STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH NOSAL and CHRISTINA NOSAL,

Plaintiffs-Appellees,

v

CITY OF POTTERVILLE,

Defendant-Appellant,

and

POTTERVILLE SEWER DISTRICT,

Defendant.

UNPUBLISHED
July 20, 2006

No. 268647
Eaton Circuit Court
LC No. 05-000499-CZ

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant City of Potterville appeals as of right the trial court's order denying in part its motion for summary disposition based on governmental immunity. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs, who are father and daughter, filed suit alleging that in May 2004 and on February 15-16, 2005, sewage backed up into the basement of their home. Plaintiffs alleged that the events were the direct result of defects in defendant's sewer system, and that defendant was liable under the sewage system event exception to governmental immunity, MCL 691.1417. Plaintiffs alleged violation of the Freedom of Information Act (Count I), failure to supply the name of the person to whom a claim should be made (Count II), and damages due to the sewage system event (Count III).[1]

Defendant moved for summary disposition of Counts II and III pursuant to MCR 2.116(C)(7), arguing that plaintiffs' claims must be dismissed because plaintiffs could not show

[1] Subsequently, the parties agreed to dismiss Count I upon defendant's payment of $2,750 in costs and fees.

that in either May 2004 or February 2005 a defect in the sewer system was the substantial proximate cause of the flooding in their home. Regarding the February 15-16, 2005, incident, defendant emphasized that the Superintendent of the Department of Water and Power testified by deposition that on February 15-16, 2005, the pumps in the Lockview Lift Station were working properly, and that the flooding in plaintiffs' home was likely caused when eight inches of snow melted and nearly one inch of rain fell onto ground that was already saturated. Defendant asserted that the opinion offered by plaintiffs' expert, Gregory Perry, a civil engineer, to the effect that if the sanitary sewer system in Lockview Meadows was not designed to take the flow from the area it served the system would fail, did not establish that the system was defective because that opinion was based on speculation and not on an examination of the system. Defendant emphasized that its own expert, Eric Van Orman, a licensed professional engineer, examined the Lockview Lift Station, found it to be adequate for the area it served, and found from the relevant pump logs that the pumps were operating properly on February 15-16, 2005.

The trial court granted defendant's motion with respect to the May 2004 incident, but denied it with respect to the February 2005 incident. The trial court remarked that it believed that plaintiffs "barely" showed that a question of fact existed as to whether a defect existed in defendant's system and caused damages to plaintiffs' residence.[2]

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

Pursuant to MCL 691.1417(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." A "sewage disposal system event" is defined in pertinent part as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). MCL 691.1417(3) provides that a claimant may seek damages by showing "that all of the following existed at the time of the event:" the agency from which compensation is sought is the appropriate agency, the system was defective, the agency knew or reasonably should have known of the defect, the agency failed to take reasonable steps within a reasonable time to correct the defect, and the defect was "a substantial proximate cause of the event" and the resulting damage. A "defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). "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).

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[2] The trial court's order granted defendant's motion for summary disposition of Count II, and granted and denied in part the motion for summary disposition of Count III. The order also dismissed defendant Potterville Sewer District on the ground that the District was not a separate entity that could be sued.

We reverse. In order to establish that defendant was not entitled to immunity for the February 2005 event,[3] plaintiffs were required to show that defendant's sewage disposal system was defective, and that the defect was a substantial proximate cause of the damage that occurred in their home. No evidence showed that the pumps at the Lockview Lift Station did not operate properly on February 15, 2005. The evidence showed that on that evening, an alarm sounded, and that the Superintendent went to the station to monitor the situation. Essentially, plaintiffs argued that the steps that defendant took on that evening, i.e., the method of operation of the system, resulted in the damage. The definition of "defect" includes a defect in the "operation" of a sewage disposal system. MCL 691.1416(e). The statute does not define "operation." Therefore, the resort to a dictionary definition is appropriate. *Willett v Charter Twp of Waterford*, ___ Mich App ___; ___ NW2d ___ (Docket No. 265264, pub'd May 2, 2006 at 9:10 a.m.), slip op at 8. The term "operation" is defined in part as: "4. the exertion of force, power, or influence; agency. 5. a process of a practical or mechanical nature." *Random House Webster's College Dictionary* (1997), p 915. Plaintiffs' contention is that the Superintendent's failure to act more quickly to contact a sump pump company caused the overflow to occur, and that therefore defendant's operation of the system was defective. However, plaintiffs failed to establish that a question of fact existed on this issue. Their assertions regarding the timing of the Superintendent's actions were based on speculation, and thus were insufficient to create a question of fact. Similarly, Perry's speculation regarding the capacity of the system did not create a question of fact. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In addition, plaintiffs failed to establish that the Superintendent's failure to act more promptly constituted a "substantial proximate cause" of the event as that term is defined. MCL 691.1416(l). This is especially true in light of the undisputed fact that several inches of snow melted and rain fell on the day the event occurred.

Plaintiffs failed to make the showing required by MCL 691.1417(3). Defendant was entitled to summary disposition of plaintiffs' claim regarding the event of February 2005.

Reversed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra

[3] Defendant does not dispute that a "sewage disposal system event" as that term is defined by MCL 691.1416(k) occurred at plaintiffs' residence.