STATE OF MICHIGAN

COURT OF APPEALS

JEROME SCHULTE, CLAIRE SCHULTE, JOHN AZZOLINI, ANNE AZZOLINI, JERROLD HERMAN, ELSIE HERMAN, BERNARD HUANG, SUCHIN HUANG, MIKYUNG LEE, KYONG-HOON LEE, JIM MOHR, CHARLES OLSEN JR., CONSTANCE OLSEN, JOHN SCHENK, NANCY SCHENK, CHARD UHER, and LIBBY UHER,

Plaintiffs-Appellants,

and

HARVEY C. BAUSS JR., HELEN W. BAUSS, IB BENTZEN-BILKVIST, and JUDY MOHR,

Plaintiffs,

v

CITY OF ANN ARBOR,

Defendant-Appellee.

UNPUBLISHED
September 1, 2011

No. 298290
Washtenaw Circuit Court
LC No. 09-000048-NZ

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

In this action alleging an exception to governmental immunity for a sewage disposal system event under MCL 691.1417, plaintiffs-appellants ("plaintiffs") appeal as of right the trial court's opinion and order granting defendant City of Ann Arbor summary disposition under MCR 2.116(C)(7) and (C)(10). We affirm.

I

Plaintiffs' claims arise out of an October 3, 2008, water main break, which allowed water to enter a sanitary sewer manhole ("manhole 26") and flow through a portion of the sanitary sewer, into plaintiffs' private sewer leads, and, eventually, into the basements of their homes.

Denny Zink, a supervisor in defendant's water department, received a telephone call at his home about the water main break under Yellowstone Drive. Zink received the call at approximately 4:00 a.m. and arrived at the reported location of the break within an hour. He observed water coming out of the road through small cracks. The water was primarily coming out at the curb line and flowing downhill to the east. He closed the closest water main valve as completely as possible, as it was impossible to close it completely without another person, and then partially closed a second valve. According to Zink, leaving the second valve partially open was standard procedure for preventing back flow or siphoning of contaminated water into the water line.

Zink then telephoned another employee of defendant, Jim Gilbreath, and said that if any residents complained of low water pressure to inform them that there was a water main break, which would be repaired. Thereafter, Zink drove to defendant's service center. Just before 6:30 a.m., he received a call from Gilbreath, who informed him that a resident had complained of water backing up in a basement. Zink immediately instructed his work crew members, who had just arrived to begin work for the day, to drive to Yellowstone and repair the water main break as quickly as possible. He believed that the crew arrived at the break location between 6:50 and 7:00 a.m. Crew members Jeffrey Butts and Mark Shelhart were the first to arrive.

According to Butts and Shelhart, there were actually two water main breaks, collectively referred to as one. The breaks were located approximately eight to ten feet from manhole 26.[1] When they arrived, there was water flowing down the street. They opened the cover to manhole 26 and saw water flowing in the manhole. The water was flowing between the manhole ring and cement joint into the manhole. Shelhart explained that the ring sits in mortar. The crew immediately shut off the water main valves located on either side of the break, stopping the flow of water inside the manhole. They then dug a hole with a backhoe and repaired the water main break. They also made repairs to the mortar around the manhole ring. Butts explained that the water from the break had pushed up the pavement around the manhole, lifting part of the manhole ring and cover and thereby allowing water to flow inside. It was unnecessary to fix the ring and cover themselves, as they "just sat back down" when the water subsided.

Plaintiffs, whose basements were flooded with water from the Yellowstone water main break, filed their complaint in January 2009. In count I plaintiffs alleged a sewage disposal system event and in count II an unconstitutional taking. Thereafter, defendant filed a motion for summary disposition of both counts. In December 2009, the trial court dismissed count II of plaintiffs' complaint and denied defendant's motion for summary disposition of count I without prejudice.

In April 2010, defendant filed a second motion for summary disposition of count I under MCR 2.116(C)(7) and (C)(10). In a May 5, 2010,[2] opinion and order, the trial court granted

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[1] The parties have submitted drawings of the water and sanitary sewer systems under Yellowstone for our review. Although it is difficult to discern on the drawings, defendant asserts that both water main breaks were just to the east of manhole 26.

[2] The order was signed on May 3, but filed on May 5.

defendant's motion. The court held that the water main break, not a defect in the sewage disposal system, caused plaintiffs' basements to flood. There was no credible evidence of a system defect, and even if there was a defect, there was no evidence that defendant knew or should have known of one. Therefore, plaintiffs' claims were barred by governmental immunity.

II

Plaintiffs argue on appeal that the trial court erred in granting defendant's second motion for summary disposition. We disagree.

The trial court awarded defendant summary disposition under MCR 2.116(C)(7) and (C)(10). We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 119-120. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity. *Maiden*, 461 Mich at 118. To survive a motion under MCR 2.116(C)(7), "the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). The trial court must consider all admissible, documentary evidence submitted by the parties and accept all well-pleaded allegations as true, unless contradicted by documentation submitted by the opposing party. *Maiden*, 461 Mich at 119. A trial court's determination regarding the applicability of a statutory exception to governmental immunity involves a question of law subject to de novo review. See *Robinson v Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009).

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides a broad grant of immunity from tort liability to government agencies, absent the applicability of a statutory exception, when such agencies are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). The sewage disposal system event exception to governmental immunity, MCL 691.1417, amends the GTLA "to provide a remedy for damages or physical injuries caused by a sewage disposal system event." *Pohutski v City of Allen Park*, 465 Mich 675, 697; 641 NW2d 219 (2002); see MCL 691.1417(1). Under subsection (2) of MCL 691.1417, 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." MCL 691.1417(2).

Subsection (3) of MCL 691.1417 requires a plaintiff to show five elements in order to avoid governmental immunity under the sewage disposal system event exception. *Willett v*

Waterford Charter Twp, 271 Mich App 38, 49-50; 718 NW2d 386 (2006). Subsection (3) provides:

> If a claimant . . . believes that an event caused property damage or physical 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 "sewage disposal system" means:

> . . . all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drainage system under the jurisdiction and control of a governmental agency. [MCL 691.1416(j).]

A "sewage disposal system event" or "event" is defined, in part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). A "defect" means "a construction, design, maintenance, operation, or repair defect." MCL 691.1716(e).

In granting defendant summary disposition, the trial court held that the water main break under Yellowstone, not a defect in defendant's sewage disposal system, caused plaintiffs' basements to flood and that plaintiffs had presented no credible evidence of a system defect. Therefore, plaintiffs could not establish the second element of the sewage disposal system event exception to governmental immunity. See MCL 691.1417(3)(b). On appeal, plaintiffs assert that defendant's sewage disposal system did, in fact, have a defect. We agree with the trial court, however, that plaintiffs have failed to allege facts establishing a system defect.

Plaintiffs first assert on appeal that defendant failed to maintain manhole 26. According to plaintiffs, defendant's failure to maintain resulted in deterioration of the manhole and "significant inflow and infiltration of water" from the water main break. The only evidence plaintiffs point to in making this assertion are the statements of their expert witness, Michael T. Williams, in paragraphs 17-17.2 of his November 10, 2009, affidavit.

Defendant argues that Williams' conclusions must not be afforded any weight because he is not qualified as an expert in sanitary sewer system and water system operation, maintenance, or repair, and because his conclusions have no credible factual support. Although a witness's qualifications and methods need not be incorporated into an affidavit submitted in support of, or opposition to, a motion for summary disposition, and the determination whether a witness is qualified to testify as an expert under MRE 702 is ultimately reserved for trial, see *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010), conclusory averments are insufficient to establish a genuine issue of material fact, *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991), even when the averments are made by a proposed expert. Here, the trial court did not specifically address whether Williams' conclusions would be admissible as expert witness testimony at trial. The court did, however, state that "there is no credible evidence to establish a pre-existing defect."

We agree with defendant's assertion, and the trial court's implicit finding, that even if Williams could testify as an expert at trial, his conclusions are unsupported by facts of record. In footnote five of his affidavit, Williams stated: "Facts not specifically referenced to an exhibit but contained in this document are facts that I have been asked to assume to be true . . . Counsel has represented that he will offer evidence to prove the truth of these assertions at trial." Williams cited no factual support for his conclusion that defendant failed to properly maintain manhole 26 and "allowed it to deteriorate to the point of substantial failure," other than the fact that water flowed into the manhole. At his January 25, 2010, deposition,[3] when asked to sum up his conclusions, Williams testified that he based his opinion that the manhole was not in proper repair on the fact that water had invaded it, and that had the manhole been properly maintained, there would have been no invasion, or at least no significant invasion. Defendant is correct that this conclusion is akin to the doctrine of *res ipsa loquitur*, which "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 155; 405 NW2d 863 (1987). Here, the mere fact that water entered manhole 26 is insufficient to establish that the manhole was defective and, more specifically, that such defect arose out of defendant's alleged failure to maintain. Plaintiffs have not presented any evidence that water flowing from a water main break into a manhole would generally only occur due to inadequate maintenance.

Williams further averred in paragraphs 17-17.2 of his affidavit that defendant breached "Standard 33.94" by failing to properly maintain manhole 26. He references section 33.94 of the "10 States Standard for Wastewater Facilities" (2004 edition), which is commonly known as the "Ten States Standards." As noted by defendant, however, when manhole 26 was designed and constructed in 1967, the 1960 version of the Ten States Standards was in effect. Further, the foreword to the 2004 edition states that the standards "are intended for use as a guide in the design and preparation of plans and specifications for wastewater facilities insofar as these standards are applicable to normal situations for an individual project." The Ten States Standards does not state that it governs the *maintenance* of sewage disposal systems, only the design of and preparation for such systems, nor is there any evidence that the water main break

[3] We rely only on the portions of Williams' deposition included in the lower court record.

that occurred in this case was the type of "normal situation" to which the standards are intended to apply. Moreover, Williams averred that defendant breached section 33.94 because the amount of water that flowed into the manhole exceeded the amount deemed permissible under that section.[4] But section 33.9, under which 33.94 falls, specifically applies to "Joints and Infiltration," whereas section 34 applies to "MANHOLES." Further, even if the testing outlined in section 33.9 applies to manholes, section 33.93 permits both water testing under section 33.94 and air testing under section 33.95. Williams focused solely on the water testing outlined under section 33.94 and, more importantly, did not state that any such testing has been performed on manhole 26. He provided no factual support for his conclusion that if defendant had properly maintained the manhole, it would have withstood the water main break with only the minimal amount of infiltration permitted under section 33.94.

Plaintiffs next assert on appeal that the "brick-and-mortar section" of manhole 26 was particularly defective. They point out that in paragraph 18 of his affidavit, Williams stated that "Defendant knew or should have known that the brick-and-mortar constructed segment of Manhole 26 which failed should have been repaired, replaced, or fixed before October 3, 2008; the failure to repair Manhole 26 caused in fact the subject Sewage Disposal System sewage backup events into Plaintiffs' homes." We note, however, that many of the subparagraphs under paragraph 18 relate to the water main break and the "age and fatigue" of the pipe that burst. The water main does not fall under the definition of "sewage disposal system" in MCL 691.1416(j). Therefore, any defects in the water main do not justify application of the sewage disposal system event exception to governmental immunity.[5]

Moreover, although Williams made some conclusions specific to the "brick-and-mortar section" of manhole 26 in his affidavit, he again failed to present factual support for his conclusions. In his affidavit, Williams averred that the brick and mortar construction was "significantly weaker strength to resist watermain invasions rather than a pre-cast concrete sanitary sewer manhole" or "steel-reinforced concrete sanitary sewer manhole." But there is no evidence of record that one of the alternative designs Williams cited would have withstood the water main break in this case. In fact, at his deposition, Williams testified that the brick and mortar construction of manhole 26, in and of itself, "was entirely acceptable" and not a defect.

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[4] Section 33.94, entitled "Water (Hydrostatic) Test" states: The leakage exfiltration or infiltration shall not exceed 100 gallons per inch of pipe diameter per mile per day . . . ."

[5] As this Court held in *Zuccker v Grosse Ile Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 279476), although the defendant in that case knew of a defect in the water main, which leaked and allegedly caused the storm sewer drain under the plaintiffs' property to back up, "the water main is not the sewage disposal system" and the plaintiffs could not avoid immunity. Here, plaintiffs criticize the trial court's citation to *Zuccker*, but the court's analysis did not rest solely on *Zuccker* as plaintiffs assert. Further, courts of this state may look to unpublished cases as persuasive authority and plaintiffs have not argued that there is anything incorrect or inapplicable about this Court's analysis in *Zuccker*.

At his deposition, Williams testified that in addition to selecting an entirely different design than the brick and mortar construction of manhole 26, defendant could have installed an interior protective ring, such as a steel ring, or mortar, mastic, or other protective compound to resist infiltration of water from a water main break. However, further review of Williams' deposition testimony reveals that he based these conclusions on an improper reading, or incomplete reading, of the evidence concerning the design and condition of the manhole. Williams testified that in considering whether a defect existed, he was "focusing on" the masonry section of the manhole, "which is generally referred to as a chimney," and "the top of the chimney where the manhole casting itself is attached." Williams admitted, however, that he had not personally examined manhole 26 and was "not exactly sure of the manhole construction." He further testified:

> *A.* . . . There's been additional testimony, I believe, in the deposition testimony of Mr. Butts, that there was no connection between the manhole casting on top of the chimney of the manhole.
>
> *Q.* Should there be?
>
> *A.* Yes.
>
> *Q.* And what would that be?
>
> *A.* It would be *a mortar bed or a bed of asphalt mastic*. And if this—the—according to Mr. Butts, the street lifted up and the manhole casting went with it, because there was no connection on top of the manhole. In fact, he stated, I believe, that *there was no repair to be made*, because once the street subsided, the manhole casting subsided also and returned to its position on top of the manhole chimney. . . It would have created a—a contact with the manhole chimney that couldn't have been even close to watertight, without having been removed and cleaned and reset. [Emphasis added.]

Contrary to Williams' reading of the evidence, although Butts testified that it was unnecessary to repair the manhole ring and cover themselves, as they "just sat back down" when the water subsided, Shelhart testified that the force of the water from the water main break had pushed up the pavement around the ring, allowing water "in between the ring of the manhole and the cement joint of the manhole." Shelhart explained that by using the term "cement joint" he meant the joint under the ring that "*sits in mortar*," and that after the water main break, *repairs were made* to the mortar around the ring (emphasis added). Thus, Williams' assertion that defendant failed to use a protective compound such as mortar or mastic to better-protect against infiltration of water is without merit.

Williams further averred in his affidavit that the videos of manhole 26 taken in 2007 and 2008 revealed "significant lime deposits flowing from the mortar area of the brick-and-mortar section" of the manhole and "should have put the Defendant on notice that Manhole 26's mortar joints between the bricks were probably failing" and "would allow unreasonable amounts of ground water to invade" the manhole. However, at his deposition, Williams testified that he should have been more careful in the phrasing of his affidavit, as the video from 2007 does not

show the chimney of the manhole. Daniel Wooden, a supervisor in defendant's field operations unit, similarly stated in his second affidavit, that the 2007 video shows only the bottom section of manhole 26 and not the "block and mortar portion." He further stated that the amount of lime scaling that is visible in the video "is not even close to the amount that would raise concerns about the lack of water tightness of the manhole structure." The lower court record further reveals that the 2008 video Williams reviewed at the time of his affidavit did not show manhole 26. Defendant had mistakenly given plaintiffs a video that contained footage of manholes other than manhole 26. Before Williams' deposition, however, defendant gave plaintiffs a 2008 video showing manhole 26.[6] In regard to that video, Williams testified that "on the bottom edge of the exposed portion of masonry" was white material that he interpreted to be lime or calcium deposits. Williams explained that the deposits likely resulted from ground water leakage through the masonry construction, but he could not tell if the deposits were in the chimney of the manhole, which was the area of concern to him. He also testified that he did not see evidence of improper maintenance in the video images. Williams did not testify that the deposits he saw indicated a defect permitting the infiltration of water from a water main break. When asked to explain whether the deposits indicated a maintenance or repair defect, he simply reiterated that because water from the water main break infiltrated the manhole, the chimney or manhole casting must have been vulnerable in some way to "a hydrostatic pressure . . . event." But he did not explain how manhole 26 was particularly vulnerable, or whether such vulnerability constituted a defect under MCL 691.1417(3)(b). Williams testified: "It's still not clear to me even how the water got in." As we have stated, the mere fact that water entered manhole 26 or that there may have been lime or calcium deposits inside the manhole is insufficient to establish that the manhole was defective.

Finally, plaintiffs assert that there was a defect in the sewage disposal system because of its close proximity to a water line. In paragraph 16 of his affidavit, Williams stated that defendant violated "Standard 38.31" by placing manhole 26 within ten feet of the horizontal plane of the water main that broke. As noted, when the manhole was designed and constructed in 1967, the 1960 version of the Ten States Standards was in effect, not the 2004 edition referenced by Williams. Moreover, review of section 38, which is entitled "PROTECTION OF WATER SUPPLIES," reveals that that the ten-foot distance requirement of section 38.31 is intended to protect the water supply from contamination, not to protect manholes from infiltration of water from water main breaks. Further, even if section 38.31 had some applicability here, Williams testified at his deposition that he had no opinion regarding whether the particular distance between manhole 26 and the water main made any difference in the infiltration of water into the manhole.

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[6] In defendant's April 1, 2010, brief in support of its second motion for summary disposition and plaintiffs' May 4, 2010, reply brief regarding inconsistency in Williams' affidavit, the parties acknowledged that defendant initially gave plaintiffs a 2008 video that omitted footage of manhole 26 and that defendant corrected its mistake, giving plaintiffs the omitted footage, before Williams' deposition.

As the trial court held, plaintiffs presented insufficient evidence to establish the second element of the sewage disposal system event exception to governmental immunity, i.e., that the system had a defect. See MCL 691.1417(3)(b). Plaintiffs' argument regarding the existence of a defect rests on Williams' assertions, which largely focused on alleged defects in the water main, rather than in manhole 26, and were otherwise unsupported by facts of record. Williams stated in his affidavit that facts "not specifically referenced to an exhibit" were facts that he was asked to assume to be true. Further, while Williams' affidavit was voluminous and required us to unravel a number of theories regarding defendant's alleged failure to properly design and maintain its system, his conclusions regarding manhole 26 ultimately lacked factual support, as was revealed at his deposition. Conclusory assertions are insufficient to establish a genuine issue of material fact. See *SSC Assoc Ltd Partnership*, 192 Mich App at 364. Even viewing the evidence in the light most favorable to plaintiffs, their claim that a defect existed in defendant's sewage disposal system fails.

The trial court held that even if plaintiffs had presented credible evidence of a system defect, there was no evidence that defendant knew or should have known of one, see MCL 691.1417(3)(c), and we agree. However, because it is necessary to establish all five elements of the sewage disposal system event exception to governmental immunity in order for the exception to apply, *Willett*, 271 Mich App at 49-50, we need not address all of the elements.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens