IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,549

THIRD DISTRICT - CASE NO. 85-2796

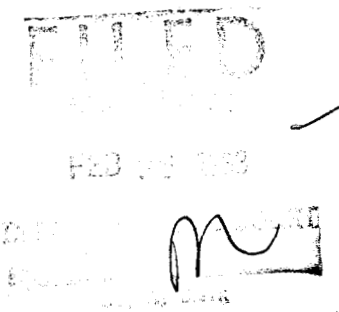
FLETCHER SLEMP and
DORA SLEMP,

Petitioners,

vs.

CITY OF NORTH MIAMI,

Respondent.



ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The Petitioners in their Reply Brief shall refer to the parties as they stood in the trial court below. Therefore, the Petitioners, FLETCHER SLEMP and DORA SLEMP, shall be referred to as the "Appellants" or "SLEMPS"; and the Respondent, CITY OF NORTH MIAMI, shall be referred to as the "Appellee" or "CITY". Reference to the record on appeal from the trial court shall be indicated by the letter "R" followed by the pagination given to said record by the Clerk of the Circuit Court of Appeal. Reference to the Appendix shall be indicated by the letter "A".

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STATEMENT OF CASE AND FACTS

The CITY in its Brief mischaracterizes the elevation of the SLEMPS' property. Its Brief makes it appear that the SLEMPS' home is located below the level of the streets and at the same level as the water table under the City of North Miami. While it is true that the SLEMPS' property is one of the lowest on their block, their property is higher than the curb of the street.

The CITY in its Brief characterizes the rainfall as extraordinary. However, it is less than the CITY experienced the week before and its pumps were perfectly capable of keeping the streets dry when the automatic switch worked properly. While it is true that the SLEMPS' property flooded in previous years, this goes to prove that the CITY was on notice long before the incident in question that their pumps needed to be properly maintained. The SLEMPS' do not claim that the CITY was negligent in allowing their predecessor in title to build their home in a low lying area. However, the CITY has not shown any facts that would indicate that the SLEMPS the assumed risk of flooding. Nor are there any facts that would negate the SLEMPS' reliance on the CITY'S drainage system to be able to prevent the rainwater from being collected by the streets and diverted to their property.

The CITY'S Brief acknowledges the CITY'S liability when its streets collect and funnel water so as to cause it to be cast

onto the SLEMPS' land. The CITY'S only defense in the SLEMPS' suit is that the SLEMPS did not allege in their Complaint the specific mechanism that caused the rains to accumulate.

Neither the pleadings nor the depositions and affidavits establish the manner in which the rainwater was caused to accumulate on the SLEMPS' property. It can be assumed that the CITY'S storm sewer system was connected to the drains in its streets. There has been no allegation anywhere in the record that surface water collected on upper property and drained onto the SLEMPS' property. If the CITY is liable for rainwater that is collected by the CITY'S streets and then cast upon the SLEMPS' property, then it would be incumbent upon the CITY to clarify the issues and establish that the CITY streets are not the source of the water that inundated the SLEMPS' property.

Although the trial court granted the CITY'S Motion for Summary Judgment on the immunity issue, the Court considered the CITY'S Motion for Summary Judgment on the issue of proximate cause and found that there were issues of fact that remained to be decided. While the City submitted an affidavit from its engineer stating that it was impossible for the pumps to have withdrawn all of the rainwater. The engineer based his opinion upon hypothetical factors in determining how much rainwater was collected. In contrast to the engineer's affidavit, an affidavit showing rainfall was submitted to the Court. It showed that six

(6) days before the SLEMPS' property was inundated by water, 5.28 inches of rain fell in the City of North Miami. The pumps did not have any difficulty extracting the water on that day because there was no flooding. Only 5.02 inches of rain fell on the date that the SLEMPS' home was flooded and the ground was dry having had two (2) prior rain free days (R. 79). At the time of the hearing, it was brought to the Court's attention that the CITY failed to maintain the automatic switch on its pumps. From 1979 to 1984, an employee of the CITY, Mr. Glatz, had the job of manually turning the storm sewer pumps on after he had been notified that there was flooding conditions (A. 6-7). He only went out to the pump house when he received a call informing him that the streets were flooded (A. 11). Although the pumps were supposed to start automatically and were always switched on automatic, he had to start them manually on approximately thirty (30) occasions (A. 9, 11-12). It would only take about twenty-five (25) minutes to drain the flooded streets after the pumps had been turned on manually (A. 14, 26). If the pumps were working the streets would not accumulate water (A. 15, 28).

