IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 13, 2016 Session

WILLIAM S. NICKELS, ET AL. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Appeal from the Circuit Court for Davidson County
No. 10C1259 Thomas W. Brothers, Judge

No. M2015-01983-COA-R3-CV – Filed September 28, 2016

Two dentists filed this action against the Metropolitan Government of Nashville and Davidson County ("Metro") under the Governmental Tort Liability Act to recover damages caused by the allegedly dangerous condition of the sewer and stormwater system behind their office. The trial court dismissed all of the plaintiffs' claims. We have concluded that the trial court erred in several respects. The trial court erred in concluding that the combined line did not present a dangerous condition pursuant to Tenn. Code Ann. § 29-29-204(a), and in applying Tenn. Code Ann. § 29-20-205(a)(1) to the dentists' claims. Moreover, the trial court erred in concluding that Metro did not have a duty to repair a known dangerous condition in the combined line. We further find that the trial court erred in concluding that the dentists were not at fault in constructing the addition to their office. We agree with the trial court that some of the plaintiffs' claims are barred by the statute of limitations and the Act of God defense.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

John R. Jacobson and David Andrew Curtis, Nashville, Tennessee, for the appellants, William S. Nickels and W. Scott Nickels.

Andrew David McClanahan, Christopher Michael Lackey, and Jenifer Bonilla Moreno, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

Dr. William S. Nickels ("Dr. Nickels") and Dr. W. Scott Nickels practice dentistry together in a professional corporation which owns a dental office on 21st Avenue North in Nashville, downhill from the Saint Thomas Midtown Hospital complex. The land surrounding Dr. Nickels's office generally rises in every direction. An alley running between Patterson Street and Murphy Avenue connects to the dental office's back parking lot. Behind this back parking lot sits a catch basin which is owned and operated by the Metropolitan Government of Nashville and Davidson County ("Metro").

The part of Nashville in which Dr. Nickels's office is located, known as "the Kerrigan Basin," is served by a combined stormwater and sewer system, or "combined line," which collects and carries both raw sewage and stormwater. Catch basins are grate-covered concrete boxes designed to integrate stormwater runoff into a combined sewer and stormwater line. Raw sewage enters the catch basin through a pipe that stops on the upstream side of the catch basin. Ideally, the stormwater entering the catch basin from above effectively binds off the sewage by exerting downward pressure on the sewage water, even when the stormwater begins to pool on top of the grate. In the catch basin behind Dr. Nickels's office, mixed stormwater sewage leaves the box through an opening at the downstream line that feeds the mixture into a twelve-inch line. The box is slightly downward sloping to the opposite end of the box allowing sewage and stormwater to exit. This twelve-inch line then connects to a massive 108-inch pipe which carries sewage and stormwater to be treated. If, however, a blockage occurs in the flow of the combined sewage stormwater line leading away from the catch basin, sewage can back up into the catch basin where it would mix with the stormwater above.[1]

In 2005, Dr. Nickels hired contractor T.W. Frierson to build an 1800-square-foot addition to his dental office. In August 2005, Metro Water Services received its first complaint of a sewer backup: a call from Brenda Ward, Dr. Nickels's office manager, that the alley behind the office was "flooding over vehicles['] hubcaps after heavy downpour. Thinks storm drain is clogged."

[1]Combined line systems are disfavored by the EPA. *See* US ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/npdes/combined-sewer-overflows-csos (last visited Sept. 20, 2016) (Combined sewer overflows (CSOs) contain untreated or partially treated human and industrial waste, toxic materials, and debris as well as stormwater. They are a priority water pollution concern for the nearly 860 municipalities across the U.S. that have CSSs [combined sewer systems]."). Under current standards, cities are not allowed to build new combined line systems, and Metro has entered a consent decree to enable the continued use of these systems. *See* US ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/npdes/municipal-wastewater (last visited Sept. 20, 2016) ("State and local authorities generally have not allowed the construction of new combined sewers since the first half of the 20th century.").

On May 15, 2006, Dr. Nickels called Metro to report the parking area and alley were again flooding. Ms. Ward testified that, during this event, she saw fluid bubbling and pushing up out of the catch basin. At trial, Harold Balthrop, a Metro Water engineer, speculated that Ms. Ward merely saw air bubbles due to pressurization and that a true backup event would more closely resemble a geyser. Metro Water did not observe the catch basin during periods of heavy rain (when these events occurred).

As a result of the incident, Metro performed a video inspection of the line that showed concrete was in the twelve-inch pipe that takes the outgoing combined sewage from the catch basin to the larger 108-inch sewer. Metro left this concrete in the line, a fact which Dr. Nickels learned after conducting discovery for the current action. At this time, Metro also inspected and cleaned the inlet boxes in the alley behind the dental office. Metro stated at trial that the concrete in the line was not initially removed because Metro was confident it would not affect the twelve-inch pipe's capacity.

