Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Mar 08 2011, 9:39 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANTS:

THOMAS R. HAMILTON
Hunt Suedhoff Kalamaros LLP
South Bend, Indiana

ATTORNEYS FOR APPELLEES:

MARSHALL P. WHALLEY
Marshall P. Whalley & Associates, P.C.
Merrillville, Indiana

STEVEN L. LIDDLE
Macuga, Liddle & Dubin, P.C.
Detroit, Michigan

IN THE
COURT OF APPEALS OF INDIANA

TOWN OF HIGHLAND and HIGHLAND SANITARY DISTRICT,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A05-1003-CT-178
LEE LIEBERMAN, et al.,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin D. Hawkins, Judge
Cause No. 45D02-0712-CT-177

March 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The Town of Highland and the Highland Sanitary District (collectively, Highland) bring this interlocutory appeal of the denial of their motion for summary judgment. We affirm and remand for trial.

FACTS AND PROCEDURAL HISTORY

In recent decades, the Town of Highland undertook a number of projects related to its sewer systems. The Town's storm sewer system and sanitary sewer system are designed to be separate,[1] so storm water should not enter the sanitary sewer system. In the 1990s, Highland and its engineering consulting firm began developing a "Storm Water Master Plan." (App. at 126.) The consulting firm was asked to "help identify the areas with the most prevalent *storm water* problems in the community" so a plan could be drafted to help resolve them. (*Id.*) (emphasis added). A plan was drafted that identified areas where there were storm water problems; discussed the cause of the problems; proposed and discussed alternative solutions to the problems; and identified remediation projects, stated engineering costs, and prioritized the projects. Although Highland never formally adopted a finalized Master Plan, its Sanitary District began to implement some of the proposed solutions to Highland's storm water problems.

The storm water management plan lists four "Master Plan Objectives," (*id.* at 4748),

---

[1] A sanitary sewer is an underground carriage system specifically for transporting sewage from houses and commercial buildings to treatment or disposal. Sanitary sewers are operated separately and independently of storm drains, which carry the runoff of rain and other water that wash into city streets. Sewers carrying sewage and stormwater together are called combined sewers. http://en.wikipedia.org/wiki/Sanitary_sewer (last visited February 10, 2011).

none of which address the separate sanitary sewer system. One document in the drafted plan notes "[t]he Town's storm sewer system and sanitary sewer system are entirely separate." (*Id*. at 4831.) In such a system, storm water should not enter the sanitary sewer system during a rainfall, "[e]ven if it is a 500-year event." (*Id*. at 4059.) If it does, it is because of "inflow infiltration" from the storm water system. (*Id*. at 3440.)

In addition to the storm water plan, the Sanitary District implemented at various times what it characterized as "Separation Program[s]," (*id*. at 128), "to help with the *storm water* problems in the town."[2] (*Id*.) (emphasis added). Pursuant to those programs, Highland had homeowners disconnect roof, foundation, and backyard drains from the sanitary sewer system. The District addressed infiltration problems by inspecting parts of the sewer system with television cameras, sealing areas of the sewer system where there were cracks and leaks until the sewer could be replaced, improving pump stations, having employees do periodic maintenance checks of the pump stations, and making "continual improvements to the sewer systems in general." (*Id*. at 129.) Highland "addressed the maintenance of the sewers on a day to day basis." (*Id*. at 130.)

On September 12 and 13, 2006, Highland experienced sustained heavy rain. One rain gauge at a Highland pump station recorded nearly eight inches of rain in a twenty-four hour

[2] An affidavit of Highland's Public Works Director describes a "current Separation Program" that was "implemented to find a way to get home owners to disconnect their foundation drains from the sanitary water system and reconnect them to the storm water system through a sump pump." (App. at 128.) It says Highland implemented two other separation programs in the late 1980s and early 1990s to have homeowners disconnect their roof drains and backyard drains from the sanitary sewer system.

period. An engineer for the Army Corps of Engineers testified "this rainfall concentrated in the Town of Highland was approximately a 600-year event." (*Id*. at 100.) The rain overwhelmed the storm sewers, and sewage backed up into some homes and businesses.

According to a different affiant, "the magnitude of the rainfall did not cause the raw sewage backups of the sanitary sewer system[;] but for the [sewer system] failures described in my report there would have been no raw sewage backups, nor the extensive damages therefrom." (*Id*. at 3430.) That affiant noted the Highland sanitary and storm water systems are intended to perform as separate sewers, "but because of system-wide defects and a failure to fully separate the systems, they still behave like a Combined Sewer during peak flow events." (*Id*. at 3428.) As the sanitary sewers were designed to be separate from the storm sewers, the backups of raw sewage would have been caused by "inflow infiltration" from the storm water system. (*Id*. at 3440.)

Several Highland homeowners (hereinafter, Homeowners) sued the Town and its Sanitary District, alleging Highland was negligent in its operation and maintenance of the sewer system, and the entry of the sewage into their homes amounted to nuisance, trespass, and an unconstitutional taking of their properties. The parties stipulated the case would be certified as a class action. Highland moved for summary judgment, the Homeowners filed a response, and Highland moved to strike parts of the Homeowners' response. The trial court denied Highland's motion to strike, granted Highland's motion for summary judgment as to the Homeowners' unconstitutional taking allegation, and denied summary judgment in all

other respects.

DISCUSSION AND DECISION

1. Motion to Strike

Highland moved to strike parts of the Homeowners' response to Highland's motion for summary judgment on the ground the Homeowners' designation of evidence lacked the specificity required by our trial rules. The trial court denied the motion. A trial court has broad discretion in granting or denying a motion to strike. *City of Mishawaka v. Kvale*, 810 N.E.2d 1129, 1133 (Ind. Ct. App. 2004). We will not reverse unless prejudicial error is clearly shown. *Id*.

Highland claims thirty-nine statements of fact were not designated, and directs us to other evidence that it concedes was designated, but asserts was not designated specifically enough or lacked foundation. It does not dispute the Homeowners' argument that all the factual allegations were supported elsewhere in the record, but notes "[w]hile Appellees may see this as redundant, it is required by the trial rules." (Reply Br. of Appellants at 10.)

Nowhere in its brief or reply brief does Highland allege it was prejudiced by the inclusion of any of the statements, exhibits, or other evidence it moved to strike. As no prejudicial error has been shown, we decline to find an abuse of discretion. *See Cua v. Ramos*, 433 N.E.2d 745, 752 (Ind. 1982) (denial of motion to strike was not an abuse of discretion when "the only inconvenience which Cua asserts in the failure of the court to strike the answer is that she was compelled to try the case on its merits").

2. Summary Judgment

When reviewing a grant or denial of summary judgment our well-settled standard is the same as it is for the trial court: whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 973 (Ind. 2005). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be construed in favor of the opposing party, here the Homeowners, and all doubts as to the existence of a material issue must be resolved against the moving party, here Highland. *Id.* If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. *Beck v. City of Evansville*, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), *trans. denied*. The party appealing a summary judgment ruling, here Highland, has the burden of persuading us the denial of summary judgment was erroneous. *Id.*

A. Immunity

Chapter 34-13-3 of the Indiana Code, the Tort Claims Act, provides immunity from liability for governmental entities in certain instances. Section 3 of the Act provides: "A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he performance of a discretionary function." Ind. Code § 34-13-3-3. A governmental entity seeking immunity, here Highland, bears the burden of proving that its conduct falls within one of the exceptions in the Tort Claims Act. *Beck*, 842

N.E.2d at 861. Because the Tort Claims Act is in derogation of the common law, we construe it narrowly and decline to find immunity if possible. *Id*. The party seeking immunity bears the burden of proving its conduct falls within the Act and it is thus shielded from liability. *Id*.

In *Peavler v. Monroe Cnty Bd. of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988), our Indiana Supreme Court adopted the "planning/operational test" as the standard for defining discretionary acts under the Tort Claims Act. "Discretionary" refers to the exercise of political power that is held accountable only to the Constitution or the political process. *Id*. at 45. Whether an act is discretionary and therefore immune from liability is a question of law for the trial court to resolve. *Id*. at 46. The essential inquiry is whether the challenged act is the type of function the legislature intended to protect with immunity. *Id*. The discretionary function exception

> insulates only those significant policy and political decisions which cannot be assessed by customary tort standards. In this sense, the word discretionary does not mean mere judgment or discernment. Rather, it refers to the exercise of political power which is held accountable only to the Constitution or the political process. . . . Merely labeling an action as planning or operational, without more, cannot pass for analysis.

Id. at 45.

The court in *Peavler* set forth a number of factors that, under most circumstances, point toward immunity:

1. The nature of the conduct--
    a) Whether the conduct has a regulatory objective;

> b) Whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
> c) Whether the conduct requires a judgment based on policy decisions;
> d) Whether the decision involved adopting general principles or only applying them;
> e) Whether the conduct involved establishment of plans, specifications and schedule; and
> f) Whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.
>
> 2. The effect on governmental operations--
> a) Whether the decision affects the feasibility or practicability of a government program; and
> b) Whether liability will affect the effective administration of the function in question.
>
> 3. The capacity of the court to evaluate the propriety of the government's action--Whether tort standards offer an insufficient evaluation of the plaintiff's claim.