The initial opinion of the Third District Court of Appeal agreed with the Plaintiffs and the trial court and found that there was an issue of fact as to whether the failure of the pumps caused the water damage.

SUMMARY OF ARGUMENT

The trial court erred in entering a Summary Judgment against the SLEMPS on the issue of whether the CITY is immune from suit for flood damage caused by the CITY'S negligent failure to maintain its storm sewer pumps. The CITY'S storm sewer pumps are an integral part of its streets and storm sewer drainage system. The ownership of property including a drainage system of a city is a proprietary function and not a governmental one. The CITY is not immune from suit where damage is caused in its negligent performance of a proprietary function.

While it is the SLEMPS contention that the drainage system includes the streets, the storm drains and the storm sewer pumps, it is the CITY'S contention that the SLEMPS should loose their suit merely because they failed to allege that the CITY'S streets and storm sewer system artificially collects water and cause it to divert it to the SLEMPS' property. The SLEMPS' Complaint assumes that the CITY'S storm sewer pumps are removing water collected by the streets and the storm sewer system. The law is well established in Florida that the city is liable for the negligent maintenance of its property. If the SLEMPS are required to plead that the streets and storm sewer system collected the waters, then, in the interest of justice, the SLEMPS should be allowed to amend their Complaint.

ARGUMENT

POINT I

A CITY IS LIABLE FOR DAMAGE CAUSED BY RAINWATER COLLECTED BY ITS STREETS AND CAST UPON A HOMEOWNERS PROPERTY.

The trial court entered a Summary Judgment against the SLEMPS on the issue of whether the CITY can be liable for flood damage caused by the CITY'S negligent failure to maintain its storm sewer pumps. Neither the pleadings nor the depositions and affidavits establish the manner in which the rainwater was caused to accumulate on the SLEMPS' property. It can be assumed that the CITY'S storm sewer system was connected to the drains in its streets. There has been no allegation anywhere in the record that surface water collected on upper property and drained onto the SLEMPS' property. If the CITY is liable for rainwater that is collected by the CITY'S streets and then cast onto the SLEMPS' property, then it would be incumbent upon the CITY to clarify the issues and establish that the CITY streets are not the source of the water that inundated the SLEMPS' property. In entering a Summary Judgment, the pleadings, deposition and affidavits must conclusively show that the Plaintiff can not prove their case. Williams v. Florida Realty & Management Co., 272 So.2d 176 (Fla. 3rd DCA 1973). Summary Judgment may be granted only when the

facts of a case are eliminated, admitted, settled or crystallized to the point where there remains nothing further to be done but to apply the law to them. Bess v. 17545 Collins Avenue, Inc., 98 So.2d 490 (Fla. 1957).

The CITY admits that it is liable if the CITY'S streets caused rainwater to be accumulated and cast onto the SLEMPS' property. However, the CITY never raised any issue with the pleadings, presumable because the ultimate facts in this case revolve around whether the CITY had an obligation to maintain its pumps under any circumstances. It is presumed that the trial court agreed with the CITY in entering the Summary Judgment and found the CITY was immune from suit arising out of the CITY'S failure to maintain its storm sewer pumps under any circumstances. In the event that this Honorable Court rules that the CITY'S liability is limited to those situations in which the CITY'S streets caused water to be cast on the SLEMPS' property and that these facts must be specifically pleaded, then the interest of justice dictates that this cause should be remanded to the trial court for the purpose of allowing the SLEMPS to amend their Complaint. Goldcoast Crane Service, Inc. v. Watier, 257 So.2d 249 (Fla. 1971); Part Properties, Inc. v. Slack, 159 So.2d 236 (Fla. 1963) and Roberts v. Braynon, 90 So.2d 623 (Fla. 1956).