Unfortunately, Metro's actions failed to stem Dr. Nickels's flooding problems. In September 2006, Dr. Nickels's office flooded from both the back door to the office and from the floor and shower drains. Dr. Nickels testified he personally witnessed the sewage coming out of the drains. Sewage shot up through these drains with enough force to splatter the material twelve inches high against the walls of the office. The trial court found that the water coming from both the drains and from under the back door contained sewage.

Then, on Sunday, June 3, 2007, Dr. Nickels's office flooded again. Dr. Nickels saw toilet paper and feminine hygiene products in the parking lot behind his office. Metro Water again televised the twelve-inch combined line and observed four to five inches of concrete and debris in the line which blocked two-thirds of the pipe. The debris consisted of bricks that could not be flushed out due to the concrete. Even though some Metro employees did not believe that the concrete was the cause of the flooding, Metro decided to remove the pieces and the damaged sections of the pipe. Metro Water crews excavated, cut, and removed two sections of pipe that contained the concrete and debris but denied Dr. Nickels's requests to be compensated for repairs to his office. The trial court found that Metro repaired all known maintenance issues on the twelve-inch combined line. Ronnie Russell, a Metro Water employee, sent an email to his superiors stating that, in light of Metro's previous knowledge of the obstruction, he disagreed with the Metro legal department's position that Metro lacked responsibility.

In an attempt to protect Dr. Nickels from further flooding (and with Dr. Nickels's permission), Metro installed a back-trap device on the office's service line which, under the Metro Code, is the property owner's responsibility. METRO. CODE OF NASHVILLE & DAVIDSON CNTY. § 15.16.200(B). A back-trap valve prevents sewage from surging from the combined line up the service line leading to the drains. It closes off a building's plumbing system when the combined line is full and when there would be enough

pressure to force sewage up the service line. The downside to the back-trap is that, during heavy rainfall events, the user loses sewer services since the back-trap closes the service line off from the combined line.

Metro was simultaneously considering other potential responses to the flooding at Dr. Nickels's office. By July 2006, Metro had examined a proposed project to increase the size of the twelve-inch combined line to a 36-inch line to increase capacity running toward the 108-inch line. Metro sent the project to the Tennessee Department of Environment and Conservation, where it was approved. After installing the back-trap valve, and consulting stormwater drainage data for Nashville, Metro viewed Dr. Nickels's problem as one of stormwater ponding and not sewage mixing with stormwater. Therefore, Mr. Balthrop and Mr. Toosi—management employees and members of Metro Water Services' Asset Management Team—believed there were greater priorities for the budget. Ultimately, the team declined to pursue the project.

On April 2, 2009, Dr. Nickels's office flooded again, while he was treating patients, creating what the trial court referred to as an "unsanitary condition." Once again, water surged from the floor drains, shower drain, and through the back door. Dr. Nickels and Ms. Ward both stated at trial that they witnessed sewage flood the office. Dr. Nickels testified that this water contained fecal matter based on its stench and the debris left in the parking lot. When asked why he failed to test this fluid, he testified he believed the smell was sufficient. Furthermore, Ms. Ward testified that she witnessed sewage back up from the catch basin in the alley. Dr. Nickels once again submitted a claim to Metro which was denied.

As a result of these events and in an attempt to mitigate future damages, Dr. Nickels retained Mr. Frierson who, in June 2009, installed a coffer dam, awning, and sump pump in order to prevent flooding under the back door.

On July 12, 2009, the combined line once again backed up through the floor drains, although the coffer dam and sump pump prevented water from entering from under the back door.

During the historic May 2, 2010 flood of Nashville, the combined sewer backed up into the dental office through the floor and shower drains. The trial court found that the coffer dam, awning, and sump pump succeeded again in preventing water from coming from under the door. Once again, the trial court found, the water came from the floor and shower drain. After this event, upon recommendation by a professional cleanup crew, Dr. Nickels paid for an air quality test to determine if fecal contaminants or other airborne diseases still existed. He received positive test results indicating the presence of contaminants after professional flooding cleaners had cleaned his office of sewage.

At trial, the plaintiffs sought damages and injunctive relief under the Governmental Tort Liability Act. Under their theory of the case, demonstrating that a dangerous condition existed and Metro was on notice would be sufficient under Tenn. Code Ann. § 29-20-204 to obtain relief. In contrast, Metro framed the issue in terms of a municipality's duties to construct and maintain stormwater infrastructure. The plaintiffs' witnesses were: Dr. Nickels; Ms. Ward; Ronnie Russell, retired Metro Water employee; James Paulus, retired Metro Water engineer; Ricky Swift, Metro Water engineer; and Ken Boyle, project manager for Mr. Frierson. Witnesses for the defense were: Leanne Scott, Metro Water engineer, and Dr. Nickels.

At the end of the proof, the trial court found there was no evidence the back-trap valve was not functioning properly. Therefore, the trial court granted Metro's Rule 41.02 motion for involuntary dismissal with regard to the damages caused by the flooding drains after the back-trap was installed. The court took the rest of the case under advisement, and the parties submitted proposed findings of fact and conclusions of law.

