

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT WILLETT,
Plaintiff-Appellant,

FOR PUBLICATION
May 2, 2006
9:10 a.m.

and

JACKIE DA PRA and ALISA WEAVER,
Plaintiffs,

v

WATERFORD CHARTER TOWNSHIP,
Defendant-Appellee.

No. 265264
Oakland Circuit Court
LC No. 04-062478-CZ

Official Reported Version

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

DONOFRIO, P.J.

Plaintiff,¹ Robert Willett, appeals as of right an order granting summary disposition in favor of defendant, Waterford Charter Township, in this action arising out of sewage backups into plaintiff's home. On appeal, plaintiff argues that the trial court erred by (1) considering evidence, instead of the pleadings alone, in granting summary disposition under MCR 2.116(C)(8), (2) determining that defendant was entitled to governmental immunity under MCR 2.116(C)(7), (3) determining that an obstruction of defendant's sewer was not a defect under MCL 691.1416(e), and (4) ruling as a matter of law that the conduct of defendant's employees did not constitute a failure to remedy the alleged defect in the sewer. Because we conclude that the trial court did not err in granting summary disposition to defendant under MCR 2.116(C)(7) on the basis of governmental immunity, and because plaintiff failed establish all the requirements of MCL 691.1417(3), specifically that defendant knew or should have known of the alleged defect, or that defendant failed to take reasonable measures within a reasonable time to remedy it, we affirm.

¹ Robert Willett, Jackie Da Pra, and Alisa Weaver filed the complaint below, but only Robert Willett is a party to this appeal.

This action arises out of a sewage discharge into plaintiff's basement. The sewer line serving plaintiff's home on Coseyburn Road was constructed in 1968 and is located within defendant's jurisdiction. On July 12, 2004, plaintiff's wife was at home at 3542 Coseyburn Road when she saw one of defendant's trucks outside their home. The truck stopped near the manhole cover next to their driveway and a man got out of the truck, lifted the manhole cover for a few seconds, and then put it back in place. Shortly thereafter, raw sewage forcefully flooded plaintiff's basement through the drains in the floor. Mrs. Willett called defendant to inform it of the sewage backup and was told that defendant was aware of a sewage problem in the area. She later spoke with Kathryn Wallace, the safety coordinator of the Waterford Department of Public Works (DPW), who informed her "that there was nothing that the township would do about the sewage backup" Another homeowner, Chris Hurst,² of 3491 Coseyburn, also reported a sewage backup at his residence to Wallace that day. Hurst's initial call to defendant on July 12, 2004, was at approximately 11:00 a.m.; Mrs. Willett's was at approximately 11:35 a.m.

Between approximately 11:00 a.m. and 11:15 a.m., defendant sent an employee, Randy Bunce, to investigate the sewage backups on Coseyburn. Between approximately 12:00 p.m. and 12:30 p.m., Bunce called defendant's office, and then Tom Coburn, defendant's superintendent of water and sewer, took geographic information system (GIS) drawings to Bunce. The GIS drawings show the location of the sewer, the location of manholes, and the direction of flow. Also, additional crew members arrived on site and found the sewer to be blocked on Walton Boulevard. The crew members opened manhole covers along Coseyburn Road looking for a dry manhole. Once Coburn and Bunce had the GIS drawings at the site, they knew which manholes to open to discover exactly where the sewer was blocked.

In the afternoon of the same day, defendant deployed a "jet truck" in an attempt to dislodge the obstruction. Defendant's crew dislodged the obstruction after going through two tanks of water using the high-pressure jet. After the obstruction was dislodged, the water in the sewer went down immediately between approximately 1:00 p.m. and 1:30 p.m. Between approximately 1:30 p.m. and 2:15 p.m., Wallace conducted an investigation of plaintiff's residence at 3542 Coseyburn, including taking photographs and providing a sewage backup report form.

Although defendant successfully "broke free" the sewer obstruction, the evidence in the record does not definitively indicate the cause of the sewer obstruction. Defendant's position is as follows: *"[S]omething was introduced into the Waterford Township sewer line that caused a backup in the sewer line. The item that was placed into the sewer line is believed to be a piece of concrete or asphalt."*

² Chris Hurst resided at 3491 Coseyburn with Alisa Weaver, who was a plaintiff below but is not a party on appeal.

Defendant prepared a digital video disc (DVD) of the sewer segments at issue³ in August 2004 using a scoping mechanism and camera that traveled along the sewer's length recording a continuous image of the inside. The DVD does not show any apparent abnormality in the sewers at issue, and the flow in the sewer segments, though slightly variable, is well below capacity. The DVD also shows still photographs of the condition of a basement after a sewage backup.

The township's procedure allowed a person reporting a backup to file a claim using a standard claim form, and the township would then have someone look into the reason for the event. In August 2004, plaintiff submitted a damage claim. Defendant denied plaintiff's claim, citing MCL 691.1416 through MCL 691.1419, contending that plaintiff failed to show that defendant's sewage disposal system had a defect and that defendant knew or should have known of the defect and failed to take reasonable steps to correct the defect.

II

Plaintiff filed a complaint stating one count for violations of MCL 691.1416 *et seq.* Plaintiff alleged that he "inquired of the Waterford crew as to the cause of the sewage disposal event" and they told him "that a large piece of concrete or asphalt was blocking Waterford's sewage disposal system." Plaintiff asserted that he "later contacted [defendant's] Supervisor, Carl Solden, who confirmed that the blockage of the sewage disposal system was caused by a large piece of concrete or asphalt."

Defendant filed its motion for summary disposition under MCR 2.116(C)(7) and (C)(8), arguing that it was entitled to governmental immunity for a backup of a sewage disposal system because plaintiff could not establish a defect in the system or that defendant knew or should have known of such a defect. In response, plaintiff argued that defendant was not entitled to governmental immunity because MCL 691.1417 provides an exception to immunity where the overflow or backup is a sewage disposal event and the governmental agency is an appropriate governmental agency.

During a hearing on defendant's motion for summary disposition, the parties acknowledged that no one really knew the exact nature of the obstruction that caused the backup. Plaintiff acknowledged that he was not alleging a construction or engineering defect in the sewer line, but alleged a negligent maintenance issue in either defendant's failure to maintain the sewer lines before the event or as a result of the manner in which defendant corrected the problem.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (8) stating as follows in its opinion and order:

³ The DVD first shows sewer number 4727, which runs at a northeast-southwest angle, along Coseyburn Road, between manhole number 3823 and manhole number 3824 at the intersection of Coseyburn Road and Plains Drive; the western end of sewer number 4727 is located east of plaintiff's home. The DVD also shows sewer number 4680 which runs north-south between manhole number 3780 on Coseyburn Road and manhole number 3781, halfway between Coseyburn Road and Walton Boulevard.

Here, it is undisputed that the overflow or backup was caused by a foreign object of unknown origin that obstructed the line of the sewage disposal system. Plaintiff[] ha[s] not alleged another cause for the problem.

The Court finds that the foreign object does not constitute a defect under the statute and has no relation to the construction, design, maintenance, operation or repair of the system. The foreign object did not become a part of the sewage disposal system itself because of the risk of damage that it may have created. There is no evidence that the system was not operating as intended or defective, merely that there was a temporary blockage to the system. Based upon the foregoing, Plaintiff[] cannot establish the essential element of a 'defect' and thus Defendant is entitled to governmental immunity.

As to Plaintiff[']s other argument that Defendant's employee acted negligently in opening manhole covers which caused additional backups in [his] basement[], the Court finds that this alleged negligence does not create an event under the Act so as to create an exception to governmental immunity. Moreover, there is no evidence that additional damage was created by the act or that the employee's actions were grossly negligent. Accordingly, Defendant's motion for summary disposition is granted.

This appeal followed.

III

"Governmental immunity is a question of law that is reviewed de novo," and decisions on summary disposition are also reviewed de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005), citing *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). Under MCR 2.116(C)(7), "all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce, supra* at 177. But such materials "shall only be considered to the extent that the[y] . . . would be admissible as evidence . . ." MCR 2.116(G)(6). "If no [material] facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce, supra* at 177, citing *Maiden v Rozwood*, 461 Mich 109, 120-122; 597 NW2d 817 (1999).

IV

Plaintiff first argues that the trial court erred when it considered evidence outside the pleadings when it decided defendant's motion under MCR 2.116(C)(8). In that regard, plaintiff further argues that defendant's motion should fail because defendant did not bring the motion pursuant to MCR 2.116(C)(10). Defendant counters that plaintiff's argument under MCR 2.116(C)(8) is irrelevant for the reason that the trial court decided defendant is entitled to governmental immunity under MCR 2.116(C)(7) and, because no material facts are in dispute, the MCR 2.116(C)(10) analysis is encompassed within the trial court's MCR 2.116(C)(7) determination and need not be brought separately under MCR 2.116(C)(10).

The record reflects that defendant moved for summary disposition under both MCR 2.116(C)(7) and (C)(8). As we stated above, for a motion under MCR 2.116(C)(7), "all well-pleaded allegations of fact must be accepted as true and construed in favor of the nonmoving party, *unless contradicted by any affidavits, depositions, admissions, or other documentary evidence . . .*" *Pierce, supra* at 177 (emphasis added). Thus, a party making a motion under MCR 2.116(C)(7) can present evidence, and there is no impropriety in the trial court considering evidence when ruling on a motion under MCR 2.116(C)(7).

It is patently obvious that the trial court considered defendant's motion for summary disposition as involving governmental immunity, and, in fact, decided the case on that basis. Because the trial court did not decide the motion on the pleadings alone, it is clear that the trial court did not decide the motion under MCR 2.116(C)(8). Therefore, plaintiff's argument lacks merit, and the trial court did not plainly err when it considered "evidence outside of the pleadings" in deciding the motion for summary disposition.

The Legislature in adopting MCL 691.1416 through MCL 691.1419 intended to provide limited relief to persons who suffer damages as a result of a "sewage disposal system event." MCL 691.4117(1). The Legislature provided in MCL 691.1417(2) that "[s]ections 16 to 19 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." Because the Legislature has provided that §§ 16 through 19 abrogate common-law exceptions to immunity, determinations under those sections are necessarily implicated in the immunity determination and are susceptible to an MCR 2.116(C)(7) adjudication. And, where material facts are not in dispute, an action brought pursuant to MCL 691.1416 through MCL 691.1419, the MCR 2.116(C)(7) analysis parallels the MCR 2.116(C)(10) analysis and is a question of law for the trial court. Factual development under each of the subsections may be required.⁴ Although factual development may be necessary, motions brought to defeat claims under MCL 691.1416 through MCL 691.1419 are properly raised under MCR 2.116(C)(7).

V

Plaintiff next argues that the trial court erred when it determined that defendant was entitled to governmental immunity. Plaintiff, relying on MCL 691.1417(2), specifically argues that defendant is not immune because the required elements to avoid immunity have been established, i.e., that the sewage backup was an event under the statutory definition and that defendant is an appropriate governmental agency under the statutory definition. Defendant responds that in order to avoid governmental immunity, plaintiff was required to show that defendant was an appropriate governmental agency, the disposal system had a defect, the agency knew or should have known of the defect, the agency failed to take reasonable steps in a reasonable time to remedy the defect, and the defect was a substantial proximate cause of the injury by operation of MCL 691.1417(3). Defendant asserts that, because plaintiff was unable to

⁴ See MCL 691.1417(2) and MCL 691.1416(k) and (l).

establish a defect in the sewage disposal system and could not establish that defendant knew of a defect or failed to take steps to remedy it, the trial court properly found defendant was entitled to governmental immunity.

"When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). To effectuate the Legislature's intent, the Court must first examine the statute's language, which, if clear and unambiguous, must be enforced as written. *Laurence G Wolf Capital Mgt Trust v City of Ferndale*, 269 Mich App 265, 270 ; 713 NW2d 274 (2005); *Wesche v Mecosta Rd Comm*, 267 Mich App 274, 279; 705 NW2d 136 (2005). "We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain Legislative intent only if the statutory language is ambiguous." *Pohutski, supra* at 683. A statute should not be interpreted to render any statutory language surplusage or nugatory. *Id.* at 684.

The Legislature promulgated MCL 691.1416 through MCL 691.1419 "[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages . . . caused by a sewage disposal system event . . ." MCL 691.1417(1). Under 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). An "appropriate governmental agency" is defined as "a governmental agency that, at the time of the sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage . . ." MCL 691.1416(b).

Although plaintiff relies on MCL 691.1417(2) in arguing that immunity can be avoided by a claimant showing only two things: a disposal system event and that the defendant is an appropriate governmental agency, MCL 691.1417(1) broadly requires that "a claimant . . . shall comply with this section," and MCL 691.1417(3) imposes *several* requirements for a claimant to avoid governmental immunity for a sewage disposal system event. MCL 691.1417(3) provides:

If a claimant . . . believes that an event caused . . . injury, the claimant may seek compensation . . . 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.

A "defect" is defined as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). Accordingly, under MCL 691.1417(3), the plaintiff must show the foregoing *five* elements in order to avoid governmental immunity. Plaintiff has provided no reason for us to believe that MCL 691.1417(2) is intended to obliterate the requirements of MCL 691.1417(3). And, plaintiff's reading of MCL 691.1417(2) ignores MCL 691.1417(4), which provides additional requirements:

In addition to the requirements of subsection (3), to obtain compensation for property damage or physical injury from a governmental agency, a claimant must show both of the following:

(a) If any of the damaged property is personal property, reasonable proof of ownership and the value of the damaged personal property

(b) The claimant complied with section 19 [concerning notice of the claim].