As was pointed out in the SLEMPS' initial Brief, drainage of surface water is a corporate or proprietary function. The CITY only cited two (2) jurisdictions for the proposition that surface water drainage is a governmental function. Not only are they contrary to Florida law which holds that the operation of a drainage system is a corporate or proprietary function, but one of the cases has been presented out of context and the other has been superceded. The case of Hutchinson v. City of Lakewood, 180 N.E. 643 (Ohio 1932) has been superceded by the case of Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E.2d 243 (1949). In Doud, the Supreme Court of Ohio held that the sewer system is not a governmental function and that the City has a duty to maintain it. The only other case cited by the CITY is that of Sioux Falls Construction Co. v. City of Sioux Falls, 297 N.W.2d 454 (1980). There the Court held that the task of controlling flood waters, as defined as the rampaging water of a river at or near flood stage, is a governmental function for which there would be immunity. It held that the City was not immune from its negligent control of run-off water. The use of this later case to bolsters the CITY'S argument in favor of immunity is a prime example of how the CITY, throughout its Brief, has attempted to associate "flood control" with police and fire protection. If the CITY had been suddenly confronted by a rampaging river, the CITY'S attempt to prevent the waters from washing away buildings

and other properties may involve police functions. However, in the instant case, we do not have a rampaging river. We have a sewer system that has been designed and constructed to divert rainwater run-off from the streets of the CITY OF NORTH MIAMI. While the CITY would like to characterize the run-off of its water as an unprecedented and uncontrollable rampaging flood, the fact of the matter is that these rains are a common occurrence in South Florida and the CITY has a drainage system and storm sewer pumps to divert the everyday water collected by its streets. The CITY originally installed an automatic system for engaging the pumps when rainwater exceeded certain levels. They allowed the automatic system to fall into disrepair, thus eliminating a safety feature. The question then is simply whether a City that installs a storm sewer pumping system to remove rainwater captured by its streets is liable for damage done when this rainwater is channelled onto adjacent property, flooding homes with water and raw sewage.

Throughout the other jurisdictions in the United States, there appears to be two (2) schools of thought. The majority view held by Arizona, Colorado, Iowa, Maine, Massachusetts, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont and Washington is that a governmental will be liable for flooding where the flooding would not have occurred had the City properly maintained its storm

sewer system. The minority view cited by the City only includes Kansas, Nebraska, Georgia, Illinois, Wisconsin, Texas and Alabama. While the CITY cited numerous other jurisdictions to support its view, these cases are either distinguishable or the law has been changed by more recent decisions. Hutchinson v. City of Lakewood, 180 N.E. 643 (Ohio 1932) was superceded by Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E.2d 243 (1949). Buerkel v. Boston, 190 N.E. 788 (Mass. 1934) was superceded by Green v. Town of West Springfield, 323 Mass. 335, 81 N.E.2d 819 (1948). City of Globe v. Moreno, 202 P. 230 (Ariz. 1921) was superceded by the case of City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952). Oklahoma City v. Evans, 50 P.2d 234 (Okla. 1935) was superceded by Oklahoma City v. Romano, 433 P.2d 924 (Okla. 1967). Reid Development Corp. v. Burrough of Verona, 76 A.2d 821 (N.J. Super. 1950) was superceded by the case of Clay v. City of Jersey City, 84 N.J. Super. 9, 200 A.2d 787 (App. Div. 1964). In each of these superceding cases, the Court has held that the City can be liable for its failure to maintain the drainage system.

Young v. Gott, 250 N.W. 484 (Iowa 1933) cited by the CITY is not only distinguishable because it did not involve the City's storm drainage system, but the Court held that the City is responsible for maintaining its drainage systems. See Scholbrock v. City of New Hampton, 368 N.W.2d 195 (Iowa 1985) for this same

proposition. In the case of McClure v. Town of Mesilla, 601 P.2d 80 (N.M. App. 1979), the Court did not even address the issue concerning the City's responsibility for its drainage system other then to find that as a result of irreparable damage the suit should have been for inverse condemnation. In another case, New Mexico specifically addressed the issue and followed the majority holding that the City is responsible for maintaining its storm sewer system. See State of New Mexico ex re. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961). In the case of Laurelon Terrace, Inc. v. Seattle, 246 P.2d 1113 (Wash. 1952), the Court held that the City was liable for damage if its sewer system became inadequate or the City drained so much water that it increased the drainage system beyond its natural condition. Not only is this contrary to the holding that the City attributes to the case, but the Washington Court held in Sigurdson v. City of Seattle, 48 Wash. 2d 155, 292 P.2d 214 (1956) that the City was in fact liable for flooding where the flooding would not have occurred had the City properly maintained its storm sewer system. The City has also misapplied or misconstrued the holding of the following cases cited in its Brief. Strauch v. City of Scranton, 44 A.2d 258 (Pa. Super. 1945) stands for the proposition that the City is liable for the maintenance of its storm sewer system. Le Brun v. Richards, 291 P. 825 (Cal. 1930) involved two (2) individual property owners

and has nothing to do with the City's liability for its drainage system. Miller v. City of Brentwood, 548 S.W.2d 878 (Tenn. App. 1977), merely held that the City had no duty to create a drainage system. In the instant case, the CITY has created the drainage system but has negligently maintained it. In Baldwin v. City of Overland Park, 468 P.2d 168 (Kan. 1970), the Court merely held that the City was not required to improve the natural drainage system. City of Louisville v. Leeza, 136 S.W. 223 (Ken. App. 1911), held that the City was liable where the capacity of its sewer system failed to keep up with the growth of the City. In Wright v. City of Oneonta, 1 N.Y.S.2d 295 (N.Y. Sup.Ct. 1937), the City owned land through which a stream flowed and the Court held the City not to be liable when flood waters carrying uprooted trees, passed through its property onto the lower property owner. In Wright v. City of Rock Island, 273 N.E. 2d 83 (Ill. 3d DCA 1971), the Court held that the City is not liable where its sewers are inadequate to carry off extraordinary rainfall. There was no allegation of damage caused by negligent maintenance of the storm sewer system. In Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984), there was no allegation that the City was negligent in the operation or maintenance of the storm sewer system. In Freeman v. City of Lake Mills, 11 N.W.2d 181 (Wis. 1943), the only thing that the City did was to substitute a pipe for an open ditch. There was no allegation that the City

negligently maintained the storm sewer system. In City of Dallas v. Winans, 262 S.W.2d 256 (Tex.App. 1953), the Plaintiff and adjacent property owners had changed the contours of the land and built levees. The Plaintiff even eliminated one (1) drainage ditch that ran past her property.

CONCLUSION

The Third District's en banc opinion should be quashed and the Summary Judgment reversed. The CITY admits that it is liable for the flooding caused by water collected in its streets and diverted to the SLEMPS' property. The issue of how the water got onto the SLEMPS' property was never established. The CITY failed to meet its burden at the hearing on its Motion for Summary Judgment. Whether the CITY'S streets were the cause of the SLEMPS' damage is a question of fact that remains for a jury determination. Likewise, whether the storm sewer water from sources throughout the CITY backed-up through the storm sewer grates near the SLEMPS' home causing water to flood over the street curbs and into the SLEMPS' home was never negated by any of the affidavit filed by the CITY. The reason the CITY failed to negate these factual issues is because it was their contention that no matter how the water got onto the SLEMPS' property, the CITY was not obligated to maintain its storm sewer pumps. If this Honorable Court feels that it is essential for the SLEMPS to plead the manner in which the water got onto their property, then they request that the case be remanded and that they be allowed to amend their Complaint. The SLEMPS can allege and prove that both storm water and raw sewage backed-up out of the sewage manholes and storm sewer drains. These waters flooded their

streets high enough so that there was a lake in which their house sat.

BASED upon the cases, authorities and statutes cited herein, the Petitioners/Appellants, FLETCHER SLEMP and DORA SLEMP, request that this Honorable Court quash the Opinion of the District Court of Appeal, Third District, reverse the Trial Court's summary judgment and remand this case for trial.

Respectfully submitted,

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