

STATE OF MICHIGAN
COURT OF APPEALS

SID HELDER, JOSEPH BETTEN, VERNA
BETTEN, MARION BETTEN, and MARLENE
BETTEN,

UNPUBLISHED
February 2, 2006

Plaintiffs-Appellees,

v

No. 256035
Kent Circuit Court
LC No. 03-006042-CK

TOWNSHIP OF GRATTAN,

Defendant-Crossdefendant/Plaintiff-
Appellant,

and

EARTH TECH, INC,

Defendant-Crossplaintiff/Defendant.

Before: Fitzgerald, P.J. and O’Connell and Kelly, JJ.

PER CURIAM.

Defendant Township of Grattan appeals by right the trial court’s denial of its motion for summary disposition based on its assertion of governmental immunity. We affirm in part and reverse in part.

I.

In 2000, defendant township contracted with Earth Tech, Inc. to assist it with the operation and maintenance of its sanitary drain (sewer) system. In October 2000, Earth Tech expanded its services to include a review and upgrade of the system’s collection lift stations and grinder pump stations. Previously, the Kent County Department of Public Works (KCDPW) operated the system. All parties concede that, during the twenty-seven years that KCDPW operated the system, there was little, if any, “routine preventative maintenance to lift stations or

grinder pumps.” Earth Tech’s review of the sewer system identified primarily mechanical defects and deterioration and that three stations were in immediate need of repair or replacement. It also indicated a need to replace a number of autodialers.¹

Plaintiffs are cottage owners in defendant township. On approximately March 15, 2002, pump station number 5 failed to pump out the collecting wastewaters from plaintiffs’ residences causing sewer back-ups and consequential damage to plaintiffs’ residences. The failure of pump station number 5 was caused by defective wiring of the three-phase monitor. This pump station was not one of the three stations identified as needing immediate repair or replacement, but did “need work.” Plaintiffs alleged that defendant township was liable for their damages because it knew, or in the exercise of reasonable diligence should have known, about the defect in pump station number 5.

Defendant township moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) arguing that there was no genuine issue of material fact as to whether it knew, or in the exercise of reasonable diligence should have known, about the wiring defect at station number 5. In support of their theory that defendant township knew or should have known about the potential for station 5 to fail, plaintiffs asserted that one and a half years before the sewage backup, defendant township was told that the autodialer in pump station number 5 needed to be replaced. Thus, plaintiffs contended, defendant township had actual or constructive knowledge of the defect that ultimately caused the sewage overflow at plaintiffs’ cottages. Plaintiffs argued:

[T]he Township was specifically told that the very autodialer that failed *would not work* and must be replaced. Despite this specific warning, the Township failed to replace the autodialer in question.

* * *

[T]he Township was told [the autodialer] would not work and should be replaced, it failed to replace it. And the monitor did not work. The Township cannot now come forward and feign ignorance.

However, after plaintiffs’ response to defendant township’s motion for summary disposition was filed, plaintiffs’ counsel filed a letter with the trial court acknowledging a factual error in their brief:

In my brief, I treat “autodialer” and the “phase three monitor” as one and the same. These are two separate devices. According to my expert, the autodialer is an alarm. Upon activation, it dials a preset phone number to alert a technician of a failure at a pump station.

¹ An autodialer automatically dials for technical assistance and sounds an alarm once sewage levels reach a certain height.

The phase three monitor is different. It reviews the electrical power coming into the lift station. When it detects an electrical phase failure it activates the autodialer.

The defect, the existence of which the parties agree, was that some unknown person rewired the phase three monitor and altered its control logic. Therefore, then the phase three monitor detected a phase power failure, it failed to activate the autodialer.

Thus, if the autodialers were in fact replaced (as you represented on the phone), it would not necessarily address the defect in question.

At the hearing on defendant township's motion, plaintiffs' conceded that defendant township had no direct knowledge of the defective wiring and that the failure to replace the autodialer was a "moot point." Instead, plaintiffs' counsel argued:

So, there is not a whole lot of factual dispute. I'm left with two basic concepts, both of which are admittedly not strong.

Number one, that the Township – and I don't believe there's any dispute that the Township realized that as of general matters, the sewer system was in poor repair, was in disrepair, and that it was – it constituted a real problem.

[W]hether or not they took steps to address those real problems is genuinely a standard of care question that a jury must resolve. In other words, we know they had notice of problems, plural. I know they had no notice of this particular defect, but they did have ample notice that there was serious problems with the system, that Department of Public Works had not maintained it for over 20 years.

In denying defendant township's motion for summary disposition, the trial court ruled that, because defendant township had knowledge of the sewer system's "endemic, systemic problems," a question of fact existed as to whether defendant township, in the exercise of reasonable diligence, could have discovered the defective wiring.

II.

Defendant township first asserts that the trial court erred in imputing Earth Tech's knowledge of the condition of the sewer system to defendant township. We disagree. This Court reviews for clear error a trial court's factual findings and reviews de novo questions of law. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

The law is clear that the knowledge of an agent is imputed to the principal. *US Fidelity & Guarantee Co v Black*, 412 Mich 99, 126; 313 NW2d 77 (1981). In this case, defendant township contracted with Earth Tech to provide "all routine operation and maintenance" of the sewer system. Earth Tech expanded its services to "include a review and upgrade of the system's collection lift stations and grinder pump stations" and the contract required that Earth Tech provide "a written analysis of the condition of all equipment in the Facilities. Such records shall be available for inspection by the Client [defendant township] at all reasonable times."

Pursuant to the contract, defendant township required Earth Tech to “maintain other records deemed useful by Earth Tech and Client [defendant township] to monitor and control the operation of the Facilities” and specifically maintained ownership over all facility records including the “plant evaluation reports.” Also pursuant to the contract, defendant township had access to Earth Tech’s records.

Under these circumstances, including defendant township’s specific mandate that Earth Tech inspect the sewer system and report back concerning its results, Earth Tech was defendant township’s agent for the purpose of imputing Earth Tech’s knowledge about the condition of the sewer system. Therefore, the trial court did not err in imputing Earth Tech’s knowledge concerning the condition of the sewer system to defendant township.

III.

Defendant township also asserts that the trial court erred in denying its motion for summary disposition because there is no factual question remaining as to whether defendant township knew, or in the exercise of reasonable diligence should have known, about the defective wiring in this case. Specifically, defendant township argues that actual knowledge of one defect cannot constitute constructive knowledge of another, unrelated defect. We agree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing de novo a decision on a motion for summary disposition based on the lack of a material factual dispute, an appellate court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriately granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* “MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.” *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). The applicability of governmental immunity is a question of law which is reviewed de novo on appeal, *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004), as is statutory interpretation, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Defendant township argues that plaintiff failed to plead in avoidance of the governmental immunity statute, MCL 691.1416 *et seq.* In particular, MCL 691.1417(2) provides government agencies with immunity from tort liability for the 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.” The statute further provides that a person seeking compensation for “a sewage disposal event” must show:

- (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. [MCL 691.1417(3); emphasis added.]

Relevant to the issue in this appeal is the meaning and application of MCL 691.1417(3)(c). Any analysis of the applicability of governmental immunity must start with the principle that “the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed.” *Pohutski v City of Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). MCL 691.1417(3)(c) specifically refers to constructive knowledge of “the defect,” not constructive knowledge of “a defect” or “any defect.” As stated by our Supreme Court:

“The” is defined as “definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)” *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between “a” and “the” as the Legislature has directed that “[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language [”] MCL 8.3a; MSA 2.212(1). [*Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000), quoting *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998) (Taylor, J. dissenting).]

Applying these principles and definitions, it is clear that, to overcome defendant township’s immunity, plaintiff must show that defendant township had constructive knowledge of “the defect,” i.e. the defective wiring in the phase three monitor in pump station 5. Defendant township argued in the trial court and on appeal that none of the evidence supplied by plaintiffs demonstrates that the township should have known about the wiring defect in its sewer system, despite its knowledge of widespread mechanical and maintenance problems with the system. We agree. Plaintiffs have not established any connection or relationship between the mechanical problems of the system and the electrical problem that caused the sewage overflow in plaintiffs’ cottages. Nor have plaintiffs submitted any evidence to contradict the affidavit of Raymond A. Fix who attested, “[t]he defect which caused the losses was not a maintenance problem, it was the miswiring of the phase monitor control. An awareness of the claimed lack of maintenance would not have alerted the township to that electrical error.” In addition, plaintiffs have not submitted any evidence to refute Ethan Hawks’ statement, “[t]here is nothing that could have been done during our routine operations checks that would have exposed this problem.” Even the documents submitted by plaintiffs reveal that it was the mechanical equipment rather than the electrical panels that were most affected by the deterioration of the system. In sum, plaintiffs have not submitted any evidence demonstrating that the defect was discernable absent a sewer event such as the one that occurred in this case. On this record, to conclude that defendant township had constructive notice of the alleged defect would require a broad rather than narrow reading of MCL 691.1417(3)(c). Accordingly, we conclude that the trial court erred in denying defendant’s motion for summary disposition.

Affirmed in part, reversed in part.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly