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ATTORNEY FOR APPELLANT:

JAMES E. AYERS
Wernle, Ristine & Ayers
Crawfordsville, Indiana

ATTORNEYS FOR APPELLEE:

KRISTIN A. MULHOLLAND
Crown Point, Indiana

KEVIN L. MOYER
MICHAEL P. IRK
Moyer & Irk, P.C.
Lebanon, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DONNA J. LAYTON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 06A04-1008-PL-597
	)	
CITY OF LEBANON,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Steven H. David, Judge
Cause No. 06C01-0505-PL-247

June 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Donna J. Layton ("Layton") sued the City of Lebanon ("the City") after sewage invaded her residence and crawl-space. A jury awarded Layton $133.00. Seeking additur or a new trial, Layton filed a motion to correct error, which was denied. She appeals the denial of that motion. We affirm.

Issues

Layton presents two issues for review:

I. Whether the damages award is inadequate; and

II. Whether the trial court abused its discretion by refusing Layton's proffered instruction contemplating recovery for emotional distress.

Facts and Procedural History

Layton owns a residence in Lebanon, Indiana, which was constructed in the 1970's and connected to the City sewer. Her four-inch diameter lateral sewer line and that of her nearest neighbor were connected. By 2003, the sewage from those two (north) properties together with sewage from four later-constructed (south) duplexes flowed into a common east-west "collector" line of six-inch diameter. Vertical clay tiles directed the flow from the six-inch collector line into the main sewer line of eighteen-inch diameter. The City maintained sewer lines of eight-inch diameter and greater, leaving the smaller lines to be maintained by homeowners or residential developers.

In 2003, Layton detected an odor in her home that caused her to suspect a gas leak. She called the local fire department; upon inspection, they advised that Layton had a "sewer leak." (Tr. 50.) Layton's son investigated and found sewage in the crawl space and yard.

Layton rented a sewer auger at a cost of $53.00. When Layton's son attempted to clear the sewer line to the end of Layton's property line, no obstruction was found. Layton obtained the services of a plumber, David Hand ("Hand"), who was able to locate a suspected area of an obstruction. He charged $80.00.

Several times, Layton had contacted City employees, who had opined that the City main line was unaffected and Layton was responsible for resolving her problem. Undeterred, Layton contacted the Mayor of Lebanon. This resulted in a site visit where Hand directed City employee Bobby Taylor ("Taylor") to the area where the collector line serving Layton and neighboring properties fed into the main sewer line.

On May 13, 2003, Taylor used a water jet machine to attempt to locate the specific blockage. He then dug down into the earth to a six-inch clay line located above the main sewer line. The clay line had a ninety degree bend, which was filled with tree roots. Taylor replaced the ninety degree bend pipe with two forty-five degree bend pipes, resolving the flow problem.

At some point after the water jet machine had been utilized, Layton walked into her residence and discovered that there was sewage on her floor, in her bathtubs, and in her shower. Layton and her daughter undertook a cleanup that lasted about thirty days. Subsequently, Layton obtained a $32,841.68 estimate for costs of mold elimination and remediation work.

On May 5, 2005, Layton filed a complaint for damages, alleging that the City had "failed to maintain and clean out its sewer system and allowed debris to accumulate therein"

and that the City "by its discharge of sewage into Plaintiff's premises thereby created a nuisance." (App. 9.) On May 17, 2010, a jury trial commenced. At its conclusion, the jury was instructed only upon a negligence theory. On May 19, 2010, the jury returned a verdict in favor of Layton, awarding her $133.00. Layton filed a motion to correct error. Following denial of that motion, this appeal ensued.

Discussion and Decision

I. Damages

Layton alleges that the trial court erred in denying her claim for additur in light of evidence of damages far in excess of the jury's award. She argues that the costs of even a "mini cleanup" excluding the crawl-space would amount to $16,895.00. Appellant's Brief at 15.

Layton sought additur under Indiana Trial Rule 59, which provides that a motion to correct error is a prerequisite for appeal when a party seeks to address a claim that a jury's verdict is excessive or inadequate. A trial court has "considerable discretion" to grant or deny a motion to correct error. Carter v. Jones, 751 N.E.2d 344, 345-46 (Ind. Ct. App. 2001). We will reverse only if the trial court has abused its discretion, that is, when the trial court's action is against the logic and effect of the facts and circumstances before it, or when the decision is without reason or is based upon impermissible reasons or considerations. Id. at 346. A verdict will be upheld if the award falls within the bounds of the evidence. Ritter v. Stanton, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001), trans. denied.

A city is not strictly liable for injuries resulting from defects in the city's

infrastructure. Schmitt v. City of Evansville, 868 N.E.2d 1127, 1129 (Ind. Ct. App. 2007) (citing City of Indianapolis v. Bates, 168 Ind. App. 555, 343 N.E.2d 819, 822 (1976)). A plaintiff can recover under a negligence theory only when the city has had actual or constructive knowledge of the defect or reason to know that it exists and an opportunity to repair. Bates, 168 Ind. App. 560, 343 N.E.2d at 822. See also State v. Bouras, 423 N.E.2d 741, 745 (Ind. Ct. App. 1981) ("[W]here there is neither actual nor constructive knowledge of a dangerous condition, so that even the reasonably prudent person would not have been alerted to action, then there is no negligence.").

To establish negligence, the plaintiff must show: (1) a duty owed to the plaintiff by the defendant; (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. Mangold ex rel. Mangold v. Ind. Dep't of Natural Resources, 756 N.E.2d 970, 975 (Ind. 2001) (citing Bader v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000)).

Here, Layton related two events: one in which her yard and crawl-space were invaded by sewage and one in which the drain traps in her residence gave way and sewage entered through each one. She theorized that the invasion of sewage into her residence was caused by Taylor's use of the water jet machine, which allegedly pressurized the lines. It is apparent that, by awarding only the amount attributable to revealing the obstruction location (the sewer auger and plumber charges), the jury did not find that Layton had sustained damages as a result of negligence on the part of Taylor in his operation of the water jet machine.

The jury was instructed that the City owed its residents a duty to maintain and control

its sewer lines and to clear root invasions from sewer pipes, and also owed a duty to avoid damage and stoppage of sewer pipes "due to negligent or unreasonable conduct with the construction of portions of its system." (Tr. 64.) The jury heard evidence that a six-inch lateral pipe was serving as a common collector although it was of atypically small size for such a function and was tapped into the sewer main line; the tree roots were located above the sewer main line.

As to the event in which Layton's yard and crawl-space were invaded with sewage, Layton testified that she immediately sought assistance. When it became apparent that there was a sewer problem as opposed to a gas leak, Layton diligently entreated City employees to identify the area of obstruction. She was denied investigative assistance and paid out-of-pocket for rental equipment and plumbing services. Apparently concluding that the City had constructive or actual knowledge of the condition and acted unreasonably in declining prompt investigation, the jury chose to award Layton the costs associated with locating the area of obstruction.

The evidence of conduct relative to the operation of the water jet machine consisted of Taylor's testimony. Taylor testified that he had placed the water jet machine nozzle in Layton's neighbor's lateral pipe, which was about fifty-eight to sixty feet in length. While Taylor "didn't turn very much pressure up," he introduced thirty gallons of water into the sewer line over a two-minute period of time. (Tr. 27.) According to Taylor, the water was pulled back toward him. He further testified that it "couldn't have gone to Mrs. Layton's" because "it'd have to go sixty feet up to that six inch [pipe], another sixty feet east and then

another whatever it is to her house, probably another sixty feet." (Tr. 29.) Taylor denied that the sewer line became "pressurized" as a result of his actions, explaining that he "had the [sewer] cap off there." (Tr. 22.)

Layton did not present evidence that the decision to use a water jet machine was unreasonable under the circumstances, nor did she offer testimony of the applicable standard of care to be employed during operation of a water jet machine. She did not present evidence of how Taylor ostensibly breached the standard of care. In other words, the jury was not advised as to what Taylor could have done differently to clear the obstruction yet prevent any sewage from back flowing in an overloaded system. As previously observed, this is not an action in strict liability. Layton was required to show a failure to exercise reasonable care before damages could be awarded.

Although the jury did not award Layton all the costs she attributed to both events, the damages awarded are consistent with the evidence presented. As the damages are not outside the bounds of the evidence, the trial court did not abuse its discretion by denying the motion to correct error seeking additur.

II. Jury Instruction

Layton also contends that the trial court erred in refusing her proffered instruction providing in relevant part:

> If you find that because of Defendant's negligence, the Plaintiff suffered emotional distress, you may award Plaintiff an amount to fairly compensate her for such distress.

(App. 33.) In reviewing a trial court's decision to give or refuse a tendered instruction, appellate courts consider whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893 (Ind. 2002). The trial court has discretion in instructing the jury, and we will reverse on the last two issues only when the instructions amount to an abuse of discretion. Id. Whether an instruction correctly states the law presents a de novo question. Id.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Lee v. Hamilton, 841 N.E.2d 223, 230 (Ind. Ct. App. 2006). Here, the trial court refused the instruction upon concluding that there was insufficient evidence to support it. We further observe that it provides an incomplete and thus misleading statement of applicable law.

The tort for negligent infliction of emotional distress traditionally required that the person claiming emotional injuries may recover damages "only when the distress is accompanied by and results from a physical injury caused by an impact to the person seeking recovery." Shuamber v. Henderson, 579 N.E.2d 452, 454 (Ind. 1991). This traditional "impact rule" was abrogated in Shuamber, in favor of a "modified impact rule." See id. The modified impact rule maintains the requirement of a direct impact, but that impact need not result in a physical injury, nor need the emotional trauma result from a physical injury. Ross v. Cheema, 716 N.E.2d 435, 436-37 (Ind. 1999).

Although the "modified impact rule" has been reaffirmed, the Indiana Supreme Court extended the scope of who may bring a claim for negligent infliction of emotion distress in Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000). Where the direct impact test is not met, a bystander may establish "direct involvement" by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligence or tortious conduct. Id. at 573. Accordingly, a plaintiff must satisfy either the modified impact rule or the bystander rule. See id.

Layton's proffered instruction did not adequately address the elements required for recovery under a claim for negligent infliction of emotional distress. Nor did she provide evidence of serious mental anguish, at most claiming that she avoided sleeping in her bedroom due to its condition and smell. As the proffered instruction is not an adequate statement of the law and there is a lack of evidence in the record to support the giving of the instruction, the trial court did not err or abuse its discretion by refusing it.

Conclusion

The jury awarded damages within the scope of the evidence when it limited the compensation to amounts paid for professional services to locate an obstruction. The proffered instruction on recovery for emotional distress was properly refused.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.