Id. at 46.

Under the planning/operational dichotomy, the type of discretion immunized from tort liability is generally that "attributable to the essence of governing." *Id*. at 45. Planning activities include acts or omissions in the exercise of a legislative, judicial, executive, or planning function that involve formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy. *Id*. Government decisions about policy formation that involve assessment of competing priorities and a weighing of budgetary considerations or the allocation of scarce resources are also planning activities. *Id*. In essence, the government is exposed to liability only when no policy-oriented decision-making process has been undertaken. *Beck*, 842 N.E.2d at 862. If a

governmental unit engages in a policy-oriented decision-making process, we may not judge the wisdom of its decisions; that judgment is left to the political process. *Id*.

In *Beck*, as in the case before us, torrential rains caused widespread flooding and homeowners alleged Evansville was negligent in failing to adequately control the flooding that resulted in the loss of use of their residences. Evansville claimed the homeowners' action was barred on the grounds of governmental immunity because it was performing a discretionary function when it commissioned and adopted its Stormwater Plan.[3] The trial court granted summary judgment for Evansville and we affirmed.

In *Beck*, the designated evidence was that Evansville commissioned a Stormwater Master Plan in 1996 to address its chronic storm water problems. The Plan specifically addressed the areas of Evansville where the plaintiff homeowners lived. The Common

[3] It appears the Evansville sewer system we addressed in *Beck* was a "combined" storm water and sanitary system. *See*, *e.g*., *Beck*, 842 N.E.2d at 859 (noting the homeowners' assertion the damage was "due to the impact of the unhealthy conditions created by the overflowing of *combination* sewers") (emphasis supplied); and *id*. (noting the city's task force recommendation to "construct a separate storm sewer system" for the affected areas). We accordingly concluded Evansville was immune from a suit based on damage to homes from flooding by sewage and surface water because Evansville had been performing a discretionary function "when it commissioned and adopted the [Stormwater] Plan." (*Id*. at 863.)

In the case before us, by contrast, the Highland storm water and sanitary sewer systems are designed to be separate, and Highland has not demonstrated why the draft plan to address *storm water* should serve as a basis for immunity from liability related to the separate sanitary sewer system. Highland's draft plan does not address the problems that apparently led to the Homeowners' damage. In its brief, Highland notes five "examples of [Storm Water Management Plan] projects undertaken," (*id*. at 6), none of which addressed the sanitary sewer system or the effects of storm water on it. Highland directs us to nothing in the storm water plan that addresses, or even acknowledges, inflow and infiltration into the sanitary sewer. Nor does our independent review of the plan document indicate that the sanitary sewers generally, or inflow and infiltration in particular, were addressed.

Council, the Board of Public Works, and the Utility Board took official action to implement the Plan. Evansville, through its officials and boards, weighed competing interests when it set priorities under the Plan. It engaged professional engineers to establish plans, specifications, and schedules for the implementation of the Plan. Much of the Plan was still being implemented at the time of the flooding, including work intended to address the problem in the homeowners' neighborhoods. Because Evansville had a comprehensive plan of maintenance and service for its sewers, and it regularly maintained and cleaned the storm water sewers in accordance with that plan, we held Evansville was immune from damages: "In considering this evidence and applying the factors set forth in *Peavler*, it is our view that [Evansville] was performing a discretionary function when it commissioned and adopted the Plan." *Id*. at 863. We accordingly affirmed summary judgment on the homeowners' nuisance and negligence claims for Evansville on the basis of governmental immunity. *Id*.

In *City of Bloomington Utilities Dept. v. Walter*, 904 N.E.2d 346, 349 (Ind. Ct. App. 2009), *trans. denied*, by contrast, we determined summary judgment for Bloomington on immunity grounds was properly denied. There, some homeowners alleged that Bloomington negligently maintained and controlled the sewer lines by failing to clear severe root invasion from the sewer pipes. That allowed the lines to become blocked, causing sewage to back up into and damage homes. We noted the *Peavler* planning/operational test distinguishes decisions involving the formulation of basic policy, which decisions are entitled to immunity, from decisions regarding only the execution or implementation of that policy, which are not.

Id. at 353.

> Here, Homeowners alleged that [Bloomington] "negligently planned, designed, installed, operated, maintained, and controlled the sewer lines serving [the Homeowners]. . . ." Specifically, Homeowners alleged that [Bloomington's] failure to exercise reasonable care in the maintenance of its lines resulted in severe root blockage of its lines, which in turn caused a sewage back-up. [Bloomington] bore the burden to show that a policy decision, consciously balancing risks and benefits, took place regarding the method by which [Bloomington] cleaned and maintained its sewers on a daily basis.

Id. at 352. We held Bloomington engaged in policy-oriented decision-making when it determined which part of the system it would maintain and that it would not use chemicals for root control. But failure to clean the sewer, unlike a policy decision, "may be evaluated under traditional tort standards of reasonableness," *id*., and did not involve the formulation of policy that would entitle Bloomington to immunity.

Highland's storm water plan addressed only the separate storm sewer system. Its inflow-and-infiltration-related maintenance programs, like Bloomington's decisions to inspect, clean, and repair its sewer system in *Walter*, did not reflect "policy-oriented decision-making." Therefore, neither can serve as a basis for immunity. It appears the Highland "separation programs" were a series of discrete projects and were not part of any larger plan that involved "[o]fficial action" for its implementation by "the Common Council, the Board of Public Works, and the Utility Board" or required Highland to "weigh competing interests when it set priorities under the Plan" as in *Beck*, 842 N.E.2d at 862.

Walter therefore controls the case before us. Highland's decisions to maintain its storm water pump stations, inspect and repair leaks that might permit storm water infiltration,

or make continual improvements to the sewer system did not amount to "the essence of governing," *Peavler*, 528 N.E.2d at 45. Rather, those decisions, like Bloomington's decisions in *Walter* regarding sewer cleaning, "merely set forth 'things [the municipality has] been doing for years,'" *Walter*, 904 N.E.2d at 353, and "may be evaluated under traditional tort standards of reasonableness." *Id.* at 352. The trial court was correct that Highland was not immune from liability, and summary judgment was properly denied on that ground.

B. Negligence[4]

In negligence cases, summary judgment is rarely appropriate. *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004). This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person--one best applied by a jury after hearing all of the evidence. *Id.* In alleging negligence, the plaintiff must show: (1) a

[4] Highland argues the court should have granted its motion for summary judgment on the Homeowners' nuisance and trespass claims. Highland's arguments on both these issues are premised on the absence of any negligence on Highland's part. (*See, e.g.*, Br. of Appellants at 44) ("[s]ince there must be some negligence shown to establish a public nuisance, the arguments above on . . . negligence also apply to the Appellees' nuisance claims"); (*id*. at 45) ("Highland did not dispossess anyone of any of their [sic] property . . . through any act or omission which [sic] imposes liability."). As we hold there is a genuine issue of fact as to whether Highland was negligent, we do not independently address the nuisance and trespass claims and we accordingly hold summary judgment was properly denied on those claims.

Highland also argues on appeal the trial court should not have denied its motion for summary judgment "on the Appellees' *Res Ipsa Loquitor* negligence claims." (Br. of Appellants at 1.) In its summary judgment motion, Highland asserted it is "not liable for . . . Res Ipsa Loquitor," (App. at 64), but on appeal it argues *res ipsa loquitor* "is an evidentiary doctrine, not a cause of action," (Br. of Appellants at 45), so it is "entitled to summary judgment on the separate count of *Res* [sic] *ipsa loquitor* plead [sic]." (Reply Br. of Appellants at 10.)

It is not apparent the trial court denied summary judgment on a "separate count" of *res ipsa loquitor*. Its order granted summary judgment to Highland on an allegation of unconstitutional taking, but denied the motion "in all other aspects," (App. at 18), including the homeowners' negligence allegation. As Highland is correct that *res ipsa loquitor* is merely a rule of evidence that might permit an inference of negligence to be drawn, *see Balfour v. Kimberly Home Health Care, Inc.*, 830 N.E.2d 145, 148 (Ind. Ct. App. 2005), we need not address *res ipsa loquitor* independently of the negligence issue.

duty owed to the plaintiff by the defendant;[5] (2) a breach of that duty by allowing conduct to fall below the applicable standard of care; and (3) a compensable injury proximately caused by defendant's breach of duty. *Schmitt v. City of Evansville*, 868 N.E.2d 1127, 1128 (Ind. Ct. App. 2007).

Highland argues it was entitled to summary judgment because it did not breach[6] any duty toward the homeowners and any negligence on its part was not a proximate cause of the damage the homeowners incurred. There is a genuine issue of fact regarding Highland's negligence, and denial of its motion for summary judgment was therefore appropriate.

---

[5] Highland asserts, without argument or explanation, that a municipality operating a sewer system "owes a duty of reasonable care to maintain the system to the system users as a class, but there is no specific duty of care to any particular individual that is a user of the system. *Rodman v. Wabash*, 497 N.E.2d 234 (Ind. Ct. App. 1986) [*reh'g denied, trans. denied*]." That appears to no longer be a correct statement of the law. In *Benton v. City of Oakland City*, 721 N.E.2d 224, 229-30 (Ind. 1999), our Indiana Supreme Court said:

> *Campbell* [*v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972), *superseded by statute on other grounds*] had held that all governmental units were bound, both directly and under a theory of *respondeat superior*, by the common law duty to use ordinary and reasonable care under the circumstances, except for such claims as failure to prevent crime, appointment of an incompetent official, or an incorrect judicial decision. But subsequent decisions had taken this general-rule-with-limited-exceptions and bifurcated it into concepts of "private duty" and "public duty." This resulted in highly abstract, almost metaphysical debates over whether the duty alleged to have been breached was a "private" one or a "public" one.
>
> Reflecting on these developments, we return to and reaffirm *Campbell.* We hold that *Campbell* is properly applied by presuming that a governmental unit is bound by the same duty of care as a non-governmental unit except where the duty alleged to have been breached is so closely akin to one of the limited exceptions (prevent crime, appoint competent officials, or make correct judicial decisions) that it should be treated as one as well.

(Footnote omitted.)

[6] Much of Highland's argument on the negligence issue is to the effect the Homeowners offered no admissible evidence to support their "claim that the sewer system as it existed on September 13, 2006 was negligently designed and engineered." (Br. of Appellants at 40.) It does not appear the Homeowners made any such "claim." While there is a conclusory general allegation Highland "improperly designed, constructed, provided, maintained and/or operated" the sewer system, (App. at 32), the specific allegations in the negligence count of the complaint seem to address operation and maintenance, and not design or engineering.

As for breach, Highland argues only that it made "enormous efforts" to maintain, repair, and operate the system, and the Homeowners' response amounts to "nothing more than do more, do it faster, and spend more." (Br. of Appellants at 41.) This, Highland says, entitles it to summary judgment on the breach issue. It does not.

The Homeowners provided ample evidence to avoid summary judgment. A Federal Emergency Management Agency flood insurance study of Highland's sanitary sewer system dated some twenty-three years before the 2006 flood notes "floodwaters enter sanitary sewers through street manholes to flood basements and lower levels of buildings, causing major cleanup problems and health hazards." (App. at 4805-06.)

A 1985 engineering study conducted for Highland noted "[s]anitary sewers surcharged at 8 different monitor locations" during two storms in 1984.[7] The rain during those storms "at no time exceeded a one-year return frequency." (*Id*. at 5725.) That study predicted the "[s]anitary sewers will continue to surcharge until inflow sources are removed and the volume of inflow reduced." (*Id*. at 5727.)

A 2007 report noted two sanitary pump stations that received "a lot of inflow and infiltration." (*Id*. at 5052, 5053.) It found there were several "known cross-connections" between the sanitary and storm sewers along one street. From 2000-2006, there was about two billion gallons of inflow and infiltration in the sanitary sewer system. "Sub systems with

[7] "Surcharging of a sewer is defined as the period when the liquid levels in the sewer exceed the crown, or inside top of the pipe. Surcharging of a sanitary sewer system generally signifies that the sewer [is] flowing at or above capacity." (App. at 5077.)

significant inflow experience the surcharging of their sewer lines, basement backups and surface discharge of their sanitary manholes." (*Id*. at 5074.)

When considered together, this evidence suggests Highland had known for years that its sanitary sewer system was not operating properly.

The Homeowners' expert stated there was "no evidence [Highland] had or followed Standard Operating, Safety or Standard Maintenance Procedures regarding Operation and Maintenance of the sanitary and Storm water systems." (*Id*. at 3477.) Highland's failure to have a "documented preventive maintenance cleaning program allowed debris to accumulate over time that severely reduced the capacity of both sewer systems and contributed to the flooding and backups." (*Id*. at 3458.)

The Homeowners' expert testified that on the day of the storm, Highland operated its system "below industry standards of care, resulting in the sanitary sewer backups," (*id*. at 3441), in that it did not have any system for judging or predicting runoff from rainfalls, it did not timely mobilize its manpower, it did no "bypass pumping **until after** the sanitary sewer backups," (*id*. at 3442) (emphasis in original), and in spite of the high-water conditions, Highland's employees "continued to perform routine duties which they had scheduled that day," such as collecting water samples. (*Id*. at 3441.)

The evidence gives rise to a genuine issue of fact as to whether Highland operated its sanitary sewer system negligently and whether such operation was a proximate cause of the damage the Homeowners sustained. Denial of summary judgment was therefore proper, and

we affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.