On September 18, 2015, the trial court entered a detailed order. We note, in particular, the following findings of fact:

> 14. In September 2006, Dr. Nickels' office experienced flooding inside the dental office. Water containing sewage remnants came into the building from under the back door and through floor drains in two different bathrooms. There was a strong foul odor of sewage in the office.
> 15. On Sunday, June 3, 2007, Dr. [Nickels] received a call from his cleaning crew and was informed that his office had flooded again. . . .
> . . . .
> 17. Dr. Nickels also observed fecal matter, toilet paper, and feminine hygiene products in the parking lot behind the Dental Office, which is a regular occurrence after the combined sewer backs up into the alley.
> . . . .
> 27. On April 2, 2009, Dr. Nickels was at work treating patients when he observed water coming through the back door and through the drains creating an unsanitary condition and causing significant damage.
> 28. On that date Dr. Nickels and his staff were treating patients when the flooding occurred and he and his staff had to help one patient down the hallway flooded with sewage.
> . . . .
> 32. On July 12, 2009, the combined line again backed into the Dental Office through the floor drains, although the coffer dam prevented the combined sewer from backing into the Dental Office through the back door.
> . . . .
> 35. The combined sewer again backed up into the Dental Office through the floor and shower drains on May 2, 2010, during the historic rainfall

event in Nashville, but the coffer dam prevented the combined sewer from backing up into the Dental office through the back door.

. . . .

41. The combined line continues to occasionally backup into the alley behind the Dental Office.

. . . .

44. There is no proof that the combined stormwater-sewer line was improperly constructed.

45. The stormwater entering the sewer line became polluted with raw sewage and is considered dangerous.

46. Contaminated water flooded a car parked in the alley and smelled of sewage.

In its legal analysis, the trial court framed the issue as one of stormwater management and concluded that Metro did not breach its duty to Dr. Nickels because municipalities do not have a duty to improve stormwater management systems. The trial court further found that the May 2010 flood was an Act of God for which Metro could not be held liable because there was no evidence that the injury would have occurred but for Metro's failure to exercise due care. The trial court also rejected the plaintiffs' argument that the statute of limitations had not begun to toll until they received documents during discovery that showed Metro's awareness of the clogged pipe. As to Dr. Nickels's decision to construct an addition to his office, the court concluded that no fault could be attributed to him. We will set forth the trial court's conclusions of law as relevant below to the issues on appeal.

ISSUES ON APPEAL

Both parties have raised several issues in this appeal. We have summarized the issues as follows:

(1) Whether Metro's immunity from suit is removed in this case pursuant to the Governmental Tort Liability Act;

(2) Whether the trial court erred in concluding that Metro did not owe a duty of care or breach a duty of care to the plaintiffs;

(3) Whether the trial court erred in dismissing the plaintiffs' claims for damages related to the June 2007 flooding event as barred by the statute of limitations;

(4) Whether the trial court erred in dismissing the plaintiffs' May 2010 claims based upon the additional ground of the affirmative defense of an Act of God;

(5) Whether the trial court erred in concluding that the plaintiffs were not negligent in constructing the addition to the office and in attributing no fault to them.

STANDARD OF REVIEW

Our review of the trial court's findings of fact in a non-jury case is de novo, with a presumption that the findings are correct unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). "[F]or the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect." *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005). We review issues of law de novo, giving no presumption of correctness to the trial court's conclusions. *Armbrister*, 414 S.W.3d at 692; *Kendrick*, 90 S.W.3d at 569-70.

ANALYSIS

(1) Governmental Tort Liability Act ("GTLA")

Sovereign immunity is the doctrine that citizens can only sue a governmental entity to the extent that it consents. *Lucius v. City of Memphis*, 925 S.W.2d 522, 525 (Tenn. 1996). This "common law doctrine is now embodied in the Tennessee Constitution, which provides that '[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct.'" *Young v. City of LaFollette*, 479 S.W.3d 785, 789-90 (Tenn. 2015) (quoting TENN. CONST. art. I, § 17). With the enactment of the Government Tort Liability Act in 1974, the Tennessee Legislature reaffirmed this doctrine and provided a governmental entity's consent to be sued in enumerated circumstances. *Kirby v. Macon Cnty.*, 892 S.W.2d 403, 406 (Tenn. 1994) (describing the GTLA as "an act of grace through which the legislature provided general immunity from tort liability to all governmental entities, removing it, however, in limited and specified instances").

In interpreting the GTLA, courts are guided by established canons of statutory construction. *See Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001). The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *see also McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). Our duty is to "'seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning.'" *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001) (quoting *State v. Turner*, 913 S.W.2d 158, 160 (Tenn.1995)). To determine legislative intent, we look to the natural and ordinary meaning of the language in the statute. *Westland W. Cmty. Ass'n v. Knox Cnty.*, 948 S.W.2d 281, 283 (Tenn. 1997); *Riggs v. Burson*, 941 S.W.2d 44, 54 (Tenn. 1997). We must also examine any provision within the context of the entire statute

and in light of its overarching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *Lee v. Franklin Special Sch. Dist. Bd. of Educ*., 237 S.W.3d 322, 332 (Tenn. Ct. App. 2007); *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read "'without any forced or subtle construction which would extend or limit its meaning.'" *Lee*, 237 S.W.3d at 332 (quoting *Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991)). Finally, because the GTLA is in derogation of the common law, it must be strictly construed. *Limbaugh*, 59 S.W.3d at 83.

Tennessee Code Annotated section 29-20-204 provides:

> (a) Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity.
> (b) Immunity is not removed for latent defective conditions, nor shall this section apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved in addition to the procedural notice required by § 29-20-302.

Tennessee Code Annotated section 29-20-206 further explains:

> Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities are concerned. Wherein immunity from suit is removed by this chapter, consent to be sued is granted and liability of the governmental entity shall be determined as if the governmental entity were a private person.

By its plain meaning, Tenn. Code Ann. § 29-20-204 functions only as a condition precedent to an underlying tort claim. Any other interpretation would distort the legislative purpose and misconstrue the basic structure and context of the statute. Interpreting § 29-20-204 as creating a duty (as suggested by the plaintiffs) would impermissibly alter the nature of the statute and would effectively negate the plain language and purpose of § 29-20-206. We conclude that Tenn. Code Ann. § 29-20-204 functions as an initial step to remove liability, which then requires a plaintiff to prove the underlying elements of a tort claim.

A. Dangerous Condition

To remove Metro's immunity, Tenn. Code Ann. § 29-20-204(a) requires that the plaintiffs sustained an "injury caused by the *dangerous or defective condition* of any public building, structure, dam, reservoir or other public improvement owned and

controlled by such governmental entity." (Emphasis added). The existence of a dangerous or defective condition is a question of fact. *Lindgren v. City of Johnson City*, 88 S.W.3d 581, 584 (Tenn. Ct. App. 2002) (citing *Helton v. Knox Cnty.*, 922 S.W.2d 877 Tenn. 1996); *see also Hale v. Lincoln Cnty.*, No. M2004-01963-COA-R3-CV, 2005 WL 3343824, at *5 (Tenn. Ct. App. Dec. 9, 2005).

In this case, the trial court found that, "The stormwater entering the sewer line became polluted with raw sewage and is considered dangerous." The trial court also found that, "The combined line continues to occasionally backup into the alley behind the Dental Office." This court is aware that, in its conclusions of law, the trial court also found that "the over taxation of the twelve-inch combined line is neither a dangerous or defective condition caused or created by Metro, nor is it the result of some negligent failure of maintenance or breach of duty owed to Dr. Nickels." We will discuss the duty and breach issues below. As to the first part of the quoted conclusion of law regarding the absence of a "dangerous or defective condition *caused or created* by Metro," this is not the relevant analysis under Tenn. Code Ann. § 29-20-204(a). (Emphasis added). Causation is not a requirement for the removal of immunity under Tenn. Code Ann. § 29-20-204(a). Rather, Tenn. Code Ann. § 29-20-204(a) requires the presence of a "dangerous or defective condition" on a public improvement "owned and controlled by such governmental entity." The trial court expressly found that, "Metro owns, controls, and is responsible for the construction, operation, and maintenance of the combined sewer pipe that traverses the alley behind the Dental Office." Based upon the trial court's findings and the record, the flooding in Dr. Nickels's parking lot was contaminated with sewage and, therefore, created a dangerous condition. (As will be discussed below, the trial court's reliance on the Tennessee Storm Water Management Act was misplaced.)

At trial, Dr. Nickels and Metro presented opposing theories as to the source and contents of the water that pooled in Dr. Nickels's office parking lot and came in under the back door. According to Dr. Nickels, when there was a heavy rain, water containing raw sewage from the combined system came up out of the catch basin. Metro's engineers testified that, during a heavy rain, the weight and pressure of the stormwater coming into the catch basin generally prevents any contents from the combined system from coming out of the catch basin.[2] From its findings, it appears that the trial court adopted Dr. Nickels's theory. The trial court found that, in September 2006, Dr. Nickels's office flooded and water that contained sewage remnants came in from under the back door and through the floor drains. In June 2007, the court found, Dr. Nickels "observed fecal

[2] Metro acknowledged that an obstruction could cause sewage to overflow from the catch basin. Metro offered no site specific evidence to counter the plaintiffs' evidence that the twelve-inch line was creating overflows from the combined sewage and stormwater line. Instead, Metro asserted the twelve-inch line could not be the issue because the larger 108-inch line was not at capacity.

matter, toilet paper, and feminine hygiene products in the parking lot behind the Dental Office, which is a regular occurrence after the combined sewer backs up into the alley." The court found that the combined line continued to back up after the 2007 repairs. The court specifically determined that these back-ups occurred because the twelve-inch combined line leaving the catch box was overtaxed during periods of heavy rainfall. It further found that, on July 12, 2009 and in 2010, the combined line again backed up through the floor drains but the coffer dam and sump pump stopped the combined twelve-inch sewer from flowing in from the back door.

Metro argues that the evidence preponderates against the trial court's findings that the stormwater ponding in the alley became polluted with raw sewage and was dangerous. We respectfully disagree. Ms. Ward testified that, in April 2009, she saw water rising out of the catch basin, filling the alley, and coming in the back door. During that same event, she took pictures of the inside of an employee's car showing water inside the car with a cup floating on the floorboard. Ms. Ward testified that the car smelled like the office (like sewage). As to the state of the office parking lot after the June 2007 flooding, Dr. Nickels testified: "as usual, there's a lot of debris, but you can see toilet paper, feminine products, and it's not a very sanitary situation." He testified that he had observed sewage and stormwater pooling in the alley in May 2011, May 2012, twice in July 2012, September 2012, November 2013, and June 2015. In some instances, the stormwater and sewage rose up over the running boards of cars parked behind the dental office. The evidence does not preponderate against the trial court's findings.

The trial court found that the twelve-inch combined line was overtaxed, and once stormwater mixed with sewage it was dangerous. It was not simply stormwater pooling behind Dr. Nickels's office during all of these events. It was mixed sewer and stormwater that contaminated the area. Therefore, the combined system was creating a dangerous condition, at least in the parking lot behind the dental office. *See generally Morris v. City of Memphis*, No. 02A01-9403-CV-00041, 1995 WL 72539, at *4 (Tenn. Ct. App. Feb. 22, 1995) (affirming trial court finding that raw sewage in floodwater created a dangerous condition pursuant to Tenn. Code Ann. § 29-20-204).[3]

B. Discretionary Decision

Tennessee Code Annotated section 29-20-205(1) provides that sovereign immunity is removed for negligent acts or omissions of a governmental employee within the scope of his or her employment "except if the injury arises out of [t]he exercise or

[3] Tennessee Code Annotated section 29-29-204(b) also requires that, to remove immunity, a governmental entity must have actual or constructive notice of the dangerous or defective condition. Neither party has raised notice as an issue on appeal.

performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." The trial court reasoned that, in deciding not to pursue the project to upsize the twelve-inch combined line, Metro employees were exercising their discretion and that, therefore, Metro retained its immunity. We disagree with this reasoning. Tennessee Code Annotated section 29-20-205 does not apply to claims brought under Tenn. Code Ann. § 29-20-204. *Morris*, 1995 WL 72539, at *2-3.

In *Morris*, the plaintiffs sued the City of Memphis for damages to their home allegedly caused by a dangerous and defective sewer system in their subdivision. *Id.* at *1. The court rejected the city's assertion that it was immune under the discretionary act defense created by Tenn. Code Ann. § 29-20-205. *Id.* at *3. The judgment against the city was premised upon Tenn. Code Ann. § 29-20-204, and the court specifically stated that "[t]his section does not provide an exception for a discretionary function." *Id.* at *2. The court in *Morris* relied by analogy upon *Swafford v. City of Chattanooga*, 743 S.W.2d 174, 177 (Tenn. Ct. App. 1987), a case holding that the city's liability for injuries pursuant to Tenn. Code Ann. § 29-20-203 (regarding immunity for injuries caused by unsafe streets or highways) is not subject to the discretionary function provision of Tenn. Code Ann. § 29-20-205. *Id.* The court in *Morris* went on to state:

> [T]he Supreme Court in *Bowers ex rel. Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992) adopted a planning-operational test as the standard for applying the discretionary acts exception. The Court said:
>
> > Under the planning-operational test, decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity.
>
> 826 S.W.2d at 430. Under this test, if a defective or dangerous condition exists and the City has notice thereof, the failure to correct such a situation would not be considered a discretionary function. *See id.* at 431.

Id. at *2-3. The court concluded that the City of Memphis was not immune from suit under the discretionary function exception. *Id.* at *3.

As stated above, the discretionary function exception to immunity does not apply to claims brought under Tenn. Code Ann. § 29-20-204. Moreover, Metro's decision not to correct a dangerous condition in the combined line does not qualify as a discretionary decision. Any finding otherwise would potentially mean that Metro would be immune under the GTLA for negligently failing to repair any sewer or other public improvement that creates a dangerous condition.

(2) Negligence

At trial, the court granted Metro's Rule 41.02 motion for involuntary dismissal with regard to the damages caused by the flooding drains after the back-trap was installed. The plaintiffs have not disputed this ruling on appeal. We, therefore, limit our analysis to issues regarding the water in and from the parking lot.

A. Duty

Tennessee Code Annotated section 29-20-206 provides that, when a governmental entity's immunity is removed, liability is to be determined as if that entity were a private person. Thus, in a negligence action, the plaintiff must prove the traditional elements of negligence: a duty of care, a breach of the duty of care, cause in fact, proximate case, and injury. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Huskey v. Rhea Cnty.*, No. E2012-02411-COA-R3-CV, 2013 WL 4807038, at *4 (Tenn. Ct. App. Sept. 10, 2013). Metro asserts, on appeal, that it has no duty to "construct or improve storm drainage systems—including combined lines." The real issue in this case, however, is whether Metro has a duty to repair a known dangerous condition in a combined line. As will be explained below, we conclude that Metro does have such a duty.

The trial court held that Metro "does not have an affirmative duty to construct or improve storm drainage systems, nor may it be held liable under tort principles for not doing so." While this statement may be generally correct, it does not address the issue in this case. The present case involves a combined line—one that handles both stormwater and sewage. Most of the cases relied upon by the trial court and Metro involve the overflow of stormwater only and are, therefore, distinguishable. *See Britton v. Claiborne Cnty.*, 898 S.W.2d 220, 223-24 (Tenn. Ct. App. 1995) (finding county not liable for damage to property caused by natural water runoff from road onto property); *Miller v. City of Brentwood*, 548 S.W.2d 878, 882-83 (Tenn. Ct. App. 1977) (finding no right of action against city for "failure to restrain property owners from reducing water absorption of their land and/or failure to provide adequate drainage facilities to drain water from improved property").

The general rule on a municipality's duty regarding the maintenance of a sewer system has been stated has follows:

> A political subdivision owes a duty of ordinary care with respect to the proprietary functions of operating a sewer system and maintaining that system in repair. A city's operation of a sewer system includes a duty to inspect for defects or potential problems, and the city is chargeable with knowledge of what a reasonable inspection would have revealed.

18A McQuillen THE LAW OF MUNICIPAL CORPORATIONS § 53:145 (3d ed. 2016). The law in Tennessee, though sparse, is consistent with these general principles. In *Morris*, 1995 WL 72539, at *1, the plaintiffs alleged that the City of Memphis negligently maintained their subdivision's drainage system, resulting in damage to their property.[4] The proof showed that the floodwater contained raw sewage. *Morris*, 1995 WL 72539, at *4. The court affirmed the trial court's judgment in favor of the plaintiffs.

In *Horton v. City of Nashville*, 72 Tenn. 39 (1879), a case cited by Metro and the trial court, the Hortons' house sat on top of a portion of a sanitary sewer constructed by the city in 1872. *Horton*, 72 Tenn. at 45. In hard rains, the sewer would break open under the house, "filling the upper rooms with foul gases and effluvia, making the building unhealthy, and unfit for either residence or business." *Id.* at 46. The sewer became obstructed at times, causing the property of the Hortons and neighboring properties to be "flooded by sewage." *Id.* The Hortons petitioned the city to remove the nuisance and for damages. *Id.* They prayed that the city be compelled to construct a new sewer. *Id.* at 47. The chancellor ruled in favor of the Hortons. *Id.* at 45. In reversing this decision, the court reasoned that "the building of a public sewer by a municipal corporation is the exercise of a legislative discretion, which the Court will not control." *Id.* at 47.

The court in *Horton* continued, however, to note that the Hortons' bill sought damages for injuries sustained by the overflow of the sewer "either by reason of its insufficiency in size to carry off the drainage, its defective construction, or its being negligently permitted to become obstructed." *Id.* at 49. The court stated:

> Although the city authorities are entrusted with a discretion in regard to constructing drains and sewers in the first instance, yet *when they have constructed them it is probably their duty to keep them in proper repair and free from obstruction.* And they are liable in damages for a neglect of these ministerial duties by which individuals suffer injury.[5]

Id. (citations omitted) (emphasis added). Thus, the court in *Horton* recognized, in dicta, the type of duty at issue here: the duty to of a municipality to repair a dangerous or defective condition, involving sewage in a combined system, of which it had notice.

[4] Although *Morris* was an action for nuisance, the nuisance claim was based upon negligence and, thus, the principles therein are relevant here.

[5] The court in *Horton* determined that, as a court of equity, it could not address the issue of damages except incident to its jurisdiction to issue injunctive relief or upon some other equitable ground. *Horton*, 72 Tenn. at 49-50.

The trial court and Metro cite the Storm Water Management Act ("the Act"), Tenn. Code Ann. §§ 68-221-1101–1113, as supporting the proposition that Metro cannot be held liable here. Metro argues that the Act "authorizes, but does not require, municipalities to construct stormwater drainage facilities," citing Tenn. Code Ann. § 68-221-1103. The Act defines "storm water facilities" to include "the drainage structures, conduits, combined sewers, sewers, and all device appurtenances by means of which storm water is collected . . . ." Tenn. Code Ann. § 68-221-1102(8). Based upon this definition, Metro asserts that municipalities may not be held liable under tort principles for a decision not to build or improve storm drainage systems, including combined sewers. We respectfully disagree.

Under the Act, "storm water" is defined as "storm water runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (*other than infiltration contaminated by seepage from sanitary sewers or by other discharges*) and drainage." Tenn. Code Ann. § 68-221-1102(7) (emphasis added). The purpose of the Act is to facilitate compliance with the Water Quality Act and the Clean Water Act "by municipalities which are affected by environmental protection agency (EPA) storm water regulations." Tenn. Code Ann. § 68-221-1101. As recognized in the statutory definition of "storm water facilities," some municipalities use combined sewers or sewers to drain stormwater. Tenn. Code Ann. § 68-221-1102(8). Nevertheless, the statutory definition of stormwater expressly excludes any "infiltration contaminated by seepage from sanitary sewers or by other discharges." Tenn. Code Ann. § 68-221-1102(7). Thus, the Act does not regulate the management of sewage. More importantly, the issue at hand is not the construction of a new combined system, but the maintenance and repair of a dangerous condition in an existing system.

Our Supreme Court has stated that "the question of whether a defendant owes a duty of care to the plaintiff is a question of law to be determined by the courts." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 365 (Tenn. 2009). The Court has further provided that, "to determine whether a duty is owed in a particular circumstance, courts must first establish that the risk is foreseeable, and, if so, must then apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable." *Id.* Our courts have stated: "'A risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom [may be] owed a duty is probable.'" *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 820 (Tenn. 2008) (quoting *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 551 (Tenn. 2005)). In the present case, we must assess Metro's duty with respect to each flooding event.

i. <u>June 2007</u>

We need not address Metro's duty with respect to this event because, as discussed below, we have concluded that this claim is barred by the statute of limitations.

ii. April 2009

After the June 2007 event, Metro removed all of the concrete and bricks in the combined line and installed a back-trap valve in Dr. Nickels's service line. The trial court found that "Metro Water Services repaired all known maintenance issues on the twelve-inch combined line." There is, however, evidence that Metro knew that the combined line remained dangerous despite the repairs Metro had performed in June 2007. Metro continued to move forward with its proposal to enlarge the sewer from twelve inches to thirty-six inches. In an internal email written in January 2008, a Metro attorney asked about the schedule to issue the design for the sewer enlargement project and stated: "This project to upsize the surface drain line and Combined Sewer is needed since a heavy stormwater backed up into Dr. Nickels[']s office." TDEC approved Metro's plan to enlarge the sewer, but Metro decided not to implement the plan. In discovery, as justification for this decision, Metro cited the cost of the project and the speculativeness of its results—i.e, that the expansion might not prevent back-ups in "every potential wet weather scenario."

We find that the evidence preponderates against the trial court's finding of fact concerning Metro's repair of all known maintenance issues, at least insofar as it implies that Metro had no notice of a dangerous condition. Rather, we find that Metro had notice of a persistent dangerous condition. We find that the risk of further flooding was reasonably foreseeable, and it was within Metro's control, not Dr. Nickels's control, to address the issue of contaminated water coming out of the catch basin up into his parking lot. As discussed above, the courts in *Morris* and *Horton* recognized such a duty. *Morris*, 1995 WL 72539, at *4; *Horton*, 72 Tenn. at 49. As to the April 2009 event, we find, as a matter of law, that Metro had a duty to repair a known dangerous condition causing contaminated water to pool in Dr. Nickels's parking lot and enter his building. By failing to take any action to remedy the flooding in Dr. Nickels's parking lot after the June 2007 event, we find that Metro breached its duty of care. *See generally Pruitt v. City of Memphis*, No. W2005-02796-COA-R3-CV, 2007 WL 120040, at *4 (Tenn. Ct. App. Jan. 18, 2007) (detailing elements of negligence).

iii. July 2009

After the April 2009 event, Metro remained on notice of a dangerous condition and continued to have a duty to resolve the issue of overflow of the combined line. Yet Metro chose to attribute all of the problems to Dr. Nickels's service line. In June 2009, Dr. Nickels hired Mr. Frierson to install a coffer dam, sump pump, and awning at the back door of his office to prevent the water overflowing from the catch basin from

coming in through the back door. Thus, when the catch basin overflowed again in July 2009, the contaminated water did not come in through the back door. By installing the coffer dam, sump pump, and awning, Dr. Nickels mitigated his damages.

iv. May 2010

We need not discuss the duty issue with respect to the May 2010 event because, as discussed below, we affirm the trial court's conclusion that this event was an Act of God.

B. Causation

In addition to duty and breach, a plaintiff seeking to make out a claim for negligence must also establish cause in fact ("but for" causation) and proximate cause (or legal cause). *Waste Mgmt., Inc. of Tenn. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430-31 (Tenn. Ct. App. 1997). Cause in fact and proximate cause are questions of fact. *Hale v. Ostrow*, 166 S.W.3d 713, 719 (Tenn. 2005). In this case, the trier of fact, the court, did not reach these questions. We, therefore, conclude that this case should be remanded in order to give the trier of fact the opportunity to rule on these issues. Moreover, the trial court's findings regarding causation will be affected by its determinations regarding comparative fault, discussed below.

(3) Statute of Limitations

The trial court found that the plaintiffs' claim for damages arising from the June 2007 flood event was barred by the statute of limitations. On appeal, Dr. Nickels challenges this decision. We agree with the trial court.

Dr. Nickels filed his complaint on April 1, 2010, which includes the allegations that, immediately after the June 2007 flood event, he reported the incident to Metro and contacted them later about the status of the repairs. Dr. Nickels testified that he had an attorney present when Metro Water employees came to assess the damage. He submitted a claim to Metro for the expenses he incurred as a result of the flooding. In his testimony, Dr. Nickels stated that he was "fairly aggressive" about getting Metro to "fix the problem."

Pursuant to Tenn. Code Ann. § 29-20-305(b), the statute of limitations for actions brought under the GTLA is one year after the cause of action arises. The discovery rule applies to actions brought under the GTLA. *Sutton v. Barnes*, 78 S.W.3d 908, 916-17 (Tenn. Ct. App. 2002). Under the discovery rule, the statute of limitations begins to run when the plaintiff "knows or in the exercise of reasonable care and diligence should know, that an injury has been sustained." *Stanbury v. Bacardi*, 953 S.W.2d 671, 678 (Tenn. 1997). The plaintiff does not have to know the type of legal claim he or she has as long as the plaintiff is "aware of facts sufficient to put a reasonable person on notice that

he has suffered an injury as a result of wrongful conduct." *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994); *see also Sutton*, 78 S.W.3d at 916-17.

The plaintiffs in this case argue that the June 2007 claims were not barred by the statute of limitations because they were not aware until discovery that Metro "knowingly failed to remove concrete from the sewer behind the Dental Office prior to sewage backing up into [the] Dental Office on June 2, 2007." This reasoning is without merit. The plaintiffs knew, in June 2007, that they had sustained an injury as a result of Metro's failure to remedy the dangerous condition of the combined sewer. It was not necessary that they know the extent of Metro's conduct for the statute of limitations to begin to run.

The trial court did not err in concluding that the plaintiffs' claims based upon the June 2007 incident were barred by the statute of limitations.

(4) Act of God

The trial court found that the May 2010 flood event was an Act of God and that "Metro cannot be held liable for any damages associated with the events of May, 2010." Dr. Nickels asserts that the trial court erred in shifting the burden of proof to the plaintiffs with respect to the Act of God affirmative defense and that Metro offered no proof that the sewage would have backed up into the dental office even if Metro had corrected the dangerous condition.

In or around June 2009, Dr. Nickels installed a coffer dam, sump pump, and awning around the back door of his office. These additions prevented water overflowing from the combined line from entering through the back door of Dr. Nickels's office. As previously stated, Metro installed a back-trap valve on Dr. Nickels's service line after the June 2007 event and there is no proof on appeal that this valve was not functioning properly. Thus, we must assume that the sewage that entered Dr. Nickels's office after June 2009 came from within his office. In the Act of God argument, the plaintiffs focus solely upon the alleged damages occurring *within* the office during the May 2010 flood. We find this argument to be without merit as we have already determined that Metro is not subject to liability for damages occurring inside the office after June 2009.

(5) Comparative fault

Metro asserts that the trial court erred in concluding that Dr. Nickels was not negligent in constructing an addition to his office "which caused stormwater to accumulate in the alley" and in finding that no fault could be attributed to him. The trial court found, "There is no evidence that Dr. Nickels was negligent in constructing the addition to the Dental Office." We find that the evidence preponderates against the trial court's finding that there was no evidence of negligence on the part of Dr. Nickels.

"[T]he comparison and allocation of fault is a question of fact to be decided by the finder-of-fact, that is the jury or the trial court sitting without a jury." *State Farm Mut. Auto. Ins. Co. v. Blondin*, No. M2014-01756-COA-R3-CV, 2016 WL 1019609, at *4 (Tenn. Ct. App. Mar. 14, 2016). Metro bore the burden of proof to establish comparative fault. *See Whaley v. Wolfenberger*, No. E1999-02518-COA-R3-CV, 2000 WL 116055, at *2 (Tenn. Ct. App. Jan. 28, 2000). Metro based its comparative fault argument upon the following legal principle: "if the owner of higher lands alters the natural condition of his property so that surface waters collect and pour in concentrated form or in unnatural quantities upon lower lands, he will be responsible for all damages caused thereby to the possessor of lower lands." *Zollinger v. Carter*, 837 S.W.2d 613, 614-15 (Tenn. Ct. App. 1992).

Contrary to the trial court's conclusion, Metro presented evidence that Dr. Nickels was negligent in constructing the addition to his office. A Metro engineer testified that the building addition by Dr. Nickels altered the natural surface flow of water and made the ponding of stormwater in the alley more severe. Moreover, Dr. Nickels's first report of a flooding incident in the alley behind Dr. Nickels's office was in August 2005, after the completion of the addition.

We find that there was evidence of negligence on Dr. Nickels's part, which the trial court failed to consider. On remand, the trial court is instructed to determine whether Dr. Nickels was negligent and to assess the percentage of fault (if any) attributable to Metro and Dr. Nickels with respect to the April 2009 and July 2009 flooding events. *See generally Eaton v. McLain*, 891 S.W.2d 587, 592 (Tenn. 1994).

CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed equally between the appellant, Dr. Nickels, and the appellee, Metro, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE