

August 30, 2011

Dear City Recorder:

Let me say at the outset that I do not choose or favor sides in disputes between cities, unless my view and analysis of the law takes me to one side. MTAS is an advisory agency, and its legal staff tries to refrain from opinions that are not solely based on its legal judgment.

City A essentially has the following question: Which of the Cities of A and B is responsible for correcting the sinking pavement problem along a sewer line in the City of A? The sewer line in question was apparently installed in 1996.

It appears to me that the City of B is not contractually liable for the problem of the sinking pavement, although under the Tennessee Governmental Tort Liability Act (TGTLA) it may be liable for damages that might be suffered by members of the public arising from its contact with it, depending on whether the courts see that problem as a street problem or a sewer system problem. As I understand the facts behind the question up to this point, City B can probably disclaim contractual liability for the sinking pavement on the grounds that it is the product of a latent defect. This answer is contrary from the tentative one I gave you and others a few days ago.

This question arises from the fact that City A has had an engineering study done “around the existing sewerline (sic) A5 and manhole A5.4 on X Avenue....the pavement has a history of settlement and the area has a history of high ground water and springs.” [Study done by AB&C (dated July 1, 2011)]. The engineering study reports that “two depressed areas were excavated down to existing 8 inch PVC pipe subgrade,” and determined that:

Below the pipe and on each side of the pipe trench was wet plastic clay. Shale and trench backfill stone was encountered. During sewer line construction, concrete check dams were installed in the sewer trench to block the flow of ground water flow (sic) along the trench. This keeps the water from removing the fine particle of the backfill stone and helps to prevent settlement of the backfill.

However, this arrangement was trapping water around the pipe and manhole and allowing the ground water to saturate the existing subgrade (silty clay). Since the subgrade has a low bearing capacity, settlement occurred due to the weight of traffic, roadway pavement, and water saturated backfill during wet periods.

But the sewer line has not been ruptured and is otherwise not leaking in the area of the sewer line in question. Apparently, the position of City B is that under its contract with City A,

it is responsible only for sewer line failures in the sense of ruptures, and not for problems arising from the condition of the soil, including the backfill, around the sewer line. The sewer line not having failed, it argues that it is not responsible for the repair of the street resulting from the sinking of the pavement. I reject that argument as not reflecting the intention of the parties to the contract, as evidenced by its language cited below, but I will address it below in connection with the possible application of the TGTLA to the sewer line. However, the language in the contract does not intercept the claim of City B that the defective trench in which the sewer line was placed was a latent defect. As we shall see below, a latent defect has been defined as “[a] hidden defect. One which could not be discovered by reasonable and customary inspection.” *Hawks v. City of Westmoreland*, 960 S.W.2d 10 (Tenn.1997), quoting *Black’s Law Dictionary*, 794 (5th ed. 1979) [At 17].

I initially assumed that if the engineering study was correct, the answer to the question of whether City A or City B is responsible for the sinking street was answered by the contract entered into between the two cities on June 21, 2004, pertinent to City A’s sewer system. One can probably argue that given the engineering study’s statement that, “the area has a history of high ground water and springs,” City A should have ensured that the contractor’s construction techniques and materials were equal to those problems when the sewer line at issue was installed in 1996, or thereabouts. But from the facts related to me about the construction of the sewer line, City A does not have the same latent defect defense to liability as does City B; it probably knew or should have known that there was a “defect” in the construction of the sewer line at issue.

The contract pertinent to the sewer line at issue was entered into between the Cities of A and B on June 21, 2004. Paragraph I provides for the term of the contract, for who is responsible for the sewer collection system during that term, and for the extent of that responsibility. Under Paragraph I(A) of that agreement, which “shall commence at midnight on July 1, 2004,” and shall endure until those debts listed and described in Exhibit A to this Agreement...are paid in full.” The debts listed in Exhibit A were “Principal balance of \$220,445.00.” As I understand the facts, the entire indebtedness was paid some time in 2010 or thereabouts. In accordance with the terms of the contract, City A transferred to City B “any and all of its right, title, claim and interest in that portion of the sanitary sewer collection system including pipes and other real or personal property owned by the town, relative to said sewer system, in which no indebtedness is outstanding.”

But Paragraph I(A) of the contract, provided that before the indebtedness of the sewer system was paid:

City B Utilities shall assume the total, full, complete and exclusive operation of the sanitary sewer collection system presently owned by the Town, including but not limited to, the management thereof, the making of any repairs thereto, the maintenance thereto, the billing of those individuals and/or entities served thereby, the collection of funds generated thereby, the disbursement of such funds as City B Utilities deems appropriate, etc. No other person or entity, including but not limited to the Town shall have any

control over the operation of the sanitary sewer collection system presently owned by the Town.

Before the transfer of the system City B had complete control and operation of that system, to the exclusion of anyone else. It even collected the entire revenues from that system.

That transfer was consistent with Paragraph II of the original 2004 Contract, which became operative on July 1, 2004, which provided that after City A's indebtedness for the sewer system was paid, and after appropriate public hearings, "the Town shall ...transfer and convey (without warranties except as set forth herein) unto City B Utilities any and all right, title, claim and interest (whether legal, equitable or otherwise) of the Town in and to the complete and total sanitary sewer collection system owned by the Town and those items and things listed and described in Exhibit B to this Agreement, which Exhibit B is attached hereto and incorporated by and for reference." Those "items and things" listed in Appendix B included:

- "Any and *all property*, of whatsoever nature, type or kind, *associated with or related to the sanitary sewer collection system* owned by the Town.
- *Any and all property*, whatever real, personal or mixed *associated with or related to the sanitary sewer collection system* owned by the Town.
- *Any and all property*, whether *tangible or intangible*, associated with or related to the *sanitary sewer collection system* owned by the Town."

It seems probable to me that the City of A's transfer to the City of B of its "complete and total sanitary sewer collection system, and, "Any and all property, of whatever nature, type or kind, associated with or related to the sanitary sewer collection system" included the trench in which the sewer system is buried, at least to the extent that it affected the sewer system's pipes.

It has been held that both public and private utilities can use municipal streets to install and maintain their infrastructure without the permission of, or payment to, the fee owner of the street. [See *Frazier v. East Tennessee Telephone Co.*, 90 S.W.620 (1900); *Johnson v. Chattanooga*, 191 S.W.2d 175 (1945); *Pack v. Southern Bell Telephone Company*, 319 S.W.2d 90 (1958).] The latter case declares that, "Since 1905 under the holding in *Frazier v. East Tennessee Tel. Co.*.... Tennessee has been committed to the view that the use of public rights-of-way by utilities for locating their facilities is a proper highway use subject to their principal purpose as travel and transportation. [At 792] Apparently that right does not constitute a utility easement but it does constitute the right of a utility to use the "property" under the municipal street easements to bury utilities. It is difficult to argue that that property is not property "associated with or related to the sanitary sewer collection system" owned by City A.

City B Utilities shall have and enjoy in perpetuity the exclusive franchise, authorization and permit to operate a sanitary sewer collection system or similar system within the geographical areas served by the sanitary sewer system owned by the town, and any additions and extensions

thereto, and shall have and enjoy the right to occupy any and all of the public roads, streets, highways, alleys, ditches and rights-of-way within the geographical areas served by the sanitary sewer system presently owned by the Town, and any additions and extensions thereto, so as to enable City B Utilities to operate and maintain the sanitary sewer collection system.

That franchise reflects City B's right to "occupy" various kinds of City A's rights-of-ways. That right obviously includes the right to excavate those rights-of-way to install and maintain what is now its sewer system in City A.

But in consideration of the facts I know about the history of the sewer line at issue, I have had to challenge my own interpretation of the contract which appears to be complicated by the fact that even if City A can successfully argue that the trench is a part of the sewer collection system, and that it was a defect in the trench that caused the settling of the pavement over the trench, and that City B was responsible under the contract for such defects, City B may be able to successfully disclaim liability for that defect on the ground that it was a latent defect. The sewer line at issue was laid by City A in 1996, and the contract between City A and City B became effective in 2004. At different times not known to me, between 1996 and June, 2011, the city had sinking pavement problems along the sewer line, leading it to have the engineering study done, which disclosed the sewer construction problems noted therein. That set of facts suggests the strong possibility that City B had no notice of the sinking pavement problem and could not have discovered it, the sewer line being buried in the ground. It is said in *R.J. Hale & Sons*, 14 Tenn. App. 461 (1932), with respect to a construction contract, that:

... the general rule is stated that where work is accepted with knowledge that it has not been done according to contract, or under such circumstances that the knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance, but the rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the defective performance. [At 470]

Also see *Ferguson v. R.W. Fowler and Associates*, 28 Fed. Appz. 372 (6th Cir. 2001); *Ellis v. Chase Comm'n's, Inc.* 63 F.2d 473, 476 (6th Cir. 1995); *Waddell v. Greenlawn Memory Gardens*, 2009 WL2877290 (Tenn. Ct. App.), for the application of the latent defect principle in other negligence contexts. We shall see momentarily, that there is also a latent defect provision in the TGTLA that provides considerable protection to the tort immunity of local governmental entities.

But the transfer of the ownership of the sewer collection system was significant in one respect: It brought City B under the TGTLA) with respect to City A's sewer system. For the

purposes of that Act, the “ownership and control” of streets, or dangerous or defective structures is required to trigger the removal of sovereign immunity of local governments for such streets and structures. [Tennessee Code Annotated, §§ 29-20-203 and 204] Before the transfer, City B had total control over City A’s sewer collection system, but not ownership.

It may be that because City B has ownership and control of the former City A sewer collection system it would be liable under the TGTLA for any damages arising from the public’s contact with the sinking pavement. An interesting question in that respect is whether, under the facts, such liability would arise under Tennessee Code Annotated, §§ 29-20-203, or 29-2-204. Presumably, City B now has notice of the sinking pavement and the *reasons* for the sinking pavement. If the courts saw the pavement problem as a street problem, the case would belong under § 29-20-203. If they saw it as a utility problem, it would probably belong under § 29-20-204.

As far as I can determine, the question of whether the “sewer collection system” includes defects in the system that do not involve actual pipe failure has been addressed by only one case in the United States: *Miller v. Commonwealth*, 690 A.2d 818 (Cmwlth. Ct. Pa. 1997). In that case, a trench containing repaired water lines sunk about 12-18 inches. The trench was struck by a car, seriously injuring its driver. The city argued, as does City B, that the trench was not a part of its “utility facilities.” The state’s local government tort liability law provided that: “(5) Utility service facilities—A dangerous condition of the facilities of steam, sewer, water or gas or electric system owned by the local agency and located within rights-of-way...” [For which local government in question was liable if the condition was reasonably foreseeable and the local government had notice of it.] The plaintiffs argued “that the phrase of the facilities” refers not only to the water pipes but encompasses the repairs as well, including the trench.”

The court held for the plaintiffs, reasoning that:

In *County of Allegheny v. Dominijanni*, 109 Pa. Cmwlth, 484, 531 A.2d 562 (1987), the Court held that the “right-of-way,” as used in this exception included the strip of land on which the local agency constructed its utility service facilities. In *Dominijanni* the underlying suit was based on the agency’s negligence, *inter alia*, in failing to use the proper backfill when installing a sewer pipe which resulted in a landslide. Consequently, this Court concludes that the language “of the facilities...and located within the rights of way” in the utilities service facilities exception applies not only to the water pipes but also to the strip of land in which the [city utility] Authority disturbed to repair its water line. [At 820]

Miller was a tort liability case, but returning briefly to the contract between the Cities of A and B, its conclusions make eminent sense in the context of the language in that contract. The phrases “complete and total sanitary sewer collection system”, and “total, full and complete and exclusive operation of the sanitary collection system,” and “the making of any repairs thereto,”

[and] “the maintenance thereto” strongly imply more than a restriction of that contract to only the sewer pipes. But even that reading of the contract would still leave City B’s latent defect defense intact.

Miller also makes sense in the governmental tort liability context and does not appear to contradict the TGTLA. (Incidentally, a “second” Miller after remand, 712 A.2d 800 (Cmwlth. Ct. Pa. 1998), held that the plaintiffs were not entitled to compensation under Pennsylvania’s tort liability act because the city had no notice of the trench defect).

Hawks v. City of Westmoreland, 960 S.W.2d 10 (Tenn. 1997), contains an excellent discussion of when a defect is (and is not) a latent defect under the TGTLA. In that case underground fire hydrants that could not be opened by the fire department were held not be a latent defect. The court reasoned that:

Moreover, “latent defect” has been defined as “[a] hidden or concealed defect. One which could not be discovered by reasonable and customary inspection.” Blacks Law Dictionary, 794 (5th ed 1979). The Utah Supreme Court, in construing a statute which, like our own, provided that governmental “immunity is not waived for latent defective conditions,” also held that a latent defect is “[a] defect which reasonably careful inspection will not reveal.” *Vincent v. Salt Lake County*, 583 P.2d 105 (Utah 1978). The closed valves and inoperable fire hydrants in this case could have been discovered by reasonable and customary inspection. Accordingly, as a matter of law, they were not latent defective conditions for which the City retained immunity. [At 16-17]

Here let me make two point about the franchise City A granted to City B that are not necessarily related to the sewer line at issue:

First, City A retains the police power over its streets even in the face of the franchise it has granted in favor of City B. That was made clear in *City of Paris v. Paris-Henry County Public Utility District*, 340 S.W.2d 885 (Tenn 1960). In that case the city adopted an ordinance requiring the utility district to obtain a permit (except in an emergency) to excavate the streets, and required utility district to pay a permit fee. The ordinance was enacted because, “Defendant, after excavating and laying its pipes in the street. It would fail to repair or restore the streets, and would leave in them ditches or trenches likely to endanger public travel...” [At 392] The utility district challenged the ordinance, pointing to an earlier ordinance in which the city had given the utility district a franchise to operate in the city. The court upheld the latter ordinance, distinguishing between the two ordinances. The earlier ordinance, said the court reflected the granting of a franchise to the utility district, which was a contract; the later ordinance was a police power ordinance regulating the city’s streets. The city could not bargain away its police powers, declared the court. The city retains the authority to regulate street cuts and excavations in its

streets.

Second, under Paragraph 5(B) of the contract the franchise granted to City B by City A, is in perpetuity. Under § 6-2-201(12) of the General Law Mayor-Aldermanic Charter, the city has the authority to grant exclusive franchises, but only for period up to 25 years.

Please let me know if you have questions about this or any other issue.

Sincerely,

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