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COMMENT

CRESTWOOD VINEYARD CHURCH, INC. V. CITY OF OKLAHOMA CITY: THE MURKY WATERS OF CONSTRUCTIVE NOTICE AND MUNICIPAL LIABILITY IN SEWAGE BACKUP NEGLIGENCE CASES

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I. INTRODUCTION

The specter of sewage sloshing up from the pipes and onto the surfaces of a previously habitable space may bring to mind images of plumbing bills and trips to the hardware store more than litigation, but in Oklahoma (and many other states), damage to private property resulting from a clog in a municipal sewer system may create a legal claim against the municipality.[1] A tort claim based on a theory of negligence concerning a

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city's operation of its sewer lines has the potential to slip between rules that often shield governments from liability, allowing courts to award damages to private property owners.[2] As with any meeting point of municipal operations and private property, these cases demand a balance between the rights of private property owners to be justly compensated for harm and the public's interest in ensuring its local government is not saddled with excessive litigation and legal expenses.[3] Likely for that reason, the rule on sewage backup negligence cases includes a requirement of notice to the city about the clog or defect at the root of the backup.[4] Notice can be actual or constructive; however, establishing a crystal-clear definition of constructive notice is challenging.[5] In *Crestwood Vineyard Church, Inc. v. City of Oklahoma City*[6], a division of the Oklahoma Court of Civil Appeals rejected one clearly erroneous definition of notice, suggesting simultaneously a significantly broader definition in its place.[7]

This Comment begins with a brief overview of the legal mechanisms that allow owners of property damaged by sewage overflows from a municipally owned and operated sewer line, to hold the municipality liable for negligence. It explores the importance of requiring prior notice to the municipality of a clogged condition in its sewer lines, taking a broad look at what is considered potentially sufficient constructive notice, and considers a parallel between the breadth of sufficient notice and the division between proprietary and governmental functions. Then this Comment examines the facts and decision of the court in *Crestwood*, paying particular attention to the court's discussion of constructive notice potentially being proven purely through a municipality's own maintenance of a sewer line. Finally, this Comment analyzes the court's test for sufficient notice in light of the fact patterns in cases it cites and considers how to balance the rights of private property owners against an

2. Spencer v. City of Bristow, 2007 OK CIV APP 67, ¶¶ 11-12, 165 P.3d 361, 363-64 (discussing the sovereign immunity doctrine and exemptions from liability under the Governmental Tort Claims Act and concluding that damage from a sewage backup may create a claim against a municipality).

3. *See* Spaur v. City of Pawhuska, 1935 OK 439, ¶ 8, 43 P.2d 408, 409 (discussing an old but still relevant statement of the goal in protecting governmental functions from liability while still allowing claims by private individuals given certain conditions).

4. *Holdenville,* ¶ 8, 293 P.2d at 366 ("after reasonable notice . . .").

5. *See Spencer*, ¶ 21, 165 P.3d at 366 (determining whether constructive notice of a sewer problem has been demonstrated is a question of fact for the jury).

6. Crestwood Vineyard Church, Inc. v. City of Oklahoma, 2020 OK CIV APP 3, 457 P.3d 278.

7. *Id.* ¶¶ 8-9, 457 P.3d at 281.

interpretation of notice that may place an outsized burden on municipalities.

II. BACKGROUND: NEGLIGENCE ACTIONS AGAINST MUNICIPALITIES FOR SEWER BACKUPS ARE WIDELY PERMITTED, BUT DEFINITIONS OF CONSTRUCTIVE NOTICE ARE SLIPPERY.

In Oklahoma, a municipality may be held liable for injuries to a person's private property caused by backups from sewers that are maintained by that municipality's employees.[8] The Governmental Tort Claims Act (GTCA), subject to its limitations and exceptions, allows for the state or one of its subsidiaries, including a municipality, to be held liable "for loss resulting from its torts or the torts of its employees acting within the scope of their employment . . . only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state."[9] Sewer system upkeep is not an exception under the GTCA, which would provide a municipality with immunity.[10] Therefore, a municipality may be held liable.[11]

Even before the GTCA became law, Oklahoma allowed for governmental entities to be held liable for negligent maintenance of their sewers because sewer maintenance was deemed a proprietary, rather than governmental, act.[12] The division between governmental and proprietary functions is often hard to discern.[13] If a court determines an action done by a state or municipality is governmental in nature, then that state or municipality may be immune from liability for that action.[14] However, when "it places itself in the same general position as a private individual or corporation," it takes on a proprietary or corporate role, and it may be liable for negligence on its part or the part of its agents.[15] Maintenance of sewer lines is a proprietary, or corporate, function.[16] On at least one occasion, the Oklahoma Supreme Court has drawn a fine line between

8. *Spencer,* ¶¶ 11-12, 165 P.3d at 363-64.
9. OKLA. STAT. tit. 51, § 153(A) (2011, Supp. 2015).
10. OKLA. STAT. tit. 51, § 155 (2011, Supp. 2016).
11. *Spencer*, ¶¶ 11-12, 165 P.3d at 363-64.
12. Spaur v. City of Pawhuska, 1935 OK 439, ¶ 10, 43 P.2d 408, 409.
13. *See* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE L. REV. 173, 175 (2016).
14. *See id.* at 177.
15. *Spaur*, ¶ 8, 43 P.2d at 409.
16. *Id.* ¶ 10, 43 P.2d at 409.

maintaining and *cleaning* a sewer; finding that cleaning, as a public-health measure, was governmental.[17] But the court has since made it apparent that keeping sewers clear of backup-causing blockages falls into the proprietary maintenance category and that cities may be held liable for related negligence.[18]

As with any tort, a person filing a claim against a town or city over damage from a sewage backup must prove that the city breached a duty of care to that person and that the damages were a direct and proximate result of that breach.[19] The Oklahoma Supreme Court has recognized a "general rule [that] . . . where a municipal corporation assumes the control and management of its sewer system . . . it is bound to use reasonable diligence and care to see that such sewer is not clogged with refuse and is liable for negligence in the performance of such duty to a property owner injured thereby after reasonable notice of the clogged condition of its sewer."[20] In other words, a municipality that operates a sewer system with its own employees has a duty to keep its sewer lines clear of obstructions or defects that could cause a backup, and it may be held liable for damages caused by a backup only if it had reasonable notice of the obstruction.[21]

Much like drawing a line between proprietary and governmental functions, concretely defining what constitutes "reasonable notice" is challenging because it is stubbornly fact-dependent.[22] The spectrum of what constitutes sufficient notice spans from direct, specific warnings received by a municipality before any harm occurs through a vast array of different kinds of constructive notice measured by an unpredictable standard that weighs different kinds of facts in different situations with an eye towards foreseeability of the sewage backup.[23] Far from actual notice of a specific problem, courts in several states have found sufficient notice where the municipality simply had no regular maintenance or inspection program for its sewer system.[24] Others have held cities liable for damage from sewer backups where specific lines were shown to have been

17. *Id.* ¶ 14-15, 43 P.2d at 410.

18. City of Holdenville v. Moore, 1956 OK 34, ¶ 8, 293 P.2d 363, 366.

19. 18A EUGENE MCQUILLIN, *The Law of Municipal Corporations* § 53:129 (3d ed. 2005).

20. *Holdenville*, ¶ 8, 293 P.2d at 366.

21. *Id.*

22. Michael A. Rosenhouse, Annotation, *Municipal Liability for Damage Resulting from Obstruction or Clogging of Drain or Sewer*, 54 A.L.R. 6th 201, § 2 (2010).

23. *Id.*

24. *Id.*

completely unexamined and untouched by the city for years.[25] A few states have even effectively removed the notice requirement, holding municipalities liable under a theory of *res ipsa loquitur*.[26] Across the entire spectrum, courts in some states have found sufficient evidence of notice where others in other states have not, and apart from the broad assertion that most states require some form of notice, the standards between states lack unity.[27]

In Oklahoma, actual notice may certainly be obtained through discovery by city workers or a third party who reports a clog in a sewer line before it overflows onto anyone's private property.[28] Similarly, Oklahoma courts have found sufficient notice where an overflow occurs on a particular piece of private property prior to a second overflow when the municipality was told about the first backup before the subsequent one.[29] More constructive notice has been suggested by the Oklahoma Supreme Court where maintenance crews discovered flaws or obstructions in sewer lines close in proximity to a line that later overflowed causing damage to property.[30]

The breadth of factual scenarios in which courts have found sufficient notice for a negligence claim against a city demonstrates the tension between holding governments accountable for damage to private property and shielding governments from being held to unrealistic standards of care.[31] Determining whether a government had sufficient notice of a flaw or blockage in its sewers can make the difference in a case against the government.[32] A finding of insufficient notice can get a case thrown out on its face.[33] But, if a case makes it to a jury and the jury finds that the notice requirement was met, in addition to all other required elements, then the municipality could be on the hook for a substantial sum.[34] Because the

25. *Id.*
26. *Id.*
27. *Id.*
28. *See* City of Holdenville v. Moore, 1956 OK 34, ¶¶ 6-7, 293 P.2d 363, 366-67.
29. *See id.*
30. *See* Spencer v. City of Bristow, 2007 OK CIV APP 67, ¶¶ 19-21, 165 P.3d 361, 365-66 (treating testimony about maintenance on lines near the plaintiff's property as valid in assessing the notice requirement).
31. *See* Spaur v. City of Pawhuska, 1935 OK 439, ¶ 8, 43 P.2d 408, 409.
32. *See* Crestwood Vineyard Church, Inc. v. City of Okla. City, 2020 OK CIV APP 3, ¶ 4, 457 P.3d 278, 280 (showing a municipality arguing lack of notice should result in summary judgment for the municipality).
33. *See id.*
34. *See* City of Holdenville v. Moore, 1956 OK 34, ¶ 14, 293 P.2d 363, 367 (upholding

definition of notice is so malleable, before finding whether sufficient notice is present, courts and juries in these cases risk a reversal unless they first answer a deceptively simple question: What is notice?[35]

III. THE CASE: CRESTWOOD VINEYARD CHURCH, INC. V. CITY OF OKLAHOMA CITY

A. Facts

On January 22, 2017, raw sewage flooded the basement of Crestwood Vineyard Church in Oklahoma City.[36] The sewage originated from Oklahoma City's municipal sewer system.[37] Following the backup, workers for the city responded to clean up the wastewater inside the church using wet-vacs.[38] But the church alleged it sustained damage that exceeded what the city workers addressed.[39] The sewage consisted of "Category 3 water," which caused toxic contamination to the church.[40] Because of the contamination, the church asserted that "all porous surfaces such as sheet rock, wood casing trims, lower cabinets, shelves[,] and glue-down carpets" had to be removed and replaced.[41]

Seeking damages for those repairs to the building, the church brought a tort claim against the city under a theory of negligence, asserting that the city breached a duty "to exercise reasonably prudent and ordinary care in maintaining its sewer lines" and that the breach was a direct and proximate cause of the contamination and damage to the church building.[42]

B. Procedural History

Crestwood Vineyard Church filed a claim with Oklahoma City seeking damages, but the city denied that claim on September 6, 2017.[43] Subsequently, Crestwood filed its initial petition in this action in the

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a jury verdict against the city that included a finding on the notice requirement).

35. *See Crestwood*, ¶¶ 9-10, 457 P.3d at 280.
36. *Crestwood,* ¶ 4, 457 P.3d at 280.
37. *Id.*
38. *Id.*
39. *Id.* ¶ 2, 457 P.3d at 279.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* 457 P.3d at 279 n.1.

Oklahoma County District Court that same month.[44] More than a year passed before Oklahoma City filed a motion for summary judgment in December 2018.[45] The trial court granted the city's motion in February 2019, and Crestwood appealed.[46]

In seeking its summary judgment, the city asserted that it did have a duty "to use reasonable diligence and care" to prevent its sewer lines from becoming clogged.[47] This is similar to the duty assigned to the city by Crestwood: to exercise "reasonably prudent and ordinary care" in its sewer-line maintenance.[48] However, the city argued that it could only be found liable for breaching that duty if "after reasonable notice of a clogged sewer condition" it failed to properly address the problem.[49] The city then argued that it had no reasonable notice of the clog at the root of the church's woes because the city had received no notifications from neighboring citizens of any problems in the sewer lines during the five years prior to the backup in the church.[50] The city argued implicitly that the reasonable notice requirement may only be satisfied if a city receives actual notice of problems with its sewers from residents in the specific areas.[51] This is the argument the trial court accepted when it granted the city's motion for summary judgment.[52]

C. Opinion

In the opinion, a division of the Oklahoma Court of Civil Appeals rejected the city's interpretation of reasonable notice as requiring complaints from residents, finding that definition too narrow because it, in part, excludes the possibility of constructive notice.[53] The city based its argument on a rule from *Oklahoma City v. Romano* that states a municipality has a duty to use reasonable diligence to see that its sewers do not become clogged and that the municipality is liable for damage caused to a third party's property by a sewage backup if the city breached

44. *Id.* ¶ 2, 457 P.3d at 279.
45. *Id.* ¶ 4, 457 P.3d at 280.
46. *Id.* ¶ 5, 457 P.3d at 280.
47. *Id.* ¶ 4, 457 P.3d at 280.
48. *Id.* ¶ 2, 457 P.3d at 279.
49. *Id.* ¶ 4, 457 P.3d at 280.
50. *Id.*
51. *Id.*
52. *Id.* ¶ 5, 457 P.3d at 280.
53. *Id.* ¶ 10, 457 P.3d at 281-2.

its duty after "reasonable notice of the clogged condition."[54] That rule, as included in the syllabus to *Romano*, did not include an explicit definition of what constitutes reasonable notice.[55] The court criticized the city for failing to include language from the body of *Romano* that states the municipality in that case "knew, or should have known" of the clog and was negligent by failing to then clear it.[56] From this, the court held that constructive notice may be sufficient to permit a finding against a city in a sewage backup tort case.[57] It emphasized that constructive notice is sufficient by quoting multiple precedential cases that include the phrase "should have known" in their rules.[58]

The court went further, however, specifying that constructive notice may come from a city's regular maintenance, or lack thereof, of its sewer lines in the area of an overflow.[59] The court again relied on language from *Romano* that stated the municipality "knew, or should have known, of the clogged condition of the sewer, but neglected to properly clean and keep said line in usable condition."[60] The court stated that *Romano* "teaches that a municipality may obtain notice of a clogged condition of a municipal utility line as a result of the municipality's own regular maintenance in 'properly clean[ing] and keep[ing] said line in usable condition.'"[61] Essentially, if a city has a duty to regularly maintain its sewer lines, then it may be possible to argue that a city had constructive notice of a clog even if it did not discover it until a backup occurred if a court finds that it failed to reasonably maintain that stretch of line.[62]

Under this statement of the rule, the court shifts attention to resulting questions that were missing from the lower court's summary judgment holding.[63] The court cited *Spencer v. City of Bristow*, in which a division of the same court rejected a motion for summary judgment on a similar set of facts because there was controversy over whether the obstruction in the

54. Okla. City v. Romano, 1967 OK 191, ¶ 9, 433 P.2d 924, 926.
55. *Id.* ¶¶ 9-10, 433 P.2d at 926-27.
56. *Crestwood*, ¶¶ 8-9, 457 P.3d at 281 (quoting *Romano*, ¶ 11, 433 P.2d at 927).
57. *Id.* ¶ 9, 457 P.3d at 281.
58. *Id.*
59. *Id.*
60. *Id.* ¶ 8, 457 P.3d at 281 (quoting *Romano*, ¶ 11, 433 P.2d at 927).
61. *Id.* ¶ 9, 457 P.3d at 281 (quoting *Romano*, ¶ 11, 433 P.2d at 927).
62. *See id.* ¶ 11, 457 P.3d at 282 ("[W]hether the City . . . should have known of a problematic condition in the pertinent city utility lines as a result of its own maintenance and inspection of those lines, or whether a problematic condition existed for a sufficient period of time for the City to be advised of its existence by the exercise of ordinary care.").
63. *Id.* ¶ 9, 457 P.3d at 281.

sewer lines "had existed for a sufficient period of time for the municipal corporation to be advised of its existence by the exercise of ordinary care."[64] This introduces the possibility that a certain lapse in time between inspections or repairs to specific sewer lines could create constructive notice.[65] Alternatively, a city could obtain actual notice of a blockage from a regular maintenance program by discovering it before a backup.[66] Both avenues are questions of fact that must be answered before granting a summary judgment.[67]

The *Crestwood* court found that the summary judgment for the city should not have been granted because neither side presented enough evidence to prove there were no disputed facts concerning whether the city had actual or constructive knowledge of the defect in the sewer line.[68] In order for a summary judgment to be granted, it must be clear that "there are no disputed material fact issues."[69] In determining if there is disagreement over material facts or if "reasonable minds could reach different conclusions from the undisputed material facts," the court must weigh evidence in a light most favorable to the non-moving party.[70] Here, the court found that the city never presented evidence on whether there had ever been any specific maintenance on the sewer line that backed up and, if there was, what that amounted to.[71] Considering the lack of evidence in the light most favorable to the church, the court held that factual questions remained unanswered concerning sufficient actual or constructive notice to the city, and therefore summary judgment should not have been granted by the lower court.[72]

64. *Id.* (quoting Spencer v. City of Bristow, 2007 OK CIV APP, ¶ 21, 165 P.3d 361, 366).
65. *Id.* ¶ 9, 457 P.3d at 281.
66. *Id.*
67. *Id.*
68. *Id.* ¶ 14-15, 457 P.3d at 283-84.
69. *Id.* ¶ 14, 457 P.3d at 283 (quoting Fargo v. Hays-Kuehn, 2015 OK 56, ¶ 12, 352 P.3d 1223, 1227).
70. *Id.*
71. *Id.* ¶ 12, 457 P.3d at 282.
72. *Id.* ¶ 14-15, 457 P.3d at 283-84.

IV. ANALYSIS: ALTHOUGH THE COURT CORRECTLY OVERTURNED THE SUMMARY JUDGMENT, ITS DEFINITION OF CONSTRUCTIVE NOTICE COULD HAVE UNINTENDED CONSEQUENCES.

The court correctly overturned the summary judgment in *Crestwood* because the city's definition of notice, which the lower court relied on, was excessively narrow, and the evidence was too sparse to prove there was no disagreement over material facts.[73] However, by stretching the meaning of language from *Romano* to suggest a form of notice based on a city's own maintenance program, the court aggravates the already cloudy waters of constructive notice.[74] This definition of notice expands beyond evidence of notice in the cases cited prominently in *Crestwood.*[75] If argued broadly and commonly, it risks increasing amounts of litigation against cities and towns and lowering the number of cases resolved before reaching a jury trial. Moving forward, courts should carefully consider the balance between private property rights and the need for functional governance, and courts should be cautious about applying the standard in an excessively broad fashion.

A. Cases Cited in Crestwood Feature More Concrete Evidence of Notice Than May be Required Under the Rule in Crestwood.

One case also decided by a division of the Oklahoma Court of Civil Appeals, cited by the church in *Crestwood*, and quoted in the *Crestwood* opinion, includes multiple pieces of evidence that suggest a more concrete standard of constructive notice than the one outlined by the *Crestwood* court.[76] Although the court in *Spencer v. City of Bristow* identifies questions about whether a municipality was negligent in the maintenance and operation of its sewer lines, its examination of the knowledge requirement goes beyond the mere existence of a regular maintenance program to consider evidence about specific actions taken (or not taken)

73. *Id.*

74. *Id.* ¶ 9, 457 P.3d at 281.

75. *See* City of Holdenville v. Moore, 1956 OK 34, ¶¶ 6-7, 293 P.2d 363, 366 (demonstrating notice can be established through a prior back-up if the plaintiff informed city representatives before the second backup at issue); *See* Spencer v. City of Bristow, 2007 OK CIV APP 67, ¶¶ 20-21, 165 P.3d 361, 366 (holding notice is a question of fact to be decided by the jury due to evidence of an earlier overflow).

76. *Spencer*, ¶¶ 19-20, 165 P.3d at 365-66 (focusing on testimony and records concerning previous, specific work done near plaintiff's property).

concerning lines near and on the plaintiff's property.[77] In that case, a homeowner experienced two separate sewage backups in her house that damaged her floors, carpet, sheetrock, and other items.[78] After the first overflow, and four months before the second overflow, the homeowner alerted the city directly about the incident and the damage when she filed a petition against it alleging negligence.[79] The city admitted that city workers had cleared blockages in sewer lines within a block of the homeowner's property before the first overflow occurred.[80] After that overflow, the workers inspected and replaced a sewer line near the homeowner's residence with full knowledge that a manhole on her property had overflowed, but they testified that they did not have actual knowledge that the house had flooded.[81] The workers did not expand their inspection to include the municipal lines directly connected to the homeowner's house prior to the second incident occurring.[82] The court held that all of that evidence created "controversy . . . as to whether [the] City had knowledge, actual or constructive, of a defect in the sewer lines to [the] residence before both overflows."[83] In part because of that dispute over material fact concerning notice of the defect, the court overturned the lower court's summary judgment that had been in favor of the city.[84] Maintenance and inspection generally are an important part of the facts in *Spencer*, but the court's discussion of whether the notice requirement was met was focused on specific actions taken by the city workers in response to a known incident.[85]

Similarly, an Oklahoma Supreme Court case that provides much of the language for the core rule relied on in *Crestwood* featured a fact pattern that included actual notice based on a prior incident.[86] In *City of Holdenville v. Moore*, a heavy rain caused the municipal sewer to backup into a homeowner's basement.[87] The court specified that the homeowner told two city councilmen and the mayor and also asked for the sewer to be

77. *Id.* ¶¶ 18-20, 165 P.3d at 365-66.
78. *Id.* ¶ 2, 165 P.3d at 363.
79. *Id.*
80. *Id.* ¶¶ 17, 19, 165 P.3d at 365.
81. *Id.* ¶¶ 19-20, 165 P.3d at 365-66.
82. *Id.*
83. *Id.* ¶ 21, 165 P.3d at 366.
84. *Id.* ¶¶ 21-23, 165 P.3d at 366.
85. *Id.* ¶¶ 19-20, 165 P.3d at 365-66.
86. City of Holdenville v. Moore, 1956 OK 34, ¶¶ 6-8, 293 P.2d 363, 365-66.
87. *Id.* ¶ 6, 293 P.2d at 365.

cleaned out.[88] The city did not clean out the sewer by the house, and about 15 days later it overflowed again, this time damaging the floors, carpet, and walls in the basement, leading to the lawsuit.[89] In upholding a jury verdict for the homeowner, the court found, in part, that the city had ample notice of the blocked sewer based on the homeowner's complaints about the first overflow.[90] Clearly, evidence of knowledge of a prior incident is not the only way to prove sufficient notice, but the inclusion of facts in the *Holdenville* and *Spencer* opinions focused on specific actions (or inactions) tied to known problems to make room for a standard of notice that is also closely tied to specific prior incidents.

The case the *Crestwood* court initially quoted from to build its notice rule is not particularly helpful as a guide to defining constructive notice because it is light on details related to notice.[91] *Oklahoma City v. Romano* is primarily concerned with the effect of classifying a city function as proprietary or governmental.[92] In that case, the plaintiff's house was flooded with raw sewage that filled his home with two-to-four inches of filthy water.[93] The plaintiff initially filed a petition alleging that the city had been negligent in the cleaning of the sewer line, later amending the petition to state the city "neglected to maintain and/or to properly clean" the sewer.[94] That added language is important because under an older, precedential case, cleaning sewers was designated as a governmental function and subject to immunity from tort liability, but maintenance of sewers was labeled proprietary, allowing the case to move forward.[95] In determining whether it was proper to allow the amended language, the court held that because the plaintiffs pleaded "that the city knew, or should have known, of the clogged condition of the sewer, but neglected to properly clean and keep said line in usable condition," the complaint fell within the principles of law applied in *Holdenville*.[96]

The court in *Crestwood* interpreted the *Romano* holding as demonstrating that a city may obtain constructive notice of a clog in a sewer line through its own regular maintenance of that line, but in context

88. *Id.*
89. *Id.* ¶¶ 1, 6, 293 P.2d at 364-65.
90. *Id.* ¶¶ 7, 14-15, 293 P.2d at 366-67.
91. Okla. City v. Romano, 1967 OK 191, ¶ 1, 433 P.2d 924, 925.
92. *Id.* ¶¶ 4-7, 433 P.2d at 925-26.
93. *Id.* ¶ 1, 433 P.2d at 925.
94. *Id.* ¶ 1, 433 P.2d at 925.
95. Spaur v. City of Pawhuska, 1935 OK 439, ¶ 17, 43 P.2d 408, 410.
96. *Romano*, ¶ 11, 433 P.2d at 927.

the language in *Romano* does not necessarily seem concerned with notice.[97] After all, the *Romano* court was primarily assessing a conflict between proprietary and governmental services.[98] The facts included in the *Romano* opinion are essentially silent on the issue of notice, perhaps because, at that point, the court was simply not weighing the validity of the claim beyond establishing whether it was a proprietary function.[99] The *Crestwood* decision is correct to interpret *Romano* as supporting the possibility of constructive notice by endorsing language allowing for liability where a city should have known of a problem.[100] But the language concerning cleaning and maintaining lines appears to be more of an action, or lack thereof, that the plaintiff alleged was a breach of the city's duty.[101] Evidence of actions taken or not taken by municipal sewer line maintenance crews is closely related to proving specific incidents of a breach of a duty, but that same type of evidence could be used to expand far beyond a similar closely related and specific definition of constructive notice.

B. An Excessively Broad Definition of Constructive Notice Could Lead to Excessive Litigation and More Jury Trials.

As a closely related issue, debates over the categorization of municipal actions parallel concerns and considerations that are raised in the process of defining the boundaries of constructive notice. Much like the unpredictable assignment of proprietary and governmental labels to various municipal and state actions, narrowing and broadening what passes for sufficient notice of a problem in negligent sewage overflow cases has a real impact on both private property owners and the municipalities themselves.[102] Calls to determine whether an action is proprietary or governmental arise most often in tort cases, usually as a court weighs whether to subject a government to liability.[103] Courts have drawn lines between the two categories that are often confusing and in

97. Crestwood Vineyard Church, Inc. v. City of Okla. City, 2020 OK CIV APP 3, ¶ 9, 457 P.3d 278, 281.

98. *Romano*, ¶¶ 4-7, 433 P.2d at 925-26.

99. *Id.* ¶¶ 1-4, 433 P.2d at 925.

100. *Crestwood,* ¶ 9, 457 P.3d at 281.

101. *Romano*, ¶ 11, 433 P.2d at 927.

102. *See* Spitzer, *supra* note 12, at 189-93 (discussing the messy process of assigning proprietary and governmental labels and the effect that has on government tort cases).

103. *Id.* at 189.

conflict with the same lines in other jurisdictions.[104] Much of that has been caused by courts seeking to find a way to compensate people who have suffered serious injuries in spite of the old doctrine of sovereign immunity, which protected states and municipal governments from all liability in any tort action.[105] Similarly, by utilizing a definition that allows for a highly expandable version of constructive notice, the *Crestwood* opinion could be weighted more in favor of a property owner.

The *Crestwood* court arguably demonstrated an interest in lightening the burden on the church by rejecting the extremely narrow definition of notice argued for by the city.[106] That definition would have required the church to establish that the city had received at least some complaints specifically about the sewer lines in the church's immediate area within the five years prior to the backup, which would have been challenging for the church to prove.[107] By rejecting it, the court created room for a plaintiff in the position of Crestwood Vineyard Church to now prove notice in any number of different ways, which is in line with precedent and simply more equitable.[108] However, allowing notice to be established merely by the city's own prior maintenance of the troubled sewer lines, lightens the burden on the plaintiff even more.[109] Depending on how different courts and juries interpret that standard, it has the potential to be satisfied with anything from highly specific evidence of maintenance done at the exact point of a backup to something close to the *res ipsa* doctrine, which the city would have a hard time ever disproving. The court has taken an improper and excessive burden off the plaintiff, but without a clearer picture of where the boundaries of constructive notice lie, it would be easy for that burden to shift excessively onto municipalities.

The fact that the rule includes a requirement of notice supports an interpretation that it is intended to protect municipalities to a certain extent from excessive damages, which parallels the Oklahoma Supreme Court's past endorsement of limiting litigation against municipalities for certain activities.[110] In *Spaur v. City of Pawhuska*, the majority opinion stated that it was important to continue to provide immunity from civil liability to

104. *Id.* at 174.
105. *Id.* at 189.
106. Crestwood Vineyard Church, Inc. v. City of Okla. City, 2020 OK CIV APP 3, ¶ 10, 457 P.3d 278, 281-82.
107. *Id.* ¶ 4, 457 P.3d at 280.
108. *Id.* ¶ 9, 457 P.3d at 281 (specifying constructive notice may be sufficient).
109. *Id.*
110. Spaur v. City of Pawhuska, 1935 OK 439, ¶ 8, 43 P.2d 408, 409.

governments not engaged in a proprietary action because "a government should not be hampered by a vast mass of litigation arising out of the exercise of governmental functions."[111] In that case, the parents of a young boy, who died after being struck by a truck owned by the city, sought damages for his death under a theory that the city employee driving the truck acted negligently.[112] The truck driver had been cleaning debris out of the city sewers, and the city argued it had immunity from the claim because he was carrying out a governmental function.[113] The court, drawing a parallel with street maintenance, which was already clearly labeled as proprietary, found that maintenance of sewers was also proprietary.[114] However, reasoning that cleaning trash out of the sewer was a matter of public health, the court held that by cleaning, rather than maintaining, the sewer, the city employee was in fact performing a governmental activity, and the city therefore could not be held liable.[115] The court defended drawing such a fine line by claiming that Oklahoma's policies allowing cities to be held liable were fairly liberal compared to other states, which highlighted the vast amount of freedom the court had in making such a determination.[116]

In holding cases to the standard of constructive notice defined in *Crestwood,* courts should consider what unintended consequences could flow from its most expansive potential interpretations. For instance, Oklahoma City encompasses more than 600 square miles, which means the city must be tasked with inspecting and maintaining a tremendous amount of sewer pipes.[117] If a jury were to hold that it is reasonable to expect the city to have notice of all defects in its system at any given time, how could Oklahoma City ever counter that? As unlikely as that scenario may be, designing a maintenance program that complies with such a potentially unbounded version of constructive notice could be a monumental task. An excessively broad interpretation of constructive notice could, at the very least, send more claims to trial and increase costs for everyone. It could also open the floodgates of litigation. This could hurt the citizens of Oklahoma by overburdening the city's legal resources

111. *Id.*
112. *Id.* ¶¶ 1-3, 43 P.2d at 408.
113. *Id.* ¶¶ 3-5, 43 P.2d at 408.
114. *Id.* ¶ 10, 43 P.2d at 409.
115. *Id.* ¶ 11, 43 P.2d at 409.
116. *See id.* ¶ 10, 43 P.2d at 409.
117. U.S. Census Bureau, *QuickFacts: Oklahoma City* (Nov. 8, 2020), https://www.census.gov/quickfacts/oklahomacitycityoklahoma.

and straining its finances. It is important to make property owners whole if a city's negligence causes them harm, but it is also reasonable to develop clearer boundaries of what proves a city had prior knowledge in order to protect its citizens from expensive or excessive litigation. The best standard will strike a balance, but before it can get on the scale, the contours of constructive notice must become firmer.

V. CONCLUSION

In *Crestwood*, the city almost certainly invented an excessively narrow version of the notice requirement for sewage backup tort cases when it argued that notice must consist of actual complaints from area property owners to the city about the specific backup-causing blockage, and the court correctly rejected that rule for not including constructive notice.[118] However, constructive notice is slippery, and without clearer boundaries, the definition suggested by the *Crestwood* court could be used to shift too much weight onto municipalities.[119] Much like the unpredictable process of labeling actions done by a state or municipality as proprietary or governmental, deciding how inclusive the definition of constructive notice should be is a relatively unguided venture that can make a dramatic difference in the outcome of a case.[120] While applying the definition of constructive notice found in *Crestwood*, courts should consider what consequences its most expansive interpretations could cause. As is the nature of municipal law, these negligence cases highlight the tension between private property rights and the interests of municipal governments in having some level of protection from excessive litigation and related financial damages.[121] Municipalities must stay healthy enough to manage the interests of all their constituents. On the other hand, property owners deserve to be compensated for damage that could have been prevented and that occurred through no fault of their own. Oklahoma courts, as demonstrated in the cases cited in the *Crestwood* opinion, have considered how to strike a balance many times before. While the court was correct in rejecting a notice requirement that would have been overly burdensome on the property owner, its replacement should be weighed

118. Crestwood Vineyard Church, Inc. v. City of Okla. City, 2020 OK CIV APP 3, ¶¶ 8-10, 457 P.3d 278, 281-82.

119. *Id.* ¶ 9, 457 P.3d at 281.

120. *Id.* ¶¶ 9-15, 457 P.3d at 281-84 (demonstrating how a different interpretation of notice singularly undid a summary judgement ruling).

121. *See* Spaur v. City of Pawhuska, 1935 OK 439, ¶ 8, 43 P.2d 408, 409.

carefully going forward.