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2015 IL App (3d) 140669-U

Order filed December 1, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

WILLIAM CLARK and JULIA CLARK,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiffs-Appellees,)	Bureau County, Illinois,
)	
v.)	Appeal No. 3-14-0669
)	Circuit No. 09-L-36
VILLAGE OF LAMOILLE,)	
)	The Honorable
Defendant-Appellant.)	Marc P. Bernabei,
)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* In a case involving a civil action based on the alleged negligent maintenance of a storm sewer and drain, the circuit court ruled that the defendant municipality was not immune from the action. The jury later found the municipality 60% liable for the plaintiffs' damages. The appellate court reversed, ruling that the municipality was in fact immune from the action pursuant to section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2008)).

¶ 2 The plaintiffs, Julia and William Clark, filed a negligence action against the defendant, the Village of LaMoille, alleging that they suffered damages due to the Village's negligent

maintenance of a storm sewer and drain. After a jury trial, the jury found the Village 60% liable and the Clarks 40% liable and assessed the Clarks' recoverable damages at \$117,364. The circuit court denied the Village's motions for a new trial and judgment notwithstanding the verdict, and the Village appealed. On appeal, the Village argues that the circuit court erred by not granting the motion for judgment notwithstanding the verdict. Specifically, the Village contends that: (1) it was entitled to immunity under section 2-201; (2) the Clarks failed to prove that the Village's alleged failure to maintain the storm sewer drain caused the flooding on their property; and (3) the Clarks failed to prove that their damages were proximately caused by the three specified flooding events, as opposed to earlier, non-actionable flooding events. We reverse.

¶ 3

FACTS

¶ 4

On September 11, 2009, the Clarks filed a civil complaint against the Village, which alleged that they suffered property damage due to the Village's negligent maintenance of a storm sewer and drain on West Railroad Street. The Clarks, who lived at 510 West Railroad Street, claimed that on nine dates between July 18, 2007, and March 27, 2009, their property flooded due to heavy rains. The complaint alleged that despite numerous complaints and requests for repairs by the Clarks between June 2002 and March 2009, the Village failed to investigate and repair the drain and the Clarks' property flooded as a result.

¶ 5

After a motion to dismiss was filed by the Village, the circuit court dismissed all claims related to events taking place before September 11, 2008, based on the one-year statute of limitations contained in section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101 (West 2008)). Thus, four of the nine dates on which rain had caused flooding events were removed from the Clarks' case.

Through two amended complaints and a motion to voluntarily dismiss, the applicable flooding events occurred on September 13, 2008; February 26, 2009; and March 6, 2009. In addition, no acts or omissions of the Village prior to September 11, 2008, could give rise to liability because of the one-year statute of limitations.

¶ 6 During pretrial matters, the Village filed a motion for summary judgment in which it alleged, *inter alia*, that it was immune from liability based on section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West 2008)) because it engaged in discretionary policy decisions regarding the drain on West Railroad Street. The motion also claimed that the Clarks could not establish proximate cause in that: (1) the flooding had been caused by extreme weather events and not the Village's conduct; or (2) the damages could have been caused by flooding events occurring at times other than September 13, 2008, February 26, 2009, and March 6, 2009.

¶ 7 After a hearing, the circuit court denied the Village's motion for summary judgment, except for any claim that the Clarks made that the Village had a duty to upgrade the sewer system. Among the court's rulings were that issues of fact existed with regard to the Village's alleged failure to investigate and repair and that the jury must be allowed to decide the issues of proximate cause and negligence, including whether the three flooding events alleged in the complaint were responsible for the damages suffered by the Clarks.

¶ 8 Further, with regard to the question of immunity under section 2-201, the court found that "the obligation to investigate and repair timely is dictated by Section 3-102 [of the Tort Immunity Act, 745 ILCS 10/3-102 (West 2008)] because that obligation to investigate and maintain -- that is, to repair -- is ministerial, not discretionary." The court discussed relevant case law and emphasized that while the jury would be free to decide that the Village was not

negligent in its response to the sewer issue, as a matter of law the Village's conduct did not constitute a discretionary policy decision.

¶ 9 The case went to a jury trial beginning in March 2014. Julia Clark testified that she used to live at 501 West Railroad Street in LaMoille. She and her husband moved in there in 1999. In 2002, the catch basin on the property began retaining water after rainfall. There was no significant puddling or pooling of water as a result, nor was there any damage to the property or the house. Julia spoke to Terry Cromwell in 2002 about the catch basin and inquired about its purpose and why it had been holding water. Cromwell, the Village's police officer and part-time maintenance worker, told Julia to take the matter up with the Village. Julia also testified that Cromwell would drive past the house while looking for flooding after rainfall in the Village.

¶ 10 Julia testified that more significant flooding occurred in July and August 2007 and February and July of 2008. In August 2007, she contacted Village Mayor Mike Pinter at his home and told him her catch basin was holding water. She thought that she probably talked with Cromwell around that time as well. Julia stated that those floods caused lawn and yard damage, but no damage to the house, even though the water reached their garage and the crawl space under the house.

¶ 11 Julia testified that a flood occurred around September 13, 2008, which resulted in 16 inches of water on the property and 37 inches of water in the crawl space and which took at least eight days to recede. On September 18, 2008, Pinter, Cromwell, and the Village's maintenance worker, Tom Lovgren, showed up at the Clarks' property. Julia told Pinter what had happened and that the flooding issues were chronic. She expressed urgency in her request for remediation, and Pinter "kind of just stood there and stared at me." Cromwell became agitated during the conversation and began yelling at Pinter; Cromwell was "pointing his finger at the house saying,

that's not our baby; that's not our baby." Lovgren stated that he was not going to dig anything up because of the mess it would cause. Julia also told them that she had informed Pinter about the flooding problems, but that "you didn't check it out when I called you at home." Julia testified that as a result of the September 13, 2008, flood, the Clarks sustained damages to their land and some of their personal property.

¶ 12 Julia testified that another flood occurred around February 26, 2009, which caused damage to the yard, the driveway, and some personal property in the garage. The water from this flood took eight days to recede.

¶ 13 Julia testified that the property flooded again on March 6, 2009. The Clarks had approximately two feet of water in the crawl space, and the water remained on the property for approximately six to eight days. She had a conversation with Lovgren on the property around March 11, 2009. The Village brought a pump to drain the catch basin. Julia testified that this flood caused damage to the land, the pool, the driveway, and some personal property in the garage.

¶ 14 Julia stated that the Village fixed a crushed or clogged drain pipe near the Clarks' property in late March 2009. After that repair was made, the Clarks did not experience any significant flooding issues.

¶ 15 Julia's husband, William Clark, testified he helped build the house around 1998. His testimony regarding the flooding of the property was largely in line with Julia's testimony. He added that there were no flooding issues on the property during construction, and the flooding issues did not begin until 2002. The property flooded several times before 2008, but none of those events lasted longer than a couple of days. With regard to the floods in February and

March 2009, the water from the February flood froze over and lingered until the March flooding event, which left the property under water for approximately 14 days.

¶ 16 William also claimed that he spoke to Lovgren and Cromwell in 2007 about the flooding, and they told him that it was not their property.

¶ 17 Edwin King, an engineer and land surveyor, testified during the Clarks' case-in-chief. He met with the Clarks in the fall of 2008 when their property was inundated with storm water. King returned after the flood waters had receded. His observations led him to believe that the drain tile underneath Railroad Street was broken, as water was not passing through the drainage system. He called Pinter and suggested that the Village repair the drain tile. Pinter told him the Village was going to repair it in the spring of 2009.

¶ 18 King opined that the broken drain tile was causing the flooding on the Clarks' property. When asked if the property would have flooded if the drain tile had been functioning properly, he did not directly answer the question. Rather, he simply stated that it was broken in 2008-09 and the property flooded, and when he was at the property again in 2013 (four years after the fix), the property did not flood.

¶ 19 Julia, William, and their children moved out in July 2009 at the suggestion of their physician and after experiencing detrimental health effects; these effects subsided after they moved. A mold remediation expert, James Zborowski, testified on behalf of the Clarks regarding the mold issues with their house. He was first retained by the Clarks in June 2009 to perform a mold inspection. Zborowski opined that the flood described by the Clarks that took place in September 2008 could have caused the mold and damage he observed. He also speculated that the 2007 and 2008 flooding events could have caused the mold and damage as

well, but he could not be sure because he did not observe the house at that time. He further admitted that he did not know which floods caused the mold and damage.

¶ 20 Cromwell testified that he was the Village's police officer as well as a part-time maintenance worker. He stated that the Clarks notified him of their flooding problem in 2008. He could not recall if they had contacted him prior to that time. He also testified that when they performed the repair, the drain pipe was collapsed about half way.

¶ 21 Lovgren testified that he learned of the Clarks' flooding problems around the fall of 2008 and he went to investigate. He stated that the Village's process was that when he found a problem, if the repair was of a nominal cost, he would simply fix it. However, if the project would be more substantial and more costly, he would have to get approval from the Village Board to perform the repair. In this instance, he put his hand into the Clarks' storm basin drain and felt that it was not moving as much water as it should. He reported this finding to the Village Board, who told him to fix the problem when the weather improved.

¶ 22 Pinter testified that he was LaMoille's mayor from 2005 to 2013, and that he had been on the Village Board for 22 years. The Clarks first contacted him about their flooding problems in September 2008. He testified that the Village's process for repairs was that when a problem was reported to the Village, Lovgren would investigate. Lovgren would perform the repair if the problem was minor, but he would have to go to the Village Board if the problem was major.

¶ 23 Pinter testified that the Village Board's minutes from October 28, 2008, stated that the Board discussed a possible blocked tile on Railroad Street, and Lovgren was tasked with investigating the problem.

¶ 24 On cross-examination, Pinter testified that he was concerned that the Village was going to have to dig up Railroad Street to perform the repair, and that the decision was made to delay

the repair until the spring of 2009 in part because they did not want the road to be torn up all winter.

¶ 25 David Horton testified that he was a licensed professional engineer who had been retained by the Village. He visited the Clarks' property in February 2013. He testified regarding an analysis he performed of the drainage on the Clarks' property; he concluded that even if the drain structure had been working perfectly at the time of the 2008 flooding event, the Clarks' property would have still flooded. He opined that the Clarks' catch basin was not adequate for the amount of drainage going through the property. With regard to the 2009 flooding events, he stated that the flooding also could have happened even if the drain structure had been working perfectly.

¶ 26 At the close of the trial, the jury found the Village liable for 60% of the damages suffered by the Clarks. The Village filed a posttrial motion for a new trial or judgment notwithstanding the verdict, which the circuit court denied in its entirety. The Village appealed and has decided to challenge only the court's denial of the motion for judgment notwithstanding the verdict.

¶ 27 ANALYSIS

¶ 28 On appeal, the Village argues that the circuit court erred by not granting the motion for judgment notwithstanding the verdict. Specifically, the Village contends that: (1) it was entitled to immunity under section 2-201; (2) the Clarks failed to prove that the Village's alleged failure to maintain the storm sewer drain caused the flooding on their property; and (3) the Clarks failed to prove that their damages were proximately caused by the three specified flooding events, as opposed to earlier, non-actionable flooding events.

¶ 29 A court should not grant a judgment notwithstanding the verdict "unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant

that no contrary verdict based on that evidence could ever stand." *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 109 (1997). If reasonable minds could differ as to the inferences and conclusions that arise from the evidence, the grant of a judgment notwithstanding the verdict is inappropriate. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999).

"A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. [Citations.] Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way. [Citations.]" *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53 (1992).

We review a circuit court's decision on a motion for judgment notwithstanding the verdict under the *de novo* standard. *McClure*, 188 Ill. 2d at 132.

¶ 30 The Village's first argument on appeal is that it was entitled to immunity under section 2-201 of the Tort Immunity Act, and the circuit court therefore should have granted the motion for judgment notwithstanding the verdict. The Village contends that the Village Board's decision as to when to repair the drain tile constituted a discretionary policy decision such that the Village was shielded from any liability for the damages sustained by the Clarks.

¶ 31 The Clarks respond that section 2-201 was not intended to be read so expansively as to immunize any act of repair, or omission of such an act, that a municipality decides to take. The Clarks emphasize that the Village had been aware for years of the problems with the drainage tile

by the Clarks' property on Railroad Street, and that a failure to maintain the drainage tile for years plus a decision to delay the repairs for an additional six months did not qualify the Village for immunity under section 2-201.

¶ 32 In this case, there is no question that the Village had a duty to maintain the sewer system, which included repair work, as municipalities are statutorily mandated to exercise care in the maintenance of their property:

"Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102 (West 2008).

¶ 33 In certain circumstances, the Tort Immunity Act can shield municipal employees and governments from liability for a failure to maintain a known unsafe condition. Section 2-201 of the Act provides that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2008). Pursuant to section 2-

109, this immunity also extends to local public entities. 745 ILCS 10/2-109 (West 2008) (stating that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable").

¶ 34 To be entitled to immunity under section 2-201, an entity "must show that its act or omission was both an exercise of discretion and a policy determination, as opposed to being ministerial." *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 803 (2008). Policy decisions are decisions that "require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *West v. Kirkham*, 147 Ill. 2d 1, 11 (1992). Discretionary acts "involve the exercise of personal judgment in deciding whether to perform a certain act or in what manner the act should be conducted." *Robinson v. Washington Township*, 2012 IL App (3d) 110177, ¶ 10. In contrast, "ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995). Our supreme court "has long recognized that the distinction between discretionary and ministerial functions resists precise formulation, and that the determination whether acts are discretionary or ministerial must be made on a case-by-case basis." *Snyder*, 167 Ill. 2d at 474. Further, because the Tort Immunity Act is in derogation of the common law, its provisions must be strictly construed against the entity seeking immunity. *Id.* at 477.

¶ 35 In *Trotter v. School District 218*, 315 Ill. App. 1 (2000), the First District noted the paramount consideration in determining a question of whether section 2-201 conferred immunity:

"Critical to the determination of whether section 2–201 immunity applies is whether the plaintiff's injury results from an act or omission by the defendants that was ministerial or that was the result of the defendants' determining policy when acting in the exercise of discretion. If the injury results from a ministerial act or omission, then the defendants are not entitled to section 2–201 immunity. If the injury results from an act or omission of defendants in determining policy in the exercise of discretion, then the defendants are immune from liability under section 2–201." *Trotter*, 315 Ill. App. 3d at 14.

¶ 36 While section 3-102 mandates, *inter alia*, that municipalities maintain their property in a reasonably safe condition, no statutory or regulatory guidelines exist that mandate that maintenance and repair work be done in a set manner.

¶ 37 The plain language of this section shows that a public entity's duty to maintain can be satisfied by responding on an *ad hoc* basis to actual or constructive notice of a condition that is not reasonably safe. The section does not mandate the creation and implementation of regularly scheduled inspection and maintenance. Nor does it require that a policy be in writing. The village, which is very small and has only one full-time maintenance employee, has an overarching policy pursuant to which repairs are made by individual discretionary decisions when the village becomes aware of the existence of a problem in need of repair. Thus, the critical inquiry regarding 2-201 immunity for the relevant flooding is not when the village knew of the flooding on the Clark's property but when it knew that some condition within its responsibility and control could be a factor in that flooding. 745 ILCS 10/3-102 (West 2008) (stating that a municipality

"shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition"). There is nothing on these facts or in this record to indicate that the Village had notice of any problem with its storm sewer and drain until after the September 2008 flood.

¶ 38 Under these circumstances, we hold that the circuit court erred when it denied the Village's motion for judgment notwithstanding the verdict. The Village was not liable for any damages resulting from the September 2008 flood, and it was immune from any claims related to the floods that occurred in February and March 2009.

¶ 39 Our ruling on the Village's first argument obviates the need to address its other two arguments.

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court of Bureau County is reversed.

¶ 42 Reversed.