IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John M. Reidy and Kelly Reidy, Appellants	:	
v.	:	No. 1079 C.D. 2009
	:	Argued: March 15, 2010
Lycoming County Water and Sewer Authority	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: June 7, 2010

John M. Reidy and Kelly Reidy (Reidys) appeal from the March 3, 2009, order of the Court of Common Pleas of Lycoming County (trial court), which granted summary judgment in favor of Lycoming County Water and Sewer Authority (Authority) in the Reidys' action against the Authority for damages arising from a sewage back-up in the Reidys' basement. We affirm on other grounds.

The Reidys, owners of a home located at 705 Broad Street in Montoursville, Lycoming County, are customers of the Authority. On May 30, 2002, and, again, on August 5, 2004, sewage backed up into the Reidys' basement. On December 9, 2005, the Reidys filed suit against the Authority, alleging that they sustained personal property loss, an increase in their homeowners' insurance premium, and a decrease of at least $50,000.00 in the fair market value of their

home due to the Authority's negligence in failing to take action to prevent the second sewage back-up. The Reidys also sought damages against the Authority for intentional infliction of emotional distress, because Kelly Reidy allegedly suffered from depression as a result of the sewage back-up.

Following the exchange of discovery, the Authority filed a motion for summary judgment, alleging that the Reidys could prove neither liability nor a legally cognizable loss in connection with the sewer back-up. Specifically, the Authority alleged: (1) the Reidys could not prove a claim of negligence because they did not present an expert opinion regarding breach of duty or causation;[1] (2) the Authority made the Reidys whole with respect to their personal property loss; and (3) the Reidys' claims for damages in the form of increased insurance premiums and diminution of home value are not recoverable under section 8553(c)(6) and (d) of the Judicial Code (Code), 42 Pa. C.S. §8553(c)(6) and (d).[2]

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[1] The elements of a cause of action in negligence are duty, breach, causation and harm. *See generally Matarazzo v. Millers Mutual Group, Inc.*, 927 A.2d 689 (Pa. Cmwlth. 2007).

[2] Section 8553(c) provides: "**Types of losses recognized**.-Damages shall be recoverable only for: … (6) Property losses." 42 Pa. C.S. §8553(c) (emphasis in original). Furthermore, Section 8553(d) of the Code, 42 Pa. C.S. §8553(d), provides:

> **Insurance benefits**.-If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under section (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

(Emphasis in original.)

The Reidys filed an answer, averring that they provided the Authority with the name of one of the Authority's employees who would testify as to the Authority's negligence. The Reidys further averred that they have not been fully compensated,[3] and their claim for diminution in the value of their home is a property loss recognized in section 8553(c)(6) and is recoverable as within the utility service facilities exception to governmental immunity. Section 8542(b)(5) of the Code, 42 Pa. C.S. §8542(b)(5).

After hearing oral argument in this case, the trial court granted the Authority's motion, concluding that the damages the Reidys seek in the form of increased insurance premiums and a decrease in the fair market value of their home are not "property losses" as contemplated by section 8553(c)(6) of the Code, 42 Pa. C.S. §8553(c)(6); thus, the claims are precluded by governmental immunity. The trial court also concluded that the Reidys' claim for intentional infliction of emotional distress is precluded by governmental immunity.[4] Consequently, the court did not address the question of the sufficiency of the Reidys' evidence of

[3] The Reidys' insurance company paid for all of their personal property loss arising out of the August 2004 incident, with the exception of a $250.00 deductible. The Authority offered this amount to the Reidys; however, the Reidys refused to accept it in the absence of further settlement monies. (Motion for Summary Judgment, ¶¶ 9 and 10, and Answer to Summary Judgment, ¶¶ 9 and 10.)

[4] The trial court reasoned that section 8542(a)(2) of the Code mandates that the alleged injury must be caused by *negligent* acts of the local agency or its employee. Although the Reidys still claim they are entitled to recover damages they suffered due to the Authority's *intentional* infliction of emotional distress arising out of the Authority's failure to correct the backups, the law is clear that their claim is not cognizable under section 8542(a)(2) of the Code. *See Kearney v. City of Philadelphia*, 616 A.2d 72 (Pa. Cmwlth. 1992), *appeal denied*, 534 Pa. 643, 626 A.2d 1160 (1993).

negligence. The Reidys appealed from the trial court's order to the Superior Court, which then transferred the matter to this court for our disposition.

On appeal, the Reidys argue that the trial court erred in granting the Authority's motion for summary judgment because they asserted facts sufficient to establish the Authority's liability under an exception to governmental immunity. We disagree.[5]

We explained in *Metropolitan Edison Company v. Reading Area Water Authority*, 937 A.2d 1173, 1175 (Pa. Cmwlth. 2007):

> Generally, local agencies are immune from tort liability. 42 Pa. C.S. §8541. However, a cause of action may be maintained where: (1) the damages would be otherwise recoverable under common law or statute if the injury was caused by a person not protected by immunity, 42 Pa. C.S. §8542(a)(1); (2) the injury was caused by the negligent act of the local agency or an employee thereof acting within the scope of his official duties; and (3) the negligent act falls within one of the enumerated exceptions to governmental immunity set forth in 42 Pa. C.S. §8542(b). 42 Pa. C.S. §8542(a)(2). Because of the expressed legislative intent to insulate political subdivisions from tort liability, the exceptions to immunity are strictly construed. *Thomas v. City of Philadelphia*, 668 A.2d 292 (Pa. Cmwlth. 1995).

[5] Summary judgment may be granted when, viewing the record in the light most favorable to the non-moving party, and, resolving all doubt as to the existence of a genuine issue of material fact against the movant, the moving party is nonetheless entitled to judgment as a matter of law. *McCarthy v. City of Bethlehem*, 962 A.2d 1276, 1278 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, 983 A.2d 1250 (2009); *Jones v. City of Philadelphia*, 890 A.2d 1188, 1191 n.2 (Pa. Cmwlth.), *appeal denied*, 589 Pa. 741, 909 A.2d 1291 (2006).

The Reidys contend that their claims fall within the utility service facilities exception, which provides as follows:

> **(b) Acts which may impose liability**.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> . . . .
>
> (5) *Utility service facilities.*—A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa. C.S. §8542(b)(5).

Thus, to withstand summary judgment, the Reidys must have alleged facts that, if proven, establish a dangerous condition of the *sewer system* facilities creating a reasonably foreseeable risk of harm after the Authority had sufficient notice to protect against the dangerous condition. *See Le-Nature's, Inc. v. Latrobe Municipal Authority*, 913 A.2d 988, 993 (Pa. Cmwlth. 2006), *appeal denied*, 594 Pa. 717, 937 A.2d 447 (2007). However, in their complaint, the Reidys allege that "[s]ewage backing up into [the Reidys'] home created an extremely hazardous condition[.]" (Complaint, ¶ 16). Arguably, they also allege that the Authority's failure to take action after the initial sewage back-up was a dangerous condition. (Complaint, ¶ 22). They do *not* allege that the sewage system itself was

dangerously defective; rather, they generally allege a "problem" in the sewage system that remained unresolved between the first and second back-ups.

This court has stated that, although the question of what is a dangerous condition is one of fact for the jury, the determination of whether an action is barred by principles of immunity is an issue of law. *Id.* at 994. In this respect, it is important to reiterate that, "at common law, municipalities are liable for injuries resulting from negligent construction of a sewer system or for failure to keep the system in repair, although they may not be held liable for damages resulting from the inadequacy of the sewer system." *McCarthy v. City of Bethlehem*, 962 A.2d 1276, 1279 (Pa. Cmwlth. 2008) (relying on *Yulis v. Ebensburg Borough*, 128 A.2d 118 (Pa. Super. 1956)), *appeal denied*, ___ Pa. ___, 983 A.2d 1250 (2009). Here, the Reidys have not supported their claim against the Authority with any evidence establishing that the sewage system was negligently constructed or in disrepair, nor have they provided any evidence, testimonial or otherwise, establishing that their injuries were caused by anything more than the inadequacy of the sewage system to handle the influx of grease from a neighboring business.[6]

Because the Reidys have pointed to no evidence in the record that would support their assertion that they are entitled to proceed with their claim, the

[6] In fact, the Reidys specifically alleged that, in May 2004, they learned from the Authority's agents that the May 30, 2002, sewage back-up "occurred as a result of a nearby businesses [sic] dumping grease into the sewer." (Complaint, ¶ 5.) In their brief, the Reidys clarify their position that *both* sewage back-ups were caused by "grease from a local neighboring business." (Reidys' brief at 9.)

trial court did not err in granting summary judgment.[7] Accordingly, we affirm the trial court's order on other grounds.[8]

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ROCHELLE S. FRIEDMAN, Senior Judge

Judge Brobson did not participate in the decision in this case.

[7] Given our determination, we do not reach the Reidys' argument that increased insurance premiums and decreased property value constitute property losses within the meaning of section 8553(c)(6) of the Code, although we acknowledge "the long-established rule that, when the damage to property is permanent, the measure of damages is the reduction in fair market value of the land." *Richards v. Sun Pipe Line Company*, 636 A.2d 1162, 1165 (Pa. Super. 1994).

[8] "This court may affirm on other grounds where grounds for affirmance exist." *Tran v. State System of Higher Education*, 986 A.2d 179, 183 n.9 (Pa. Cmwlth. 2009).

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O R D E R

AND NOW, this 7th day of June, 2010, the order of the Court of Common Pleas of Lycoming County, dated March 3, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge