STATE OF MICHIGAN

COURT OF APPEALS

NICOLE HOLMES, Plaintiff-Appellee,	UNPUBLISHED March 27, 2008
v	No. 276949 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 06-611258-NO

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant City of Detroit appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

This case arises from injuries allegedly received by plaintiff on March 12, 2006, as a result of becoming trapped in an area backfilled by defendant's water and sewerage department following repair of one of its underground systems outside a residence located at 19019 Curtis in the city of Detroit. Several months after the incident, plaintiff filed a complaint against defendant alleging gross negligence and liability under the sewage disposal system event exception to governmental immunity, MCL 691.1417(2). Defendant moved for summary disposition of the entire cause, arguing that the sewage disposal system event exception was not applicable in this case because there was no evidence that the incident at issue involved a defect in its "sewage disposal system," as defined by MCL 691.1416(j). In support of this argument, defendant submitted copies of several Detroit Water and Sewerage Department (DWSD) work orders concerning repairs performed by the department in the area near plaintiff's home shortly before and after the incident in which plaintiff was allegedly injured. These documents indicate that on February 16, 2006, DWDS instructed one of its crews to locate and repair a "broken main . . . in [the] berm in front of 19019 Curtis." These documents further indicate that a crew dug in the identified area the following day and discovered a "leak on [an] 8" main," reportedly caused by the "blowout" of a service clamp. The leak was repaired that same day through the installation of a new clamp, after which service to the "main" was reconnected and the hole backfilled upon detection of "no leaks." The work orders additionally indicate, however, that just two days after the incident in which plaintiff was purportedly injured, a DWDS crew returned to the site at 19019 to "check [its] repairs" and found the area "saturated." Detecting a

sound emanating from the "main," the crew dug out the wet dirt and found a lose clamp, which was then tightened. After no longer detecting any sound or water, the crew backfilled the hole and cleaned up the area. Relying on these documents, defendant argued that the evidence submitted by the parties showed that plaintiff's claimed injuries were the result of a defect in its clean water delivery system, i.e., a break in the water main outside 19019 Curtis, to which the sewage disposal system event exception does not apply.

Defendant also argued that the statutory exception, which defines "sewage disposal system event" for which a government agency is liable as "the overflow or backup of a sewage disposal system onto real property," MCL 691.1416(k), is limited in its application to those instances where sewage flows onto real property. Here, defendant argued, there was no evidence that "sewage or water, for that matter, trespassed onto any real property or into any residential home." Rather, the evidence showed only that there had been a leak and water percolation in the "berm in front of 19019 Curtis," which is owned by the city itself.

Defendant further argued that, even if the sewage disposal system event exception applies, a person claiming noneconomic damages for personal injury under the exception must, pursuant to MCL 691.1418(2), establish that he or she has suffered a "serious impairment of body function" as defined under § 3135 of the insurance code, MCL 500.3135, i.e., "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Here, defendant argued, plaintiff had shown only subjective complaints of pain in her lower back and legs, which were insufficient to support the "serious impairment" threshold.

Finally, defendant argued that while officers and employees of governmental agencies may be held liable for grossly negligent acts or omissions in the discharge of their public duties, MCL 691.1407(2), the exception does not apply to governmental "agencies" such as itself. Thus, defendant argued, it was also entitled to summary disposition of plaintiff's claim for gross negligence. The trial court, however, denied the motion.

II. Analysis

A. Governmental Immunity

The trial court did not err in denying defendant's motion for summary disposition on the basis of governmental immunity. While we agree that the sewage disposal system event exception to governmental immunity does not apply to publicly operated and maintained potable water delivery systems, we nonetheless conclude that summary disposition was appropriately denied because there remains a question of fact concerning the nature of the system at issue.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). MCR 2.116(C)(7) permits summary disposition of a claim that is barred by immunity granted by law. In reviewing a motion under MCR 2.116(C)(7), a court is required to consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence, *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153

(1998), which must in turn be considered in a light most favorable to the nonmoving party, *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred by governmental immunity is a question of law for the court to decide. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id*.

1. Sewage Disposal System

Subject to various exceptions, a governmental agency is generally immune from tort liability when it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1).[1] The exception provided in MCL 691.1417(2) states, in relevant part, that a governmental agency is immune from such liability "for the overflow or backup of a *sewage disposal system* unless the overflow or backup is a *sewage disposal system event* . . . ." (Emphasis added). In arguing that summary disposition of plaintiff's claim under this exception was improperly denied, defendant first asserts that the exception does not operate to impose liability upon a governmental agency for defects in its potable water delivery systems. Rather, defendant argues, the exception is plainly limited in its application to those systems that collect and dispose of storm water or other unwanted wastes. We agree.

Resolution of this issue requires interpretation of the various provisions of the sewage disposal event exception to governmental immunity, which must be narrowly construed to afford defendant broad protection. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) ("the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed"). The proper interpretation of a statutory provision is a question of law, which this Court reviews de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). When construing the provisions of a statute, the primary task of this Court is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "This task begins by examining the language of the statute itself." *Id*. Where the plain language of the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed and no further judicial construction is required or permitted. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196, 694 N.W.2d 544 (2005). Rather, the statute must be enforced as written. *Id*.

MCL 691.1416(j) defines a "sewage disposal system" to which MCL 691.1417(2) applies as

> all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency.

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[1] Plaintiff does not dispute that a municipality's supplying of its residents with water and sewerage services is a governmental function.

Initially, it must be noted that the statute does not expressly speak to potable water delivery systems, but rather only to those instrumentalities "used or useful in the collection, treatment, and disposal of sewage" and other wastes, including storm water. This limited reference to systems utilized or otherwise helpful in the management and "disposal" of waste and other unwanted materials supports defendant's assertion that the exception was not intended to apply to potable water delivery systems. The Legislature's repeated use of the terms "sewer" and "sewage" further supports this conclusion. Because the statute does not itself define these terms, they must be accorded their plain and ordinary meanings. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 102; 693 NW2d 170 (2005). The word "sewer" is commonly defined as "an artificial conduit, usu. underground, for carrying off waste water and refuse, as in a town or city." *Random House Webster's College Dictionary* (1992), p 1228. Consistent with this definition, "sewage" is itself commonly understood to mean "the waste matter that passes through sewers." *Id*. When viewed in connection with the statute's clear limitation to instrumentalities "used or useful in the collection, treatment, and disposal of sewage" and other wastes, including storm water, the statute, narrowly construed, plainly does not encompass a system designed to deliver potable water, but rather only those systems that collect and dispose of storm water or other unwanted wastes.[2]

Contrary to defendant's assertion, however, this conclusion does not entitle it to summary disposition under the facts of this case. Plaintiff alleged in her complaint that her injuries were proximately caused by a defect in defendant's "sewage disposal system," and this Court must accept this allegation as true unless there is evidence to the contrary. *Sewell*, *supra* at 674. To assert a contradiction entitling it to summary disposition, defendant relies on the DWDS work orders concerning the department's repair activities outside 19019 Curtis shortly before and after the incident during which plaintiff was allegedly injured. Defendant asserts that these documents establish that plaintiff's alleged injuries were the result of a defect in its potable water delivery system, to which we have determined the sewage disposal system event exception to governmental immunity does not apply. However, when viewed in light most favorable to plaintiff, these documents do not support defendant's position such that summary disposition in its favor is appropriate. *Herman*, *supra* at 133-134. As argued by plaintiff, the DWSD work orders submitted by defendant merely reference the repair of a "main" outside 19019 Curtis and are thus insufficient to effectively contradict her allegation that the incident in which she was injured involved a defect in defendant's "sewage disposal system." Defendant was not, therefore, entitled to summary disposition of plaintiff's claim under the sewage disposal system event exception to governmental immunity on this ground.

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[2] We find plaintiff's reliance on *Linton v Arenac Co Rd Comm*, 273 Mich App 107; 729 NW2d 883 (2006), to assert that the sewage disposal system event exception applies to more than just sewers to be misplaced. At issue in *Linton* was whether a roadside drainage ditch was a "storm water drain" within meaning of MCL 691.1416(j). In addressing this question, this Court noted that the term "sewage disposal system," as defined by MCL 691.1416(j), expressly applies to systems designed for storm water drainage and thus refers to more than instrumentalities dealing with actual sewage. *Id*. at 115-116. Unlike the roadside drainage ditch at issue in *Linton*, there is no similarly express reference to potable water delivery systems.

2. Sewage Disposal System Event

Defendant next argues that summary disposition was required because the incident in which plaintiff was purportedly injured was not a "sewage disposal system event" for which liability is imposed by MCL 691.1417(2). We disagree.

MCL 691.1416(k) defines a "sewage disposal system event" for which a governmental entity may be liable as "the overflow or backup of a sewage disposal system onto real property." In asserting that the facts established below do not support that such an event occurred, defendant relies on the undisputed fact that any overflow or backup from its system, regardless whether deemed a water or sewage system, was limited to the berm area between sidewalk and street. Defendant argues that, because this area is not privately owned and there is no evidence that water or sewage trespassed into any residential home, the incident does not meet the statutory definition of a sewage disposal system event set forth in MCL 691.1416(k). Initially, we note that there is no evidence to support that the berm area to which the event was admittedly contained was owned by defendant, rather than a private individual. Regardless, there is nothing in the plain text of MCL 691.1416(k) to support that an overflow or backup resulting from a defect in a sewage disposal system must intrude upon privately owned property or into a residential structure in order to constitute a "sewage disposal system event." Rather, the statute unambiguously requires only that the system overflow or backup "onto real property." This Court "may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002); see also *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998) (courts may "not judicially legislate by adding into a statute provisions that the Legislature did not include"). Thus, we reject defendant's argument that the exception is inapplicable because the facts do not support overflow or backup onto privately owned property or into a residential home.

D. Serious Impairment of Body Function

In her amended complaint, plaintiff asserted that she had suffered pain, anguish, and loss of the enjoyment of her life as a result of the injuries to her back, hip, and legs. However, a plaintiff may recover noneconomic damages under the sewage disposal system event exception to governmental immunity only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 691.1418(2). Thus, having suffered neither death nor permanent serious disfigurement, in order to recover for her alleged pain, suffering, and loss of the enjoyment of her life, plaintiff must establish that she suffered a serious impairment of body function as defined by § 3135 of the insurance code, MCL 500.3135. MCL 691.1416(h). A serious impairment of body function is defined in the code as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Defendant claims that plaintiff's injuries to her hips, back, and legs were not objectively manifested and did not affect her general ability to lead her normal life. Thus, defendant argues, it was entitled to summary disposition pursuant to MCR 2.116(C)(10) because there exists no genuine issue of material fact that plaintiff suffered a serious impairment of body function.

The issue whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the trial court, unless there is a material factual dispute

concerning the nature and extent of the person's injuries. MCL 691.1418(3). Here, defendant does not contest the nature or extent of the injuries alleged by plaintiff. Rather, defendant argues only that these injuries are not objectively manifested and do not affect her general ability to lead her normal life. Thus, the trial court properly reached the question whether plaintiff has suffered a serious impairment of body function. As explained below, however, the court erred in finding that the evidence established such an injury.

1. Objective Manifestation

Generally, to be "objectively manifested" an injury "must be capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing." *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). An impairment can be objectively manifested, for example, by an x-ray, *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984), or by a passive range of motion test, *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986). However, pain, in and of itself, is not an objectively manifested condition and cannot be relied upon to establish the existence of a serious impairment of body function. *Kreiner v Fischer*, 471 Mich 109, 133 n 17; 683 NW2d 611 (2004). Accordingly, mere "[s]ubjective complaints that are not medically documented are insufficient." *Id*. at 132.

Here, the emergency room records of plaintiff's visit to Sinai Grace Hospital on March 12, 2006, indicate that x-rays of her leg and ankle taken at that time were normal. Other records presented by plaintiff indicate that she exhibited limited range of motion during several examinations by her family physician and while participating in physical therapy. However, while limitation of movement observed in passive tests is considered an objective manifestation of an injury, *Shaw*, *supra* at 96, the results of an active range-of-motion test, i.e., a test by which the plaintiff moves her body until she feels pain, are not considered an objective manifestation of an injury because the plaintiff can control the test results, *Salim v Shepler*, 142 Mich App 145, 369 NW2d 282 (1985). In this case, many of the records on which plaintiff relies do not indicate whether the range-of-motion tests performed were "active" or "passive," while others expressly indicate that the test performed was "active." "Since it is plaintiff's responsibility to present [her] claim in the best manner, this Court must assume the limited flexion was not objectively manifested." *Shaw*, *supra* at 97. Applying this assumption, and considering the absence of any other evidence showing that plaintiff suffered an objectively manifested injury, the trial court erred in finding that the plaintiff suffered a serious impairment of body function.

Contrary to defendant's assertion, however, plaintiff's failure in this regard did not entitle it to summary disposition of plaintiff's entire claim under the sewage disposal system event exception. As noted, the requirement of a serious impairment of body function applies only to a plaintiff's claim for noneconomic damages. MCL 691.1418(2). Here, in addition to such damages, plaintiff alleged and provided testimonial support for economic damages in the form of medical expenses associated with the incident in which she was injured. Thus, defendant is

entitled only to partial summary disposition of plaintiff's claim under the sewage disposal system event exception, i.e., that for noneconomic damages.[3]

B. Gross Negligence

Defendant also argues that the trial court erred in failing to grant summary disposition of plaintiff's claim for gross negligence. In arguing to the contrary, plaintiff asserts that the DWSD is not a "political subdivision" and is thus not entitled to the general immunity provided for in MCL 691.1407(1). See MCL 691.1401(d) (defining a "governmental agency" as "the state or a political subdivision"). However, political subdivisions include municipal corporations and their departments, MCL 691.1401(b), and a city is a municipal corporation, MCL 691.1401(a). Consequently, both defendant and its department of water and sewerage are entitled to statutory governmental immunity if engaged in a governmental function unless an exception to such immunity applies. *Stevenson v Detroit*, 264 Mich App 37, 41; 689 NW2d 239 (2004). Gross negligence, however, does not operate as such an exception in this case. As argued by defendant, the gross-negligence exception to governmental immunity applies only to individual public officers and employees, not to governmental agencies. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled in part on another ground *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). Consequently, the trial court erred in failing to grant summary disposition of plaintiff's claim for gross negligence in favor of defendant.

Accordingly, we affirm the trial court's denial of summary disposition on the basis of governmental immunity, but remand this matter for entry of an order granting summary disposition of plaintiff's claim for gross negligence and for noneconomic damages under the sewage disposal system event exception. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[3] Because we have determined that plaintiff did not suffer an objectively manifested injury, we need not address the question whether the injury has affected her general ability to lead her normal life.