IN THE COURT OF APPEALS OF IOWA

No. 8-443 / 07-1411
Filed October 29, 2008

JIMMY J. SMITH and
KARYL L. SMITH,
Plaintiffs-Appellants,

vs.

CITY OF WAVERLY, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Bremer County, John S. Mackey, Judge.

Plaintiffs appeal from the district court's grant of summary judgment for the defendant finding the City was immune from suit under the Municipal Tort Claims Act. **AFFIRMED.**

John J. Hines of Dutton, Braun, Staack, Hellman, P.L.C., Waterloo, for appellants.

Samuel C. Anderson of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Plaintiffs, Jimmy and Karyl Smith, appeal from the district court's grant of summary judgment to defendant, the City of Waverly (City), finding the City was immune from liability under the Municipal Tort Claims Act. The Smiths contend granting summary judgment was erroneous because there is a genuine issue of material fact as to whether the City knew its property contained improper fill which gave rise to a duty to warn the Smiths. They argue the Municipal Tort Claims Act does not provide immunity to the City if it knew of the land's condition and they have brought forth evidence to support such a finding. In viewing the record and the legitimate inferences drawn therefrom in a light most favorable to the Smiths, we find no error was committed as the City is immune from suit even if all of the Smiths' allegations are true.

I. BACKGROUND.

The following facts appear undisputed from the record. In 1993 the Smiths purchased a building located on the main street of Waverly. The Smiths renovated the building, creating a chiropractic office and several living units. Inspections of the property in 1994 and 1999 revealed no structural defects. Waverly Tire Company owned the property immediately east of the Smiths' property until it transferred the property to the City in October 1999. The Waverly Tire Company building was razed sometime in the 1980s and the City was provided a statement certifying there was no solid waste on the lot prior to the transfer in 1999. East of the Waverly Tire Company were the Langholz and

Roeder properties, which were transferred to the City in late 1999 and early 2000.

The City had an engineering firm develop plans for building demolition and site restoration on the Waverly Tire, Langholz, and Roeder properties. The engineering firm's report, presented to the Waverly mayor and city council in April 2000, indicated there was improper fill on the former Waverly Tire lot and proposed the City remove the debris and replace it with clean backfill material. Cleanup of the buried debris on the Waverly Tire lot added $51,000 to the estimated project cost. City staff further investigated the site, digging three trenches approximately two feet wide, five feet deep, and four-to-five feet long between the Waverly Tire and Langholz lots. The trenches were dug at the front, middle, and back of the property. It is unclear where the City did this inspection. The record only shows that the City dug trenches "between the adjoining properties" but does not specify which properties. At the May 15, 2000 Waverly council meeting, the City's engineer informed the council "that there was no wood debris only cement block buried on said lot." Based on this information, the council purportedly voted to cancel from the project plans removal of debris and replacement of backfill on the Waverly Tire lot. The buildings on the Langholz and Roeder lots were demolished by the City in July and August 2000.

In October 2003, the city council approved an agreement with several veterans groups to build a tribute including several monuments on the former Waverly Tire, Langholz, and Roeder lots. The completed tribute was dedicated on July 4, 2004.

On or around September 15, 2004, the Smiths discovered that the eastern basement wall of their building had caved in. In making repairs to the basement wall, the Smiths discovered debris buried on the Waverly Tire lot, including tires, cement blocks, and propane tanks. The Smiths contacted a civil engineer to inspect the damage who advised that the wall failed due to pressure on the foundation walls caused by vibrations of heavy equipment used during the demolition of the Langholz and Roeder buildings and the construction of the veteran tribute. He opined that the horizontal forces normally caused by use of heavy equipment were increased against the wall due to the improper fill on the Waverly Tire lot.

In the engineer's affidavit he noted in his professional judgment, the City's discovery of any bricks or slivers of wood would indicate the presence of improper fill rather than the lack of improper fill and would signal remedial action needed to be taken. He suggested the City should have exhibited greater concern since heavy construction activity would exert additional lateral pressure on areas of improper fill.

The Smiths allege after the basement wall caved in, the city engineer warned them the ground on the Waverly Tire lot was unstable and advised they should be careful while repairing the basement wall. Smiths contend this and other evidence proves the City had knowledge of the improper fill before it allowed construction activity on the lots east of the Smiths' property and it had a duty to warn them of the instability.

The Smiths filed suit asserting the City was negligent in failing to warn them of the lot's condition before it permitted construction of the veteran tribute park so the Smiths could have taken preventative measures to protect their foundation walls. The City moved for summary judgment contending, among other things, it was immune from liability under Iowa Code section 670.4(6) (2005). The district court granted the City's motion and the Smiths appeal.

II. STANDARD OF REVIEW.

We review a district court ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 447 (Iowa 2008). Summary judgment should be granted

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3); *Perkins ex rel. Perkins v. Dallas Center-Grimes Cmty. Sch. Dist.*, 727 N.W.2d 377, 378 (Iowa 2007). In an appeal of a summary judgment ruling, our duty is to determine, "(1) whether a genuine issue of material fact exists, and (2) if the law was correctly applied." *City of West Branch v. Miller*, 546 N.W.2d 598, 600. If the dispute concerns, not facts, but only legal consequences flowing from agreed facts, summary judgment is appropriate. *Id.* "A fact question is generated if reasonable minds can differ on how the issue should be resolved." *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). But, "[a] fact is material only if its existence would affect the outcome of the suit." *K & W. Elec., Inc. v. State*, 712 N.W.2d 107, 112 (Iowa 2006).

In making this determination, we are mindful that the party seeking summary judgment has the burden to firmly establish undisputed facts which entitle it to a judgment as a matter of law. *K & W Elec.*, 712 N.W.2d at 112. If the moving party does meet this burden, the resisting party must present specific facts demonstrating that there is a genuine issue of material fact. *Id.* We are to look at the record in a light most favorable to the resisting party and afford the resisting party all legitimate inferences that are reasonably gleaned from the record. *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Yet, the resisting party must not rely on the allegations made in its pleading and speculations are not sufficient to create genuine issues of material fact. *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008).

III. NEGLIGENCE & MUNICIPAL TORT CLAIMS ACT.

A municipality is liable to others for its tortious conduct and for torts committed by its officers and employees while acting within the scope of their duties, unless Iowa Code chapter 670 provides otherwise. Iowa Code § 670.2; *Jahnke v. Inc. City of Des Moines*, 191 N.W.2d 780, 783 (Iowa 1971). "The general rule is that of municipal liability—immunity is the exception." *Graber v. City of Ankeny*, 656 N.W.2d 157, 161 (Iowa 2003). Though Iowa Code section 670.2 eliminates immunity as a bar to a plaintiff's cause of action for negligence, to succeed, that action must be based on the breach of an existing duty. *Donahue v. Washington County*, 641 N.W.2d 848, 851 (Iowa Ct. App. 2002). The statute "does not create a prima facie cause of action in negligence, nor does it create the element of duty necessary to establish such a negligence

claim." *Id.* "'[B]ecause the existence of a duty is a question of law for the court, it may appropriately be adjudicated on a motion for summary judgment.'" *Kolbe v. State*, 625 N.W.2d 721, 725 (Iowa 2001) (quoting *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999)). In addition to proving they were owed a duty, the Smiths must prove, (1) the City breached that duty, (2) the breach was a proximate cause of their injury, and (3) damages. *See Donahue*, 641 N.W.2d at 850.

A. Duty.

The Smiths claim the City had a duty to warn them of the unstable ground caused by buried debris on the former Waverly Tire lot and were negligent for failing to do so. Under common law, the duty to warn "is dependent upon superior knowledge and arises when one may reasonably foresee danger of injury or damage to one less knowledgeable unless forewarned of the danger." *Wernimont v. Wernimont*, 686 N.W.2d 186, 192 (Iowa 2004); *Lovick v. Wil-Rich*, 588 N.W.2d 688, 693 (Iowa 1999).

> Negligence is the breach of a known duty of care. In the absence of a duty owed, there can be no legal breach. Put another way, there must be a *duty* to warn before the law will recognize a *failure* to warn.

Ries v. Steffensmeier, 570 N.W.2d 111, 114 (Iowa 1997) (internal citation omitted).

The Smiths contend the City had a duty to warn them because there is "an overriding requirement that one must exercise ordinary care in the use of his property so as not to injure the rights of neighboring landowners." *O'Tool v. Hathaway*, 461 N.W.2d 161, 163 (Iowa 1990). The City argues this rule is

inapplicable to the situation since it is undisputed that it was not the City, but instead, the prior owner, Waverly Tire Company, that created the condition causing damage to the Smiths' property. It contends in this situation the court should apply the standard set forth in the Restatement of Torts and adopted by the Iowa Supreme Court in *Schropp v. Solzman*, 314 N.W.2d 413, 416 (Iowa 1982). It provides,

> One who takes possession of land upon which there is an existing structure or other artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm caused to them by the condition after, but only after,
>
> (a) the possessor knows or should know of the condition, and
> (b) he knows or should know that it exists without the consent of those affected by it, and
> (c) he has failed, after a reasonable opportunity, to make it safe or otherwise to protect such persons against it.

Restatement (Second) of Torts § 366, at 264 (1965); *Schropp*, 314 N.W.2d at 415.

In some respects, both parties' assertions are correct. The City indeed bears the duty to use its land with ordinary care so as not to damage its neighbor's property, as described by the Smiths. This is an overriding duty that arises by the City's basic possession of property and exists regardless of whether there is a dangerous condition on the land created by a prior owner or not and regardless of the City's knowledge of any dangerous conditions. This duty does not charge the City with constructive knowledge of defects caused by prior owners and does not necessarily require warnings to adjoining property owners of known defects. The duty is only relevant in considering whether the City exercised ordinary care in its demolition activities and in allowing

construction on the lots, after it received the information suggesting the Waverly Tire lot contained improper fill. Defendant's position, the Restatement standard, accurately describes the scope of the City's duty owed to the Smiths after it knew or should have known of the improper fill. If the City knew or should have known that the land on the former Waverly Tire lot was unstable, it was required to make the condition safe or protect its neighbors from the dangerous condition. Restatement (Second) of Torts § 366, at 264 (1965); see *Schropp*, 314 N.W.2d at 415-16. Under this standard, if the City knew or should have known of improper fill, giving notice to the Smiths may have been one method to protect the Smith property from any effects of the former tire lot's unstable ground.

Regardless of whether we analyze the circumstances to determine whether the City exercised ordinary care so as to avoid injury to the Smith property, or whether we proceed under the Restatement approach, the City would only have a duty to warn the Smiths if it knew or should have known of the dangerous condition and it could reasonably foresee danger or injury to the Smith property. *See Wernimont*, 686 N.W.2d at 192. If there are genuine issues of material fact concerning the defendant's knowledge of the danger, summary judgment is inappropriate. *See id.* (stating that to avoid summary judgment, plaintiff had to generate a genuine issue of material fact as to the defendant's knowledge of the danger and plaintiff's unawareness of it). However, these fact questions are not reached if, based on the undisputed facts, the City is immune and cannot be held negligent as a matter of law under the Municipal Tort Claims Act. *See Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 884 (Iowa 2002)

(noting that whether an immunity provision of section 670.4 applies to a case is a question of law for the court).

The district court found the City was immune under Iowa Code section 670.4(6). It provides in relevant part,

> The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.
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> . . .
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> 6. Any claim for damages caused by a municipality's failure to discover a latent defect in the course of an inspection.

The Smiths argue this section does not apply because their negligence claim is based on a failure to warn, not a failure to discover, citing *Summy v. City of West Des Moines*, 708 N.W.2d 333, 344 (Iowa 2006) for support. In *Summy*, the plaintiff filed a negligence claim against the City for injuries he sustained after being hit by a golf ball on a City-owned golf course. *Summy*, 708 N.W.2d at 336. The City alleged it was immune from the claim because the golfer who hit the stray ball was playing on a City-issued pass and one provision of section 670.4 grants immunity on claims based on a City's issuance of permits if the damage was caused by a third party while that party was not under the supervision of the City. *Id.* at 344. The court determined immunity did not apply because the plaintiff's claim of negligence was not based on the City's allowing the golfer who hit the ball to play; rather, the claim was "premised on the City's failure to protect the plaintiff from the foreseeable hazard of an errant golf shot." *Id.* It concluded the immunity section did not apply because Summy's claim was not based on the

City's actions in issuing golf passes, but instead focused on whether the City exercised reasonable care, as the possessor of land, to protect players from foreseeable risks. *Id.*; *see also Messerschmidt*, 654 N.W.2d at 884 (finding section providing immunity for city's acts or omissions in issuing permits and conducting investigations and inspections did not apply to plaintiff's claim that city was negligent in removing barricades on road).

We find the circumstances of this case distinguishable from those in *Summy*. Accepting all of the Smiths' allegations as true, the undisputed facts show their claim is related to the City's investigation and inspection of the Waverly Tire lot. Their petition references the demolition and excavation plans developed by an engineering firm for the City. It is undisputed that the engineering firm inspected the property prior to drawing up the proposed plans. The Smiths also do not dispute that the City conducted its own inspection for debris in response to the plans by digging trenches on the vacant lots prior to permitting construction of the veterans tribute park. Indeed, plaintiffs allege the City knew of the improper fill as a result of inspections of its property. There is a close connection in this case between plaintiffs' claim and the City's actions in inspecting the property. We therefore find the claim relates to inspection as referenced in Iowa Code section 670.4(6).

The more difficult issue is whether the unstable land was a latent defect under Iowa Code section 670.4(6). The Smiths contend the immunity provided in section 670.4(6) regarding a city's failure to discover latent defects does not entitle the city to summary judgment under the circumstances. They assert there

was no latent defect because the City knew of the improper fill. The record indicates the City had received notice that the ground was likely to contain improper fill from the demolition plans designed by an engineering firm. The City contends it investigated the potential problem by digging trenches and found only a few bricks and slivers of wood. Even though the City's own trenching apparently revealed minimal debris, the affidavit of a civil engineering expert for the Smiths states that the discovery of any bricks or wood would reaffirm the presence of improper fill rather than negate it.

The undisputed facts show that though the City was alerted to potential debris on the lot in the spring of 2000, the improper fill was a latent condition and not confirmed to be on the premises until after the Smiths' foundation wall caved in. We therefore find, as a matter of law, section 670.4(6) applies to the Smiths' claim. Under this section, the City cannot be found liable for damages caused by its "failure to discover a latent defect in the course of an inspection." Iowa Code § 670.4(6). Though the plaintiffs frame their claim as one seeking recovery for "failure to warn," not "failure to discover," to avoid disposal of their claim under this section, the word choice does not alter the substantive claim. Regardless of the phrasing, plaintiffs' claim still relates to the City's investigation and inspection of the former tire lot because a failure to warn would only arise if the City *knew or should have known of the condition* from its inspection of the property. Under section 670.4(6), the City cannot be held accountable for failing to detect improper fill buried below the surface during an inspection. Under another immunity provision, section 670.4(10), the City cannot be held accountable if the

city employees did not discover the improper fill because they conducted that inspection negligently. *See* Iowa Code section 670.4(10) (providing immunity for acts or omissions of city employees during inspections and investigations when damage to plaintiff is caused by a third party). Therefore, even accepting the City was alerted to the improper fill by the engineering firm's demolition plans and by discovering a few pieces of debris when it dug trenches, the City cannot be liable for its employees' failure to recognize there was a potentially hazardous condition. No duty to warn or take precautions to protect the Smith property arose because the City did not know a dangerous condition existed. We therefore affirm the district court as the City is immune from suit as a matter of law.

AFFIRMED.