2012 IL App (1st) 102425-U

THIRD DIVISION
March 14, 2012

No. 1-10-2425

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLSTATE INSURANCE COMPANY; ATLANTIC MUTUAL INSURANCE COMPANY; ENCOMPASS INSURANCE; and STATE FARM FIRE AND CASUALTY, as Subrogees of their Respective Insureds, Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
	)	No. 03 L 16284
v.	)	
THE CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellee.	)	HONORABLE WILLIAM J. HADDAD, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: Following a bench trial, the circuit court's ruling that the plaintiffs (insurance companies) failed to show the defendant City of Chicago's implementation of a sewer control system caused their insureds to suffer sewer backups was not against the manifest weight of the evidence. Following a jury trial, the insurance companies failed to show the jury's answer to a special interrogatory addressing local governmental immunity was inconsistent with the general verdict in favor of the City of Chicago. The judgments of the circuit court are affirmed.

¶ 2 Plaintiffs Allstate Insurance Company, Atlantic Mutual Insurance Company, Encompass Insurance, and State Farm Fire and Casualty (Insurers), as subrogees of their respective insureds, appeal judgments entered in favor of the defendant City of Chicago (City) after trials of the Insurers' claims of negligence, willful and wanton conduct, nuisance, and unconstitutional takings of property. On appeal, the Insurers argue: (1) the City is not immune from takings claims brought under the Illinois Constitution (Ill. Const. 1970, art. I, §15); (2) the City's implementation of a sewer inlet control program known as Rainblocker caused widespread sewer discharge into the properties of the Insurers' insureds; (3) the City's affirmative defense of immunity should not have been submitted to a jury; and (4) the City was not immune from tort claims arising from the implementation of Rainblocker. For the following reasons, we reject the Insurers' arguments and affirm the circuit court's judgments.

¶ 3 BACKGROUND

¶ 4 On December 31, 2003, the Insurers filed suit against the City, alleging that in 2000 and 2001, the City implemented a sewer inlet control program known as Rainblocker. In August 2001, the Chicago metropolitan area experienced a series of summer rains. The Insurers' third amended complaint alleged that on August 2, 2001, August 25, 2001, and August 30, 2001, the City's failure to implement Rainblocker properly as designed caused the City's sewer system to back up, sending raw sewage and storm water into the basements of homes, apartments and other structures. The Insurers alleged they issued policies of insurance to their insureds and were subrogated to the extent of any claims made pursuant to policy provisions. The Insurers' complaint asserted tort claims including negligence, willful and wanton conduct, and nuisance.

The Insurers also asserted a claim that the City's actions caused a taking of private property without just compensation under the Illinois Constitution (Ill. Const. 1970, art. I, §15).

¶ 5 Prior to trial, the City asserted affirmative defenses, including that its acts were subject to immunity under sections 2-109 and 2-201 of the Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-109, 2-201 (West 1998)), which provide that a local public entity is not liable for injuries resulting from an act or omission of a public employee serving in a position involving the determination of policy or the exercise of discretion when determining policy or exercising discretion. The City unsuccessfully attempted to have the suit dismissed on this basis. Subsequently, the Insurers filed a response, asserting the Tort Immunity Act did not apply to their claims.

¶ 6 The Insurers' tort claims proceeded to a jury trial, while their state constitutional claim proceeded to a bench trial.

¶ 7 At the jury trial, John Velon testified by a video deposition that he was a licensed engineer and vice president of Montgomery, Watson, Harza (MWH), and worked for Harza Engineering Company (Harza) before its merger into MWH. Velon stated that in the late 1990s, Harza engaged in discussions with the City about improving the City's sewer system. The City primarily has a combined sewer system, which carries both waste water from sewage lines and rain water from downspouts and catch basins. In the mid-1990s, the City experienced flooding events. According to Velon, when a combined system becomes overtaxed or surcharged, it results in combined rain water and sewage backing up into home basements with potential safety hazards.

¶ 8 Velon also testified that Harza was previously involved with inlet control projects to alleviate similar flooding problems in Arlington Heights and Evanston, Illinois. The goal in Evanston was to protect basements against a "hundred year storm," meaning storms which have a probability of occurring once in 100 years. Velon stated that the system implemented in Evanston apparently worked quite well. Velon added that in the mid-1990s, Chicago could only accommodate a one to five year storm.

¶ 9 Velon further testified the City hired Harza to conduct feasibility studies for an inlet restriction program called Rainblocker in different areas of the City. These studies concluded an inlet control program was feasible. The City authorized Harza to do design work in the pilot study areas. Harza's design called for the installation of inlet restrictor devices to limit the amount of water flowing in from the streets and the disconnection of downspouts to prevent overloading the sewers. According to Velon, downspout disconnection was essential. Harza estimated that approximately 80% of downspouts needed to be disconnected for Rainblocker to work in the pilot study areas. The disconnection part of the design was conveyed to the City by its inclusion in the written pilot studies, various diagrams, and oral statements to City engineers and officials at the City's Department of Sewers.

