

CLIENT MEMORANDUM

The Clients assert four basic claims arising out of the City of Anderson's sewer backing up inot their basement. Those claims consist of negligence, nuisance, trespass, and taking of property without just compensation. The Clients also assert that the City of Anderson negliently inflicted emotional distress. The City of Anderson denies these claims. Counsel for the Clients outline the bases for their clients' claims below.

NEGLIGENCE

Negligence requires duty, breach of duty, and damages. Regarding duty, *Benton, V. City of Oakland City* states that a governmental unit possesses to use ordinary and reasonable care under the circumstance. See 721 N.E.2d 224, 228 (1999). As a matter of law, the City of Anderson has a duty of reasonable care in maintaining the sewage system to all sewage drain users and no special or private duty to the plaintiffs as individuals. See *Rodman v. City of Wabash*, Ind.App., 497 N.E.2d 234, 240 (1986); *Henshilwood v. Hendricks County*, Ind.App., 653 N.E.2d 1062, 1068 (1995). *Benton* did away with the special or private duty test. 721 N.E.2d at 231. *Henshilwood* held that a failure to maintain or repair an existing sewer system was an affirmative act of negligence which removed the matter from a governmental unit's discretionary duties. Therefore, the City of Anderson possessed a duty to the Clients as a matter of law to take reasonable care in maintaining the sewage system. Such a duty negates the City of Anderson's assertion of immunity under the Indiana Torts Claims Act that maintaining the sewer system constitutes a discretionary function.

The City of Anderson also asserted the affirmative defense of contributory negligence. As shown by the videotape of the pipes, the Clients did nothing to contribute to their problem. The videotape shows that the cause of the overflows emanated from the City of Anderson's sewer system. Several cases speak of the plaintiffs showing a particularized injury. See *Gates v. City of Chandler*, Ind.App., 720 N.E.2d 1192, 1197 (1999); *Henshilwood* at 1068; and *Rodman* at 240. Unlike *Henshilwood* and even more unlike *Rodman*, of their neighbors only the Clients suffered from raw sewage in their basement.

As for damages, the Clients lost personal property and damage to their real estate from the sewage overflows. The City of Anderson asserts as an affirmative defense that the Clients did not mitigate their damages. That the Clients installed a shut off valve for preventing further occurrences of raw sewage flooding into their basement, should suffice for mitigation of damages. Unlike the plaintiffs in *Rodman*, the City had not advised a shut off valve prior to the flooding of sewage into the Clients' basement. Indtaed, the Clients notified the City of the flooding, the City examined the area and only after subsequent flooding did the City advise the use of a shut off valve.

Therefore, the Clients have stated a cause of action for negligence. The City of Anderson had a duty to the Clients, that duty was breached and caused the Clients the damages complained of in their Complaint.

NUISANCE

Where a governmental unit spews sewage upon the land of another the courts have found an actionable nuisance. See *City of Frankfort V. Slipper*, 88 Ind. App. 356, 162 N.E. 241 (1928); *Zabst V. City of Angola*, 99 Ind. App. 111, 190 N.E. 891(1934). A municipal corporation is liable in a civil action for erecting and maintaining a nuisance the same as a natural person.. Raw sewage deposited in a citizen's basement does not differ from raw sewage washing up on one's pasture. *Henshilwood* restates this issue in terms of a ditch maintained by the County. Here the City maintained a sewer that backed up into the Clients' basement. The nuisance was temporary but nonetheless the City of Anderson created a nuisance. The videotape shows the cause for the Clients being flooded with raw sewage. IC 32-30-6-6 describes a nuisance as whatever is injurious to health or offensive to the senses so as essentially to interfere with the comfortable enjoyment of life or property. Raw sewage gushing into one's basement can only be described as injurious to health or offensive to the senses. The Clients abated the nuisance so that the claim rests only there being a temporary nuisance. However, the damages caused to both the real and personal property is permanent. The Clients establish that they do have a cause of action and that the City's affirmative defenses of failure to state a cause of action, contributory negligence, and failure to mitigate damages fail.

TRESPASS

Of course, trespass consists of the unlawful entry upon the land of another. *Cullison v. Medley*, Ind., 570 N.E.2d 27 (1991); *Talbott v. English*, 156 Ind. 299, 307, 59 N.E. 857, 860 (1901). As one can commit interference with a person's possessory interest by terminating electricity to the property or commit trespass by spilling oil over one's real estate, the City's sewage backing up into the Clients' basement can support a claim of trespass. See *Nate v. Galloway*, 408 N.E.2d 1317 (Ind. Ct. App. 1980); *Indiana Pipe Line Co. v. Christensen*, 188 Ind. 400, 123 N.E. 789 (1919); and *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 17 N.E. 171 (1888). As the City left undenied that it controlled the sewage that end up in the Clients' basement, the only remaining question is damages. Case law limits damages to the actual harm caused before suit was filed by the Clients. As with *Indiana Pipe Line Co. v. Christensen* the Clients suffered a completed tortuous act, resulting in permanent injury to their land and personal property.

TAKING OF PROPERTY WITHOUT JUST COMPENSATION

The Clients claim that the City's used their basement as a temporary holding facility for Anderson's sewage without compensating them as required by both the state and federal constitutions. The *Rodman* case raised a similar issue unsuccessfully. Unlike Rodman, the Clients had no actual knowledge that Anderson's sewer backed up into their basement nor were the Clients informed prior to the flooding that an antibackflow valve would prevent their basement from becoming a storage facility for the City's raw sewage.

As the City of Anderson did not take over the Clients' basement via eminent domain proceedings, Clients's takings claim is for inverse condemnation. There are two stages in an inverse condemnation action.. The first stage determines the issue of whether a compensable taking has occurred. At this stage the landowner must show that he has an interest in land which has been taken for a public use without having been appropriated pursuant to eminent domain laws. If the trial court, acting as finder of fact in the first stage, determines that a taking has occurred, the matter proceeds to the second stage, at which the court appoints appraisers and damages are assessed. *Bussing v. Ind. DOT*, 779 N.E.2d 98 (2002); *Jenkins v. Board of County Comm'rs of Madison County*, 698 N.E.2d 1268, 1270-71 (Ind. Ct. App. 1998), trans. denied. At this, the first stage only concerns us. The Clients can show their interest in the real estate which constitutes their home. For a taking there must be either a physical taking or the governmental unit must commandeer some substantial right attached to the use of the property. See *State v. Jordan*, 247 Ind. 361, 368, 215 N.E.2d 32,35 (1966). The raw sewage flooding into the Clients' basement was a physical invasion of the Clients'

property by the City of Anderson. The aftereffects of the sewage include diminution of the real property's value and destruction of personal property. Unlike *Rodman*, evidence will show that the flooding did not occur over a long period of time but that the sewage remained for several days. Also unlike *Alonso v. City of Hammond*, 648 N.E.2d 1221, 1224 (Ind. App. 1995), the Clients suffered more than one occurrence of raw sewage in their basement. Sewage belongs to the public sphere and using the Clients' basement for storage of the City's sewage was a public use. Only when the Clients installed a valve did the problem stop. So the Clients prove the elements necessary for the first stage of an inverse condemnation claim. The first stage for an inverse condemnation process.

It needs noting that the sewage did destroy personal property belonging to the Clients. Nothing in the texts of Article I, §1 or USC Amendment 5 limits the taking to real property.