The Legislature unmistakably set forth the requirements that a claimant must satisfy in order to assert a claim for a sewage disposal system event and clearly enumerated them in MCL 691.1417(3). While plaintiff points to MCL 691.1417(2), which does suggest that there are only two elements required to overcome immunity, MCL 691.1417(2) cannot be read to override the clear mandates of MCL 691.1417(1), (3) and (4). It would be an illogical reading of § 1417 to conclude that the two elements required to overcome immunity stated in subsection 2 render superfluous the carefully detailed factors set forth in subsections 3 and 4. *Pohutski, supra* at 684. Accordingly, plaintiff was required to satisfy the five elements required under MCL 691.1417(3).

Plaintiff next argues that the trial court erred in determining that the obstruction of the sewer line was not a defect as contemplated in MCL 691.1417(3)(b). Plaintiff conceded at the hearing that there was no construction or design defect. Rather, plaintiff contended that there was a maintenance defect. Specifically, plaintiff asserted that defendant failed to keep the sewer in its normal, free-flowing condition. In other words, plaintiff claimed an imperfection in defendant's maintenance of the sewer.⁵ Thus, under the facts presented, the question before us is whether a foreign object believed to be concrete or asphalt introduced into the sewer system by an unknown third party creating an obstruction in the sewer constitutes a maintenance defect.

The statute defines "defect" as "a construction, design, maintenance, operation, or repair defect." MCL 691.1416(e). The statute does not further define the terms used to define "defect."

⁵ Plaintiff included the defect allegation in the complaint, albeit without the specification of being a maintenance defect. Accordingly, taking the pleadings in a light most favorable to the nonmoving party, *Pierce, supra* at 177, plaintiff alleged a maintenance defect.

Given that the definition of "defect" itself uses the term "defect," and the second use of the term is undefined in the statute, we reference dictionary definitions. *Laurence G Wolf, supra* at 271; *Pierce, supra* at 178. A "defect" is defined as "a fault or shortcoming; imperfection." *Random House Webster's College Dictionary* (1997). "Maintenance" is defined as "the act of maintaining," and "maintain" is defined as: "1. to keep in existence or continuance; preserve. 2. to keep in due condition, operation, or force. 3. to keep in a specified state, position, etc." *Id.*

The record reflects that someone introduced a large concrete or asphalt object into defendant's sewer line that caused a backup in the sewer system. There is no allegation or evidence that defendant in any way created or contributed to the obstruction. Defendant's response to the obstruction indicates that it viewed the obstruction as a fault or a defect requiring immediate maintenance. After being notified of the sewer backup, defendant deployed a "jet truck" to attempt to dislodge the obstruction and restore proper operation of its sewer lines. Thus, under the plain language of the statute, there was evidence to support plaintiff's allegation that the "sewage disposal system had a defect." MCL 691.1417(3)(b). We point out that plaintiff did not allege that defendant did anything to create the obstruction, or that even an ideal daily maintenance program could have prevented this obstruction. The record displays that, apparently, someone placed a large obstruction, believed to be concrete or asphalt, in the sewer lines. Reasonable minds could not differ that no reasonable maintenance program could have prevented the rogue act of a third party in creating the "defect"; however, the Legislature has not included a "fault" element in MCL 691.1417(3)(b). The Legislature required only that a plaintiff allege the mere existence of a "defect" in the sewage disposal system according to the plain language of MCL 691.1417(3)(b). Thus, we must apply the plain and unambiguous language of the statute and, because the facts are not in dispute, conclude that the obstruction of the sewer constituted a defect under MCL 691.1417(3)(b), and that the trial court erred in finding, as a matter of law, that the obstruction by a foreign object did not constitute a defect.

As we stated above, plaintiff was required to satisfy *all* the factors listed in MCL 691.1417(3).⁶ The next required element at issue is that defendant knew or in the exercise of reasonable diligence should have known about the defect. MCL 691.1417(3)(c). Plaintiff merely alleged that defendant "knew, or in the exercise of reasonable diligence should have known, about the defect," but failed to present any evidence to support his allegation. After reviewing the record evidence, we can find no factual basis to conclude that defendant could have known about this obstruction before or when it occurred because the obstruction was apparently the result of a unilateral act of a third party.

The next required element at issue is that plaintiff must prove that defendant "failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." MCL 691.1417(3)(d). Again, although plaintiff so alleged in his complaint, plaintiff failed to present evidence to support his allegation. In fact, contrary to plaintiff's allegations, the evidence indicates that within minutes after receiving notice of the problem, defendant

⁶ The parties do not contest MCL 691.1417(3)(a), that defendant was an appropriate governmental agency.

dispatched its crew to the area, and the crew remedied the problem promptly. In the early afternoon of the same day that plaintiff's wife reported the sewage backup, defendant deployed a jet truck that dislodged the obstruction. Defendant accomplished this by approximately 1:30 p.m. after receiving the telephone call regarding the problem at approximately 11:00 a.m. We conclude that reasonable minds could not differ that 2 1/2 hours to locate and resolve a sewer backup of unknown cause or origin is a reasonable amount of time. Thus, plaintiff failed to support the fourth required element with evidence.

Plaintiff next argues that the trial court erred in determining that the response of defendant's crew did not constitute a failure to take reasonable steps to correct or remedy the maintenance defect. A careful review of the trial court's findings reveals that the trial court never found that the response of defendant's crew did not constitute a failure to take reasonable steps to correct a maintenance defect. Rather, the trial court held: "As to Plaintiffs' other argument that Defendant's employee acted negligently in opening manhole covers which caused additional backups . . . the Court finds that this alleged negligence does not create an event under the Act so as to create an exception to governmental immunity."

In this instance, a sewage disposal system event, or simply an "event," is "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). The trial court provided no reasoning for its conclusion that alleged negligence in opening manholes, causing additional backups, was not an event. The definition of "event" does not exclude a backup caused by an effort to remedy (or to find the cause of) a prior or existing backup. MCL 691.1416(k). The trial court therefore erred in concluding as a matter of law that the alleged additional backups, allegedly caused by opening manhole covers were not "events."

However, in order to establish liability, a claimant asserting an event must show that defendant "failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." MCL 691.1417(3)(d). Here, plaintiff lacks evidence that defendant failed to respond promptly and reasonably to remedy the alleged maintenance defect. Defendant successfully dislodged the obstruction and the "water went down immediately," only about 2 1/2 hours after defendant received the first notice. Thus, reasonable minds could not differ that defendant's response was reasonably prompt and effective.

Plaintiff argues that the method initially employed by defendant in attempting to correct the maintenance defect, i.e., opening the manhole covers without the benefit of the GIS drawings, was unreasonable. Plaintiff has proffered no evidence that opening the manhole covers was anything other than an initial response and no evidence that any other method could have been employed before the GIS drawings arrived. Reasonable minds could not differ that opening manhole covers to search for the unknown problem was a logically sound response. Also, plaintiff provided no evidence to illustrate how merely opening manhole covers could have caused an additional sewage backup that would not otherwise have occurred. Plaintiff lacks any evidence that opening the manhole covers caused further sewage backups that would not otherwise have occurred by reason of the existing obstruction. And plaintiff fails to specify how the successful dislodging could have been accomplished more promptly. Accordingly, plaintiff lacks evidence that defendant failed to take reasonable steps within a reasonable time, a showing required by MCL 691.1417(3)(d).

Although the trial court incorrectly concluded that alleged negligence in opening manholes, causing additional backups, was not an "event," the trial court reached the right result for the wrong reason, because plaintiff failed to show that defendant failed to take reasonable steps within a reasonable time to remedy the alleged maintenance defect in the sewer. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

We conclude that the trial court properly held that plaintiff failed to satisfy the requirements of MCL 691.1417(3). Even though the trial court was incorrect in its finding that the obstruction failed to constitute a "defect" in the sewage disposal system under the language of MCL 691.1417(3)(b), because plaintiff failed to meet all the requirements of MCL 691.1417(3), the trial court reached the right result for the wrong reason and summary disposition was appropriate. *Gleason, supra* at 3.

VI

The trial court did not err in considering "evidence outside of the pleadings" in granting defendant's motion for summary disposition because the motion was granted under MCR 2.116(C)(7), not (C)(8). The trial court did not err in granting summary disposition to defendant under MCR 2.116(C)(7) on the basis of governmental immunity because plaintiff failed to meet all the requirements of MCL 691.1417(3), specifically a showing that defendant knew or should have known of the alleged defect, or that defendant failed to take reasonable measures within a reasonable time to remedy it.

Affirmed.

Kelly, J., concurred.

/s/ Pat M. Donofrio

/s/ Kirsten Frank Kelly