

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

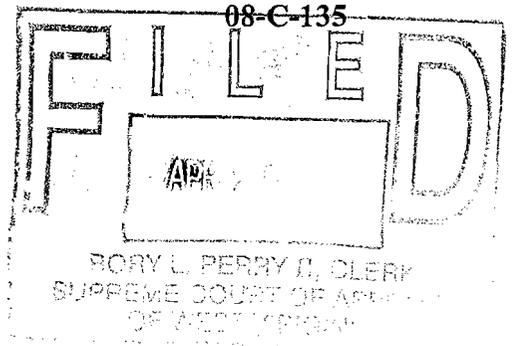
BRANDY PINGLEY, et al,

Plaintiffs,

vs.

HUTTONSVILLE PUBLIC
SERVICE DISTRICT,

Defendant.



ORDER

On June 9, 2008, the Plaintiffs filed a Complaint with this Court against the Defendant, Huttonsville Public Service District (HPSD). The Defendant, HPSD filed a responsive pleading by way of a "Motion for Summary Judgment" on or about July 11, 2008.

This matter came for hearing on October 6, 2008 before this Court. After hearing arguments from all parties to this matter, the Court took the matters under advisement.

After mature consideration of the arguments made in the parties respective motions and pertinent case law, the Court FINDS as follows:

1. The Plaintiffs claims stem from an alleged sewer system failure in the Huttonsville Public Service District (HPSD) on or about April 14, 2007.
2. The Plaintiffs complaint alleges that the HPSD breached it's duty as a public utility to ensure water lines, sewer lines, and sewer systems are adequately maintained, inspected, in good repair, and compliant with all applicable code.
3. The Plaintiffs allege that the sewer system failed and caused substantial and hazardous back up into the Plaintiffs' property.
4. The Plaintiffs allege damages based on the following claims:
 - a. Loss of property,
 - b. Loss of use of property,
 - c. Emotion distress,

- d. Pain and suffering,
- e. The loss of consortium of family members,
- f. Loss of use of home,
- g. Diminution of value of home,
- h. Lost wages,
- i. Attorney fees and costs,
- j. Annoyance
- k. Inconvenience
- l. Humiliation
- m. Embarrassment
- n. Loss of enjoyment of life.

5. On or about July 11, 2008, the Defendant filed a Motion for Summary Judgment arguing that the Plaintiffs never informed the Defendant of any problems they experienced with the water/sewage system prior to April 17, 2007. Therefore, the Defendant argues that it had no notice of any problems regarding the Plaintiffs' sewer line and had no opportunity to remedy the alleged problems. The Defendant maintains that once the Plaintiffs notified the Defendant of the problem, the Defendant inquired as to the scope of damages and promptly repaired all damages to the Plaintiffs' premises.
6. That the Defendant's Motion for Summary Judgment included an affidavit of Ms. Bonnie Serrett, Executive Secretary of HPSD noting that the Plaintiffs came to the HPSD offices in April 17, 2008 with photographs of damage to their home and property. The affidavit also indicates that the HPSD promptly initiated an inquiry into the damage to the Plaintiffs' property and notified its insurer of potential liability. The affidavit states that the HPSD inquiry demonstrated that no complaints were made about water or sewer service to the Plaintiffs property prior to April 17, 2008.
7. On or about September 26, 2008, the Plaintiffs filed a "Response to Defendant's Motion for Summary Judgment" arguing that the Defendant's motion should be denied, as it is premature. Plaintiffs argue that the development of this case through discovery will show that the Defendant breached a duty of care through negligent maintenance, design and inspection of the sewer lines.
8. In support of their response, Plaintiffs submitted an affidavit authored and signed by their attorney, Erika Klie, Esq. Such affidavit indicates that Ms. Klie has contacted a public utility and septic system expert regarding the maintenance and design of the sewer lines involved in this matter. The affidavit states that, following discovery, the expert will likely author an opinion that the HPSD did not meet the requisite standard of care of reasonably prudent public service provider.

Preliminarily, the Court notes that summary judgment is proper in instances where there is no

genuine issue of material fact, as provided for under Rule 56(c) of the West Virginia Rules of Civil Procedure.

In reviewing the parties motions, the Court is of the opinion that summary judgment is proper, as the Plaintiff cannot make a sufficient showing on an essential element of the case that they have the burden to prove. The Plaintiff cannot prove an essential element of its claim of breach of duty by a public utility. The West Virginia Supreme Court of Appeals (WVSCA) has held that "summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Burless v. West Virginia University Hospitals*, 215 W.Va. 765 (2004), and *Painter v. Peavy*, 192 W.Va. 189 (1994).

As to a public utilities duty, the WVSCA held in *Calabrese v. City of Charleston*, 515 S.E.2d 814, 822, "a municipality, in maintenance of its sewerage system, owes only the duty of reasonable care to avoid damage to the property of others." The WVSCA also notes in *Calabrese* that without notice of a specific issue or concern with the property or service lines, a public utility has no duty to act beyond ensuring the line is open, in repair, and free from nuisance.

The Plaintiffs have not to date raised any allegations before this Court indicating that there was a pre-existing issue with the sewer line, prior to the April 14, 2008 problems. After the April 14, 2008 problems were brought to the HPSD's attention, some three days later, the HPSD took reasonable action. As the Defendant's Motion and accompanying exhibits indicate, the HPSD promptly inquired about the problems with Plaintiffs sewer line and notified it's insurer of the potential liability on April 17, 2008. After inquiring as to the problems, the Defendants repaired the Plaintiffs sewer line and any damages to the

property, as evidenced by insurance claim checks issued to the Plaintiffs following the April 14, 2008 problems.

Arguably, if the HPSD had knowledge of problems with the sewer lines and any impending damages and had ignored a duty to reasonably remedy those problems, they would be liable for such damages that might have occurred. In the case at bar, however, the HPSD had no knowledge of any problems with the Plaintiffs sewer line prior to April 17, 2008. Once the HPSD was made aware of such problems, it took prompt action to repair any damage to the Plaintiffs property and the Plaintiffs sewer lines.

Prior to the Plaintiffs notifying the Defendant on April 17, 2008 of the sewer line issue, the HPSD only had a duty to ensure the lines were open, in repair, and free from nuisance. The HPSD complied with the aforementioned duty, as outlined under *Calabrese*. Therefore, the Plaintiff cannot maintain a viable claim against the Defendant for breach of duty, as Plaintiffs are unable to make a sufficient showing of the essential elements of that claim.

In light of the foregoing, the Court hereby ORDERS that the Defendant's Motion for Summary Judgment be hereby GRANTED.

The Court further ORDERS that this case be DISMISSED and REMOVED from the Court's active docket.

It is, SO ORDERED.

The Clerk of this Court shall forward copies of this Order to counsel for the Plaintiffs, Erika Klie, Esq., and counsel for the Defendant, Robert F. Green, Esq.

Enter this 11th day of December, 2008.

ENTERED

DEC 12 2008

JUDGE



A TRUE COPY:
ATTEST:
PHILIP D. RIGGLEMAN
CLERK OF THE CIRCUIT COURT

BY M. H. Green DEPUTY

Civil ORDER BOOK
NUMBER 84 PAGE _____
PHILIP D. RIGGLEMAN, CLERK

30 M. H. Green. 12/12/08

E. Klie
Green