STATE OF MICHIGAN

COURT OF APPEALS

DONALD E COPUS and LINDA COPUS, Plaintiffs-Appellees,	UNPUBLISHED December 2, 2021
v	No. 355218 Lenawee Circuit Court
LENAWEE COUNTY DRAIN COMMISSIONER, Defendant-Appellant.	LC No. 18-006070-CZ

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the order denying defendant's motion for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). This matter arises out of a sewage backup that occurred in the basement of plaintiffs' vacation home, following the failure of wiring to an effluent pump recently installed by defendant and the failure of a check valve installed on that pump. We reverse.

I. FACTUAL BACKGROUND

Plaintiffs own a vacation home in Onstead, Michigan. In 2016, plaintiffs began remodeling work on the home and the property. In the spring of 2017, defendant, through its agents, decided to take advantage of the fact that work was already being performed on the property, and so it performed upgrades to the sewage system serving the property. Defendant excavated and replaced the risers on plaintiffs' existing sewage tank, installed a new effluent pump package, and installed new electrical service and wiring to the pump. The "package" consists, in relevant part, of the pump itself, several floats used to control when the pump turns on and off, an alarm system, and a check valve.[1] A check valve is supposed to ensure that fluid only runs in one direction; its function

[1] A second check valve was installed outside the tank, but that check valve appears to have no relevance to this matter. The tank in this matter functions as a temporary storage basin for sewage; instead of discharging directly into the sewer system, sewage would be discharged into the tank,

in this matter was to prevent sewage from flowing back into the tank from the sewer. The electrical service was installed by Adrian Electric and Generator Company (AEG). The wiring was underground-rated cable that was mostly placed inside PVC conduit, except for a "frost loop" section.[2] The pump package was powered by two circuit breakers, a small control breaker for the floats and alarm, and a large breaker for the pump itself; both were in an exterior box that was powered by another breaker inside the house. Defendant's employee, Bruce Roback, personally installed the plumbing and the conduit.

The sewage tank and pump upgrades were performed on April 28, 2017. Meanwhile, work continued on plaintiffs' home, apparently including some painting and further concrete removal. On August 9, 2017, plaintiffs moved back into the home. A few days later, on August 12, 2017, plaintiffs and their guests discovered sewer water backing up from a drain in their basement. According to Linda Copus, her understanding was that she "happened to flush the toilet upstairs and water spurted out" of the drain, and she was alerted to the backup by her guests. Plaintiffs promptly contacted defendant, and Roback investigated the cause of the backup. Roback determined that the control breaker had tripped. The pump breaker had not tripped. Roback reset the breaker, whereupon the pump activated and emptied the tank. Roback performed a continuity test[3] on the wiring, which revealed no evidence of a short, and he monitored the operation of the pump for an hour. Roback concluded that the breaker had probably tripped for a reason unrelated to an electrical problem, such as construction jostling the breaker box. Plaintiffs encountered no further problems on that occasion after resetting the breaker. Plaintiffs again used their property the following Labor Day weekend,[4] including having "six to eight" guests present according to Donald Copus, and they encountered no problems with the plumbing, although they did not specifically check whether the pump was operating.

On September 9, 2017, a much more serious sewage backup occurred in plaintiffs' basement, which caused extensive damage. According to plaintiffs, they arrived at their property that day and immediately smelled sewage, following which they went into the basement and observed several inches of sewage water. Plaintiffs again contacted defendant, and Roback again returned to the property. This time, Roback discovered that both the control breaker and the pump breaker had tripped, and upon resetting them, he discovered that the interior breaker powering the exterior box had also tripped. After resetting all three breakers, the pump turned on. Roback tested that the pump appeared to be drawing an appropriate amount of power, and he again monitored the pump operation for some time. However, he concluded "you don't get all three . . . breakers

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and when sufficiently full, the pump would discharge the contents of the tank into the sewer system.

[2] A frost loop is a portion of exposed cabling with extra slack, commonly in an "S" shape, to accommodate movement of wire caused by frost. In this case, the frost loop was also used to avoid sewer gasses traveling into the breaker panel from the tank.

[3] A continuity test sends a low voltage through a circuit as a quick check for whether the circuit is open (i.e., broken) or closed (i.e., complete).

[4] Labor Day weekend in 2017 was September 2-4, 2017.

tripping at the same time without having something," so he summoned AEG to check the system. Roback was highly experienced, but he was not a licensed electrician. No one had been at the house between September 4, 2017, and September 9, 2017.

On September 11, 2017, AEG performed a megohmmeter test[5] on the electrical wires and discovered that three wires "were not within normal operating limits." Roback dug up the wires and found one of the wires had been partially severed. It is undisputed that no one knows how or when the wires were damaged, although several individuals offered hypotheses, including a blow from a shovel or someone pulling too hard on the wire. The wires were repaired, but during the process of inspecting the pump, Roback discovered that the water in the tank was slowly rising. Further inspection revealed that the check valve on the pump had also become damaged, so the check valve was also replaced. Upon examination, the pump chamber turned out to have accumulated a substance that appeared to be paint of the same color used during the remodeling of plaintiffs' home. The same substance had damaged the seal on the check valve.

Plaintiffs' expert and master electrician, Douglas Quick, stated: "[I]f a licensed electrician had been contacted by . . . Roback on August 12, 2017, to diagnose the reason why the circuit breaker tripped, the second September 9, 2017 flooding event could have been avoided." However, Quick conceded that a breaker could also trip for reasons unrelated to damaged wiring, such as something clogging the pump. Quick further conceded that calling an electrician was merely good practice rather than mandated by statute or code, and doing so might not be warranted under all circumstances.[6] Chad Fox, a master electrician for AEG, testified[7] that if AEG had been called out in August 2017, AEG would have merely reset the breaker, spent an hour monitoring the pump to make sure it was turning on and off as it should, and concluded that it had merely been a "nuisance trip" if the pump seemed to be working properly.

Roback opined that the check valve had been functional on August 12, 2017, "as evidenced by the tank continuing to drain properly, once electricity was restored." Roback explained that if the check valve was not functioning, the pump would cycle on more frequently. He further opined that if the check valve had not been damaged, the backup into plaintiffs' basement would have been avoided or significantly limited, irrespective of the damaged wiring. Roback noted that dumping paint into a sewer drain was illegal, although no one contends that plaintiffs did so personally, and the substance was apparently not specifically tested to verify that it really was paint.

Plaintiffs filed a complaint on July 11, 2018, arguing defendant was liable under MCL 691.1415, *et seq.*, because it failed to exercise reasonable care and diligence in repairing and

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[5] A megohmmeter test sends a high voltage through a circuit to check whether there is any "leakage" of current; doing so can indicate problems with the insulation on a wire not revealed by a continuity test.

[6] We note that complete copies of all other witnesses' depositions were included in the lower court record, but only excerpts from Quick's deposition were provided. We are a court of record and are therefore limited to what is actually in the record.

[7] Fox appears to have testified as a fact witness rather than as an expert.

maintaining the sewer system. Defendant moved for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10), arguing it was entitled to governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1407 *et seq*, specifically MCL 691.1407(1), and plaintiffs cannot establish the application of the sewage disposal event exception, MCL 691.1417(2). The trial court denied defendant's motion for summary disposition, and this appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. A motion brought under MCR 2.116(C)(8)[8] should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. at 119. When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The interpretation and application of statutes, rules, and legal doctrines is also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. PRINCIPLES OF LAW

Under the GTLA, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are several exceptions to this immunity.[9] *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). However, "[t]he immunity conferred on governmental agencies is broad, and the exceptions narrowly drawn." *Haliw v Sterling Hts*, 464 Mich 297, 303; 627 NW2d 581 (2001).

This case involved the sewage system event exception, MCL 691.1417. The statute provides that "[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 691.1417(2). A "sewage

[8] Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Maiden*, 461 Mich at 119-120. Because the trial court considered materials beyond the pleadings, it appears not to have decided the summary disposition motion under MCR 2.116(C)(8).

[9] "The six statutory exceptions to governmental immunity are the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the governmental hospital exception, MCL 691.1407(4); the proprietary function exception, MCL 691.1413; and the sewage system event exception, MCL 691.1417." *Lash*, 479 Mich at 195 n 33.

disposal system event" is defined, in relevant part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). An "appropriate governmental agency" is defined as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury." MCL 691.1416(b). For the exception to apply, all five of the following elements must be established:

> (a) The governmental agency was an appropriate governmental agency.
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> (b) The sewage disposal system had a defect.
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> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
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> (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.
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> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. MCL 691.1417(3).

A "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*).

A party cannot establish its position on the basis of speculation. *Health Call v Atrium Home & Health Care Servs*, 268 Mich App 83, 96; 706 NW2d 843 (2005). "[T]he mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "[T]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164. "[C]onjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*. (internal citations omitted). Where the "probabilities" of a causal connection between the harm at issue and other potential causes "are at best evenly balanced," there is no basis for a jury to attribute the injury to one cause rather than the other. *Id*. at 165-166.

There appear to be two defects that contributed to the September 9, 2017, backup event: the damaged electrical wiring and the damaged check valve. It appears undisputed that MCL 691.1417(3)(a) and (b) are satisfied, and the parties present no serious argument regarding MCL 691.1417(3)(d). There is no evidence or contention that defendant had actual knowledge of either defect, so at issue is whether defendant knew or should have known of the defects with the exercise of due diligence, and whether the defects were a substantial proximate cause of both the event and the damage. Defendant generally contends that plaintiffs offer nothing more than speculation.

IV. CHECK VALVE

Plaintiffs dispute whether the substance that damaged the check valve was illegally-dumped paint, noting that the substance was not scientifically tested. However, plaintiffs have no evidence contradicting Roback's conclusion, informed by his extensive experience with sewer and

water systems, that the color and texture of the substance was probably not a coincidence. Furthermore, additional painting work was apparently performed between the two backup events, making paint a highly plausible possibility. Although there is no evidence that plaintiffs were personally responsible for the presence of the substance, the strong probability that it was paint casts some doubt on whether the substance was even present yet on August 12, 2017.

Nevertheless, the important question is whether defendant should have known about the substance in the exercise of reasonable diligence. The concept of reasonable diligence has long been regarded as the degree of effort expected of an ordinary prudent person under the circumstances. *Robinson v Gordon Oil Co*, 258 Mich 643, 648-651; 242 NW2d 795 (1932); *Snyder v Advantage Health Physicians*, 281 Mich App 493, 502; 760 NW2d 834 (2008). More importantly, however, Roback had a reasonable basis for his belief that the check valve was operating properly on August 12, 2017, and plaintiffs have not offered a scintilla of evidence to the contrary. Our Supreme Court has recently explained, in the context of medical malpractice, that the concept of "reasonable diligence" calls for some kind of investigation when the facts would "arouse suspicion" in an ordinary person. *Bowman v St John Hosp & Med Ctr*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket Nos 160291, 160292), slip op at p 15. Presuming the substance actually was present on August 12, 2017, the evidence shows no reason why defendant should have suspected a problem with the check valve on that date. We conclude that plaintiffs cannot satisfy MCL 691.1417(3)(c) regarding the damaged check valve.

V. ELECTRICAL WIRING

Conversely, although no one knows exactly when or how the wiring was damaged, plaintiffs averred that no exterior construction work occurred between August 9, 2017, and September 11, 2017. The logical inference is that the wiring was already damaged by August 12, 2017, albeit not necessarily to the same extent. Therefore, there is at least a question of fact whether it would have been physically possible for defendant to have discovered that the wire was damaged on August 12, 2017. Notwithstanding the concessions made by Quick that perhaps an electrician need not literally always be summoned any time a breaker trips, Quick nevertheless opined that reasonable diligence required an electrician to be called in the absence of a known reason for the trip. The evidence is not unequivocal, but Quick's opinion is sufficient to establish a question of fact whether defendant should have summoned AEG on August 12, 2017, rather than after the second backup event.

However, even if defendant should have summoned AEG earlier, that does not establish that defendant should have learned of the damaged wiring. Quick offered an opinion about what a licensed electrician would have done if summoned on August 12, 2017. However, Fox, who is a master electrician for the actual electrical contractor that was summoned, testified that AEG would have performed no additional diagnostics beyond those already performed by Roback. Notably, the diligence arguably required of defendant was only summoning an electrician, and, again, AEG was the electrician who would have been summoned. A person who makes reasonable inquiries but who is unfortunately misled by the answers will not be charged with constructive knowledge of the truth. *Converse v Blumrich*, 14 Mich 109, 120-121 (1866). Quick opined that "if a licensed electrician had been contacted . . . the September 9, 2017 flooding event *could* have been avoided" (emphasis added). However, Quick's expectation of the testing an electrician would have been performed was objectively inaccurate guesswork, and his conclusion was clearly

speculative. The evidence shows that, even if defendant had summoned AEG on August 12, 2017, the wiring fault would have remained undetected. We conclude that plaintiffs cannot satisfy MCL 691.1417(3)(c) regarding the damaged wiring.

Because plaintiffs cannot show that defendant should have discovered either the damaged check valve or the damaged wiring in the exercise of reasonable diligence in August 2017, it is unnecessary for us to consider whether either defect would constitute a "substantial proximate cause," MCL 691.1417(3)(e), of the damage that occurred on September 9, 2017. Summary disposition must be granted in defendant's favor.

Reversed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause