STATE OF MICHIGAN

COURT OF APPEALS

RALPH METZGER and LINDA LARGER,

Plaintiffs-Appellees,

v

CLARK TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED
November 20, 2008

No. 278730
Mackinac Circuit Court
LC No. 05-006001-NZ

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right following a jury verdict in favor of plaintiffs in this case regarding the applicability of governmental immunity for residential sewage backup. We affirm.

Plaintiffs own a vacation home in Cedarville. In February 2005, plaintiffs returned to their Cedarville home and found sewage flowing back through the home from the toilet and bathtub. The jury awarded plaintiffs over $130,000 in damages.

Defendant argues that the trial court erred in denying it motion for judgment notwithstanding the verdict (JNOV) or in the alternative a new trial. We review a trial court's decision on a motion for JNOV de novo. *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id*. at 260-261. A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). A new trial may be granted when a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). However, a verdict should be overturned under this rule only when it is "manifestly against the clear weight of the evidence." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). We review the applicability of governmental immunity de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

Citing MCL 691.1417(3), defendant argues that plaintiffs failed to establish that defendant had notice of a defect in the township sewage system that was a substantial proximate cause of plaintiffs' damages. A government agency may be liable for a sewage disposal system

interruption, or may be entitled to government immunity, depending on the surrounding facts of the case according to MCL 691.1417, which states in part as follows:

> (1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event, a claimant and a governmental agency subject to a claim shall comply with this section and the procedure in [MCL 691.1418 and MCL 691.1419].
>
> (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 disposal system event and the governmental agency is an appropriate governmental agency. [MCL 691.1416 and MCL 691.1419] 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.
>
> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (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.

Relevant definitions are codified at MCL 691.1416, including:

> (e) "Defect" means a construction, design, maintenance, operation, or repair defect.
>
> * * *
>
> (k) "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 system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.

(*iii*) An act of war, whether the war is declared or undeclared, or an act of terrorism.

(*l*) "Substantial proximate cause" means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury.

Considering the evidence and all legitimate inferences in the light most favorable to plaintiffs, there are issues of material fact upon which reasonable minds could differ. See *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). James Landreville, the township official charged with maintaining the sewer system and who inspected the home's grinder pump on the night of the event in issue, specifically attributed the event to the failure of a check valve due to freezing. He likened the problem to two incidents that previously occurred in the township (the Elesser and Spring Lodge events). These two previous events resulted in the township pursuing a strategy to forestall any future occurrences. But when the implemented strategy proved problematic, it was abandoned and not replaced. There is no evidence at the time the strategy was abandoned the township had information that the problem had ameliorated.

Tony Hamel, who accompanied Landreville to inspect plaintiffs' property, testified that after he and Landreville pulled out the grinder pump, Hamel noticed that the check valve was broken. He recalled that Landreville told him how the check valve had also broken at the Elesser and Spring Lodge properties. Further, while defendant's expert witness disagreed that the event was caused by a frozen check valve, he admitted that he could not positively identify the cause of the accident. Therefore, the trial court did not err in denying defendant's motion for JNOV, as this Court cannot substitute its judgment for that of the jury. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

For these same reasons we conclude that the court did not err in denying defendant's alternative request for a new trial. See *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31-32; 609 NW2d 567 (2000).

Defendant also asserts that the trial court erred in allowing plaintiffs to cross-examine defendant's employees about maintenance issues that occurred after the plaintiffs' backup in February 2005. However, defendant has failed to identify the questioning it finds in error. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). A review of the lower court record reveals that, at least part of the challenged testimony was responsive to a line of inquiry opened by defendant on direct examination. "Once either party has put some fact into evidence, the other party has an

unquestioned right to fully develop all facts and circumstances surrounding the subject matter." *Olweean v Wayne Co Rd Comm*, 385 Mich 698, 702; 190 NW2d 108 (1971).

We affirm.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot