which they
11 maintained and checked the condition of the
12 lines was reasonable and satisfied the duty that
13 they had.

14 Instruction A likewise was a one
15 sentence Instruction that dealt with the block.

16 MR. ANDERSON: I felt like that the
17 sentence standing alone was misleading and
18 unduly emphasized the term of the blockage which
19 I felt like was not necessarily the theory on
20 which the plaintiffs' case had been presented.

21 THE COURT: All right, having made those
22 rulings and made those statements I did overrule
23 the defendant's motion to strike and then the
24 defendant's motion and request for a directive

1 verdict. I do feel like its up to the Jury to
2 decide. Now, having said that we will now wait
3 for the decision of the Jury.

4 MR. ANDERSON: I think so I will be
5 procedurally correct for purposes of the record I
6 would move for a directive verdict on behalf of
7 the plaintiff and have the Court deny the same
8 and preserve it for the record.

9 THE COURT: For the same reasons that I
10 have stated I think it is a decision for the
11 Jury and I would not be inclined to direct a
12 verdict in favor of the plaintiff, either.

13 MR. ANDERSON: Thank you.

14
15 (A recess was taken. Following the
16 recess Court and Counsel returned to the open
17 Courtroom and the following was had.)

18
19 THE COURT: Okay, I am advised that the
20 Jury has indicated that they have reached a
21 verdict. I would request that Counsel just
22 simply let me take the verdict and let me
23 discharge the Jury and then I will permit you
24 all to make whatever appropriate motions there

INSTRUCTION NO. 1

Your verdict must be based on the facts as you find them
and on the law contained in all these instructions.

The issues in this case are

- (1) Was The Town of Vinton negligent;
- (2) Was The Town of Vinton's negligence the sole proximate
cause of the Plaintiffs' damages.

On these issues the Plaintiffs' have the Burden of Proof.

2.

*given
4-30-87
goc*

INSTRUCTION NO. 2

When a party has the burden of proof on an issue, then he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

Giver
4,30-87
JOL

INSTRUCTION NO. 3

Negligence is the failure to use ordinary care. Ordinary care is the care that would be reasonably used by the Town of Vinton in maintaining the sewer lines.

giver
4-30-87
gpc

INSTRUCTION NO. 4

The Court instructs the jury that a proximate cause of an injury or damage is that cause which in natural and continuous sequence produces the accident, injury or damage. It is a cause without which the injury or damage would not have occurred.

given
4-30-87
goc

INSTRUCTION NO.

5

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

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4-3057
g02

INSTRUCTION NO. 6

The Court instructs the jury that the fact there was an accident and that the plaintiffs were damaged does not, of itself, entitle the plaintiff to recover.

The plaintiffs have the burden of proving by the greater weight of the evidence that the Town was negligent and that its negligence caused the plaintiffs' injuries.

*Giver
4-30-87
gor*

INSTRUCTION NO. 7

The Court instructs the jury that an unavoidable accident is one which ordinary care and diligence could not have prevented or one which occurred in the absence of negligence by any party to this action.

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4-3087

INSTRUCTION NO. 8

In considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion and the manner by which he arrived at it and whether all of the material facts that he relied on have been proved.

given
4-30-87
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INSTRUCTION NO. 10

You shall find your verdict for the Plaintiffs, Roger and Linda Bryant, if they have proved by the greater weight of the evidence that:

- (1) The Town of Vinton was negligent; and that
- (2) The Town of Vinton's negligence was the sole proximate cause of the Plaintiffs' damages.

You shall find your verdict for the Defendant, Town of Vinton, if:

- (1) The Plaintiffs failed to prove either or both of the two elements above.

given
4-30-57
jor

INSTRUCTION NO. A

referred

The Court instructs the jury that a town is not liable for every accident that happens because of a blockage of its sewer line. ~~Neither is it liable for every injury that is caused by a defect in its sewer lines.~~

V.M.J.I. No. 32.030

referred

INSTRUCTION NO. B

The Court instructs the jury that you shall return your verdict for the plaintiffs if they proved by the greater weight of the evidence:

(1) that the town had actual or constructive notice of a blockage in a sewer system; and

(2) that the town negligently failed to repair or warn; and

(3) that the town's negligence was the sole proximate cause of the plaintiffs' accident and damage.

You shall return your verdict for the town.

(1) if the plaintiffs failed to prove any or all of the three elements above; or

(2) if the town proved by the greater weight of the evidence that the plaintiffs were negligent and that their negligence was the proximate cause of the accident.

INSTRUCTION NO. C
8

referred

The Court instructs the jury that a town has a duty to use ordinary care to repair or warn of a blockage in the sewer system within a reasonable time after it has notice of the problem. The notice may be either actual or constructive.

A town had actual notice if any town employee who supervises the sewer system or who has power to direct work on them actually knew of the blockage.

A town had constructive notice if the blockage existed long enough that a city would have discovered it if it had used ordinary care.

If a town has notice, either actual or constructive, and fails to perform this duty, then it is negligent.

V.M.J.I. No. 32.040

Thereupon, the defendant presented its evidence and rested. The defendant, by counsel, renewed its motion to strike the evidence as further stated at the bar of the Court and requested the Court to enter a directed verdict in favor of defendant, which motion the Court overruled.

Thereupon, the jury, after being instructed by the Court and hearing argument of counsel, retired to the jury room to deliberate and reach its verdict.

Thereupon, the jury returned with its verdict as follows:

"We, the jury, find out verdict in favor of the plaintiffs and assess their damages at \$2,830.74." Carter Bradley, Foreman, April 30, 1987.

Whereupon, defendant moved the Court to set aside the verdict of the jury as contrary to the law and the evidence on the grounds that plaintiff had produced insufficient evidence of negligence to support the verdict of the jury and on the ground that the Town of Vinton was entitled to rely on the defense of sovereign immunity;

Whereupon, the Court took the Motion under advisement and permitted both parties to submit briefs on defendant's motion to set aside the jury verdict as contrary to the law and the evidence; and

After a hearing on December 21, 1987, and after considering the authorities and argument of counsel, the Court refused to set aside the verdict of the jury.

Therefore, it is ADJUDGED and ORDERED that judgment is hereby entered in accordance with the verdict of the jury in favor of the plaintiff in the amount of \$2,830.74 with interest at the judgment rate of interest from the date of judgment.

Defendant, by counsel, having indicated its intention to take an appeal from this judgment pending action thereon by the Supreme Court, it is further ORDERED that execution of this judgment be and it is hereby suspended for 30 days and thereafter until the Supreme Court rules on said appeal, provided that defendant files with the clerk of this court a cash bond in the amount of \$250.00 within 30 days.

Nothing further remaining to be done in this case, the Court orders that the Clerk furnish certified copies of this Order to counsel of record and that this matter be stricken from the docket of this Court.

ENTER this 4th day of March, 1988.

G. O. Clum
Judge

We Request Entry of this Order:

Anthony F. Anderson
Anthony F. Anderson, Counsel
for the Plaintiffs

We Object to this Order for Reasons Stated in Memoranda filed with the Court and for reasons set forth by counsel for the defendant at the Bar of the Court.

Susan W. Spangler
Susan W. Spangler, Counsel
for the Town of Vinton 98

A COPY TESTED:-ELIZABETH W. STOKES, CLERK
CIRCUIT COURT, ROCKINGHAM COUNTY, VA.

BY Marsha B. Conner
DEPUTY CLERK

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in submitting the case to the jury because the evidence presented at the trial of the case shows that the Town of Vinton is entitled to rely upon the defense of sovereign immunity, which is a complete bar to the Bryants' action against the Town.

2. The Circuit Court erred in submitting the case to the jury because the Bryants submitted no evidence of negligence with which to support a jury's verdict and therefore did not present sufficient evidence to establish their prima facie case.

3. The Circuit Court erred in refusing to grant the Town's proffered instruction labeled "Instruction A."

4. The Circuit Court erred in failing to give the "Instruction B" proffered by the Town, and in giving the Bryants' instruction 10 in lieu thereof.

5. The Circuit Court erred in failing to give the "Instruction C" proffered by the Town, and in giving the Bryants' instruction 1 in lieu thereof.