¶ 10 Velon testified that in March 1996, the City contracted with Harza to develop the Rainblocker program by installing the inlet restrictor devices in pilot study areas and test their functionality. In 1999, Harza conducted a post-implementation flow monitoring program, but according to Velon, there was insufficient rainfall during the study period to yield meaningful results. Velon stated Harza requested further flow monitoring, but the City did not authorize it.

¶ 11 Moreover, Velon testified that Harza learned the City planned to implement Rainblocker citywide, but was not consulted about the decision. Harza did not design the citywide implementation of Rainblocker. Velon would not speculate whether the City's implementation of Rainblocker was reasonable. Velon opined that if the inlet restrictor devices were installed, but downspout disconnection rates were less than 80%, the system would not work as planned and would provide some incremental benefit. Velon stated the incremental benefit would have to be measured on a block-by-block basis.

¶ 12 John Kosiba testified he was the City's commissioner of the Department of Sewers from July 31, 1998, through May 2000. Kosiba is not an engineer. Kosiba initiated citywide implementation of Rainblocker in 1999. An October 8, 1999, article published in the Chicago Sun-Times quoted Kosiba as stating citywide implementation of the project had begun. According to Kosiba, the downspout disconnection rate was 15%-20% when the City began implementing Rainblocker.

¶ 13 Dennis Connolly, a civil engineer, worked for the City's Department of Sewers from 1993 to 2002, leaving with the title of first deputy commissioner. Connolly testified Kosiba accepted the recommendation of department officials to implement Rainblocker citywide and rejected Harza's recommendation for further study for three reasons: (1) the immediate need to prevent further flooding; (2) City funds would be better spent on implementation instead of further study; and (3) studies would not necessarily eliminate more flooding. According to Connolly, Kosiba consulted with him and Bilal Al Masri, the department's chief engineer, before making the decision. Connolly believed the decision was based on engineering reasons. Connolly also

believed Harza's recommendation was motivated in part by a desire to generate more business, as the recommendations for implementation were basically the same, regardless of the pilot area studied.

¶ 14 Connolly opined that without an 80% downspout disconnection, some people would experience sewer backup into their basements, depending on the severity of a storm. Over objection, Connolly added that he would also expect a reduction in the amount.

¶ 15 Al Masri testified that after Rainblocker was implemented, there were a series of rain events in August 2001. The Department of Sewers received a number of complaints regarding sewer surcharge and overland flooding. The City hired Harza to conduct an investigation of these complaints in different areas of the City. Harza also studied the effect of the inlet control program in a 2,250 acre sample area. According to Al Masri, the study showed 65% of downspouts remained connected, implying a 35% disconnection rate. Al Masri added the study concluded the implementation or Rainblocker improved the capacity of the system from a somewhat less than one-year level of protection to a slightly more than one-year level of protection. Al Masri conceded that the study showed a higher rate of downspout disconnection compared to other documentation.

¶ 16 Suzanne Kostrova, an insurance claims consultant, testified she was asked to review property damage claims made by the Insurers' insureds after the August 2001 storms. Kostrova reviewed approximately 2,243 such claims. Kostrova determined approximately 1,200 of these claims involved sewer surcharge.

¶ 17 Theodore Hromadka, an engineer and professor with master's degrees in applied mathematics and water resources in civil engineering, testified on behalf of the Insurers. His professional experience included preparing or directing 55 master plans of drainage for cities, including Los Angeles, California, and Moscow, Russia. He worked with combined sewer systems in San Francisco and Sacramento, California.

¶ 18 Hromadka testified that prior to installing an inlet controls, water could exit the system through the catch basins or through basement surcharge. The inlet control system, if properly installed and calibrated, should prevent basement flooding. However, Hromadka testified the inlet restrictors restricted flow from coming back up through the catch basins, so the flow must go into basements. Disconnecting downspouts puts more water in the street, which can be controlled by the inlet restrictors.

¶ 19 Hromadka conducted a study of approximately 2,200 flood damage claims from the August 2001 storm events. He opined, within a reasonable degree of engineering and hydraulic certainty, that the City failed to implement downspout disconnection properly, improperly sized inlet restriction devices based on location, and failed to install a complete system. Hromadka also opined that the widespread flooding during the August 2001 storms showed the flood risk was increased, rather than decreased, by the City's modification of Harza's design. Hromadka observed that flooding resulted in areas of the City where the rainfall had only a 2 to 45 year intensity. Yet, the incidents of flooding were just as likely in areas where there was less rain, suggesting another factor was at work. Hromadka acknowledged there may have been homes where rain blockers provided an additional level of basement backups from surcharge in August

2001. Hromadaka did not have the history of basement backups for claimaints at the time he rendered his opinions in this case. Hromadaka stated the question of why some people had sewage backup and others did not would have to be examined on a case-by-case basis.

¶ 20 After the close of evidence, the circuit court instructed the jury on the Insurers' tort claims. Over the Insurers' objection, the court also instructed the jury on the City's defense of governmental tort immunity. Following closing arguments and jury deliberations, the jury returned a general verdict in favor of the City on the tort claims. The jury also answered a special interrogatory finding the City's decision to implement Rainblocker was both a determination of policy and the exercise of discretionary, rather than ministerial, acts.

¶ 21 Following the jury verdict, the Insurers filed a motion for judgment notwithstanding the verdict or for a new trial. The Insurers also filed a brief in support of their constitutional claim. The City filed responses to both; the Insurers replied to the City's responses. The parties also filed supplemental briefs on the question of whether a statutory immunity applies to a takings claim brought pursuant to a state constitution.

¶ 22 On June 15, 2010, the circuit court entered an order denying the Insurers' posttrial motion for judgment notwithstanding the verdict or a new trial. On July 20, 2010, the circuit court entered a memorandum order ruling the City was immunized against the Insurers' takings claim. The order also states the court was not convinced there was sufficient scientific evidence establishing a causal link between the implementation of Rainblocker and the sewer surcharges.

¶ 23 On August 18, 2010, the Insurers filed a timely notice of appeal to this court.

¶ 24 DISCUSSION

¶ 25 I. The Takings Claim

¶ 26 On appeal, the Insurers first argue the circuit court erred in ruling the City had no liability for their takings claim under the Tort Immunity Act. The Insurers maintain a claim brought under the Illinois Constitution cannot be abrogated by a statutory immunity. The City responds that this court must first address the circuit court's other ruling that the Insurers failed to prove causation. The Insurers characterize the causation portion of the circuit court's order as "ambiguous commentary" and a "somewhat ambiguous holding."

¶ 27 However, the circuit court's order plainly states – in a section of the order entitled "Causation" – the court was not convinced there was sufficient scientific evidence establishing a causal link between the implementation of Rainblocker and the sewer surcharges. " 'A court will consider a constitutional question only where essential to the disposition of a case, *i.e.*, where the case cannot be determined on other grounds.' " *Beahringer v. Page*, 204 Ill. 2d 363, 370 (2003) (quoting *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 396 (1994)). Accordingly, we turn to address the issue of causation.

¶ 28 For damages to be compensable in an eminent domain proceeding, the damage must be the direct and proximate result of the taking. *Illinois State Toll Highway Authority v. Dicke*, 208 Ill. App. 3d 158, 172 (1991). Generally, the standard of review in a bench trial is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶12 (citing *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002)). A decision is against the manifest weight of the evidence only when an opposite conclusion is

apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252. "The court on review must not substitute its judgment for that of the trier of fact." *Id.* (citing *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 434 (1991)). In particular, since the trial judge is in the best position to weigh the evidence and evaluate the expert testimony, we will not substitute our judgment as to the credibility of witnesses for that of the trial court. *Stanton v. Republic Bank*, 144 Ill. 2d 472, 479 (1991). In a bench trial, the judge must determine the credibility of an expert witness and the weight of his testimony but the judge is not bound to accept the expert's opinion. *Hewitt v. Hurwitz*, 227 Ill. App. 3d 616, 620 (1992). A judgment will not be overturned merely because the reviewing court might disagree with the judgment or might have come to a different conclusion. *Eychaner*, 202 Ill. 2d at 270–71.

¶ 29 In this case, the Insurers maintain their expert testimony was uncontradicted, dismissing the testimony of the engineers who worked for the City and Harza that Rainblocker was incrementally beneficial as "guess, surmise and conjecture." "Proximate cause 'must be established to a reasonable certainty,' and may not be 'based upon mere speculation, guess, surmise or conjecture.' " *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1007 (2005) (quoting *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542, 553 (2000)). The Insurers also dismiss the Harza study conducted after the August 2001 rains, which showed an incremental benefit, as involving a small and unrepresentative area of the City. The Insurers further assert the City was barred from arguing at trial that Rainblocker led to a reduction of flooding, but the portions of transcript the Insurers cite address whether the City would be allowed to elicit

testimony about the number of flooding complaints the City received before and after implementing Rainblocker, not a general bar on the subject.

¶ 30 Although the record shows Hromadka to be highly qualified in his field, the City correctly notes his study was based on all of the flooding claims received by the Insurers, rather than the complaints involving sewer surcharge. The City also correctly notes that Hromadka formed his opinions without considering the prior flooding history of the relevant pool of claimants. Moreover, the record shows Hromadka agreed the question of why some people had sewage backup and others did not would have to be examined on a case-by-case basis. Conversely, Velon testified that any incremental benefit of Rainblocker would have to be measured on a block-by-block basis. Given this record, the trial judge's conclusion that the Insurers failed to prove the City's implementation of Rainblocker caused the sewer surcharges at issue may be debatable, but it is not arbitrary or unreasonable.

¶ 31 II. The Tort Claims

¶ 32 The Insurers also maintained in their posttrial motion that: (1) the circuit court erred by instructing the jury on the City's affirmative defense under the Tort Immunity Act; (2) the jury incorrectly decided the immunity issue; and (3) they were prejudiced by the timing of the instruction. A trial court should enter a judgment *non obstante veredicto* (judgment *n.o.v.*) only if all of the evidence, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict could ever stand. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 88; *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 156 (2003) (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d

494, 510 (1967)). That standard also applies to a trial court's denial of a motion for judgment *n.o.v.* *Check*, 342 Ill. App. 3d at 156 (citing *Knight v. Haydary*, 223 Ill. App. 3d 564, 569 (1992)). Whether that standard is met is reviewed *de novo*. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999).

¶ 33 In contrast, the standard of review for the granting or denial of a motion for a new trial is whether the trial court abused its discretion. *Check*, 342 Ill. App. 3d at 156-57 (citing *Pekelder v. Edgewater Automotive Co.*, 68 Ill. 2d 136, 138 (1977)). "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Check*, 342 Ill. App. 3d at 157 (citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991)). "An application of impermissible legal criteria also justifies reversal." *Check*, 342 Ill. App. 3d at 157 (citing *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993)).

¶ 34 The City responds that judgment should be entered on the tort claims because the Insurers' posttrial motion did not challenge the general verdict entered in favor of the City. When a jury renders a special verdict consistent with its general verdict, the special verdict has no effect and judgment is entered only on the general verdict. *Kosrow v. Acker*, 208 Ill. App. 3d 143, 146 (1991). A special verdict overrides a general verdict to the extent of any clear and absolute inconsistency, but a consistent special verdict is meaningless and of no consequence. *Id.* When the special verdict is consistent with the general verdict, the issue is whether there is sufficient evidence to support the general verdict. *Id.*

¶ 35 The Insurers reply that the special interrogatory is inconsistent with the general verdict. They note that the trial judge gave a similar instruction on each tort claim:

> "If you find through consideration of all the evidence any of these propositions was not proven, then your verdict should be for the defendant ***.
>
> On the other hand if you find in consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's affirmative defense ***."

Thus, the Insurers conclude the jury's completion of the special interrogatory shows the jury found in their favor on the merits but entered a verdict against them based on the City's affirmative defense.

¶ 36 However, the trial judge also instructed the jury as follows:

> "Now, a special interrogatory is supplied with these instructions. After you reached – and I mean after you have reached a verdict, it is then and only then you would fill in and sign the special interrogatory, return it to the Court along with the other forms of verdict, special interrogatory like the other forms must be signed by each one of you. This is it. I'm holding it up. And you've already heard it, but I'm going to read it to you. 'On or before August 2001, were the decisions by the City to implement the rain blocker program, both one, determinations of policy, and, two, the exercise of discretionary acts rather than ministerial acts?' And there's a blank for yes and a blank for no. You must fill in one of those, sign it and return it to me with the other forms of verdict."

Given this instruction from the trial judge, the jury was required to complete the special interrogatory, regardless of the basis for the general verdict. It cannot be inferred the jury

necessarily found in favor of the Insurers on the merits of their tort claims and based their verdict on the City's affirmative defense.

¶ 37 The record shows no clear and absolute inconsistency between the general verdict and the special interrogatory. Thus, the issue is whether there is sufficient evidence to support the general verdict. The Insurers did not challenge the general verdict on the tort claims in their posttrial motion. Indeed, on the merits, the Insurers raised only the issue of causation involved in the takings claim involved in the bench trial (which, for the reasons earlier stated, was not against the manifest weight of the evidence). Accordingly, we conclude the special verdict was without effect and the circuit court did not err in denying judgment *n.o.v.* on the general verdict.

¶ 38 CONCLUSION

¶ 39 In sum, the circuit court's ruling that the Insurers failed to show causation on their takings claim was not against the manifest weight of the evidence. The circuit court did not err in denying judgment *n.o.v.* on the Insurers' tort claims because the special interrogatory was not clearly and absolutely inconsistent with the general verdict in favor of the City. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.