

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL AWADA,

Plaintiff-Appellant,

V

CITY OF MELVINDALE,

Defendant-Appellee.

UNPUBLISHED

December 14, 2010

No. 293564

Wayne Circuit Court

LC No. 08-111472-CZ

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

On May 5, 2008, plaintiff filed a complaint alleging property and personal injury damage at his commercial property located in defendant city. Specifically, the building experienced two overflow sewer events in November 2006, and March 2007, allegedly as a result of defendant's defective sewer system. Defendant moved for summary disposition of the complaint pursuant to MCR 2.116(C)(7) and (C)(10), alleging that the claim was barred by governmental immunity, the failure to comply with statutory notice provisions, and the failure to maintain plaintiff's sewage ejection system. Plaintiff opposed the motion for summary disposition, alleging that there were factual issues regarding the proximate cause of the events and that there was sufficient evidence of notice. Defendant filed a supplement to the motion for summary disposition, contending that plaintiff's expert admitted that the sewer ejection system was not maintained and would have prevented any sewer event. The trial court agreed and granted defendant's motion for summary disposition.

The application of governmental immunity presents a question of law that is reviewed de novo, and the decision to grant summary disposition is also reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). If there are no material facts in dispute or if reasonable minds could not differ regarding the legal effect of the facts, the application of governmental immunity is resolved as an issue of law. *Id.* A governmental agency is immune from tort liability when performing a governmental function unless a statutory exception applies. *Jackson Co Drain Commissioner v Village of Stockbridge*, 270 Mich App 273, 282-283; 717 NW2d 391 (2006).

MCL 691.1417, the sewage disposition system event exception to governmental immunity provides in relevant part:

(2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage dispositional system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

A “sewage disposal system event” or “event” means:

the overflow or backup of a sewage disposal system onto real property. An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:

- (i) An obstruction in a service lead that was not caused by a governmental agency.
- (ii) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspouts.
- (iii) An act of war, whether the war is declared or undeclared, or an act of terrorism. [MCL 691.1416(k).]

A person seeking compensation under the sewage disposal system event exception to governmental immunity must demonstrate all of the following:

- (a) The governmental agency was an appropriate governmental agency.
- (b) The sewage disposal system had a defect.
- (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
- (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
- (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(3).]

“Substantial proximate cause” is defined as “a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury.” MCL 691.1416(l). When examining this statute, the courts are guided by the principle that the immunity conferred upon governmental agencies is broad, and the statutory exceptions are to be narrowly construed. *Bosanic v Motz Development, Inc*, 277 Mich App 277, 282; 745 NW2d 513 (2007).

In the present case, defendant's expert opined that plaintiff's property would not have experienced sewer backups if the sewer pumping system located in plaintiff's building had been maintained. Specifically, civil engineer Brian Savolainen opined that the check valve on the sewer pumping system failed. Additionally, inspector Richard Davis evaluated the building's pumping system and found that one pump was missing and the other pump did not have a properly functioning back check valve. Dr. Norbert Becker, plaintiff's expert, acknowledged that plaintiff did not provide evidence that he maintained his check valves at his building. Additionally, although there was no appropriate service interval for a check valve prescribed by an ordinance or code standard, Dr. Becker opined that the maintenance schedule was contingent on the installation itself and the value that the property owner placed upon the risk associated with a sewage backup. However, Dr. Becker ultimately admitted that plaintiff did not maintain his sewage system, and if the system had been maintained, the events "definitely" would not have occurred.

The trial court reviewed the expert testimony and concluded that the evidence established that plaintiff was more than 50% responsible for the events that caused damage to his property. Based on the testimony presented, the trial court did not err in granting defendant's motion for summary disposition. In his deposition, plaintiff testified that the building at issue was most recently utilized as a flea market, but it had been closed for several years. He acknowledged that there were issues with the premises flooding on multiple occasions. Despite this knowledge, plaintiff left second-hand goods on the premises. Plaintiff further testified that he tried to lease the property, but was unable to do so after the prospective tenant saw the condition of the property. In the deposition excerpts provided, there was no indication why the building's sewer ejection system that was designed for a large building was not maintained. The experts testified that the damage to plaintiff's property would not have occurred if the building's sewer ejection system had been operating properly. Thus, assuming as the trial court did that defendant's sewage disposal system was defective, plaintiff failed to demonstrate that the defect was 50% or more of the cause of the events and the property damage or physical injury. MCL 691.1417(3)(e). Additionally, the events in question occurred on dry weather dates. Although plaintiff's expert opined that it was possible to have events on dry weather dates due to insufficient flow in the system, plaintiff's expert failed to offer the cause of the events on these dry weather dates as opposed to other similar dates.

On appeal, plaintiff alleges that he complied with the plumbing code, that he had no duty to have equipment on his premises to cure defendant's defect, that the issue of proximate cause presented a question for the trier of fact, that there is a distinction between proximate cause and factual cause, and that defendant admitted that it would not rely on plaintiff's sump pumps as a defense to the action. These issues are not preserved for appellate review because they were not raised, addressed, and decided by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). The issue preservation requirements are designed to prevent a party from harboring error as an appellate parachute by "sandbagging" the circuit court after an unfavorable ruling is rendered. *Polkton*, 265 Mich App at 95-96. In order to succeed on appeal, the appellant must address the basis of the trial court's decision. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

We may address an unpreserved issue where the lower court record provides the necessary facts. *Hines*, 265 Mich App at 443-444. In the present case, the record does not contain sufficient information regarding the plumbing code. Moreover, the trial court did not impart a duty on plaintiff to place a system on his property to correct any defects in defendant's system. Rather, to obtain compensation under the sewage disposal system event exception, plaintiff had to prove that any alleged defect in defendant's system was "50% or more the cause of the event and the property damage or physical injury." In light of the history of flooding at plaintiff's property and the decision to continue to store goods despite this knowledge, plaintiff failed to meet his burden of proof. Although the issue of causation and proximate cause may be a factual issue, in the present case, the term "substantial proximate cause" is defined within the statute. When the Legislature has defined a given term within a statute that definition is controlling. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Moreover, the issue of the application of governmental immunity presents a question of law particularly where reasonable minds could not differ regarding the legal effect of the facts. *Willett*, 271 Mich App at 45. Finally, on this record, we cannot conclude that defendant breached an admission. All of the experts treated plaintiff's sewage ejection system differently than a mere sump pump. In light of our holding that the trial court did not err in granting summary disposition based on causation, MCL 691.1417(3), we need not address the issue of notice.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood