SIXTH DIVISION
August 8, 2014

No. 1-13-2771



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| DARYL WASH and CHERYL WASH, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiffs-Appellants, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 L 8579 |
| | ) | |
| BENCHMARK CONSTRUCTION CO., INC., an Illinois Corporation, | ) | |
| | ) | The Honorable |
| | ) | Lynn M. Egan, |
| Defendant-Appellee. | ) | Judge Presiding. |

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JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

**O R D E R**

¶1 *HELD*: Summary judgment was proper where plaintiffs failed to establish a causal connection between defendant's water main installation and the flooding in their basement following a heavy rainstorm. The circuit court did not abuse its discretion in finding defendant's check for partial payment of plaintiffs' insurance claim was not admissible.

¶2 Plaintiffs, Daryl and Cheryl Wash, appeal the order of the circuit court granting summary judgment in favor of defendant, Benchmark Construction Company, Inc, on plaintiff's two-count

complaint for negligence and *res ipsa loquitur*. Plaintiffs contend the circuit court erred in accepting defense expert's factual assertions and finding plaintiffs' failure to rebut defense expert's opinion was fatal to their cause of action. Plaintiffs contend, in the alternative, that the circuit court erred in finding there was no causal connection between defendant's conduct and the injury suffered by plaintiffs. Finally, plaintiffs contend the circuit court erred in failing to consider a $15,000 "partial payment" paid by defendant's insurer as evidence of defendant's liability. Based on the following, we affirm.

¶3 FACTS

¶4 On September 4, 2008, plaintiffs' home, located at 10960 South Prospect Avenue in Chicago, Illinois, was damaged when the sewer backed up into the basement following a heavy rainstorm. According to plaintiffs' third amended complaint,[1] in July, August, and September of 2008, defendant was hired by the city of Chicago (City) to install a water main under their residential street. Specifically, defendant replaced a 6 inch water main pipe with an 8 inch water main pipe. The pipe was located beneath the public street in front of plaintiffs' house.

¶5 Plaintiffs' alleged that, on or about July or August of 2008, defendant breached its duty:

> "not to damage Plaintiffs sewer line in the course of installing the water main at a site adjacent to the Plaintiffs' property in that it:
>
> a) Failed to use proper techniques in the course of excavating the street for the purpose of installing a water main;
>
> b) Failed to ascertain the location of water drains and sewer lines in the area adjoining the Plaintiffs' property where the water main was to be installed;

[1] Plaintiffs incorporated their negligence claim against defendant as it had been alleged in their second amended complaint.

c) Failed to take necessary precautions to prevent the fracture and/or clogging of the private sewer line emanating from Plaintiffs' home;

d) Failed to use proper techniques in the course of backfilling and paving the street where the water main had been installed; and

e) Failed to properly inspect the area where the work was to be performed."

Plaintiffs further alleged that defendant caused a "fracture and/or separation of the private drain sewer" coming from plaintiffs' home and connecting to the City's sewer line. Plaintiffs continued that "[a]s a consequence of the foregoing failures and of a heavy rainstorm on or about September 4, 2008, a sewage backup occurred in Plaintiffs' private drain sewer line flooding the entire basement with sewage and water that reached a level in excess of twelve inches." Plaintiffs' basement was damaged as a result.

¶6 Plaintiffs added that they lived in their home for 13 years prior to September 4, 2008, and the street had never been excavated at the location of their sewer pipe. Moreover, according to plaintiffs, defendant was in exclusive control of the equipment used in the installation of the water main. In addition, plaintiffs alleged that, "[w]ithin a few months of the wastewater backup," defendant made an "unconditional partial payment of $15,000" to plaintiffs.

¶7 In their third amended complaint, plaintiffs presented claims for negligence and *res ipsa loquitur* against defendant and claims for negligence and *res ipsa loquitur* against the City. The circuit court subsequently granted the City's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). Discovery ensued on the remaining claims against plaintiffs.

¶8 In his deposition, Mark Atkins testified that he was a project manager for defendant-company and was assigned to the water main project in question. The water main was being replaced in conjunction with the City's 100-year replacement program. The new, 8 inch water main was installed directly below the old, 6 inch water main. Atkins described the method of digging into the pavement to expose the old water main and replacing the pavement after installing the new water main. Once the new water main was installed, the old water main was closed off, but was not removed. According to Atkins, the City has a combined sewer system, in that private sewage lines and water drains flow into the same sewer pipes. Those private lines are pitched downward, away from a house, allowing gravity to flow from the house toward the main line. Atkins testified that plaintiffs' private sewer line ran from their property across the water main, as opposed to parallel to the water main.

¶9 Atkins further testified that defendant-company was notified that plaintiffs' had a sewage backup problem on September 4, 2008. The new water main had been installed for four to six weeks by that time. In response to plaintiffs' call, on September 5, 2008, employees of defendant-company excavated to locate plaintiffs' private sewer line. Atkins was not present for the excavation. Atkins did not have an opinion regarding what caused the backup.

¶10 At his deposition, Daniel Wylde testified that he was the foreman with defendant-company assigned to dig up the sewer line at issue on September 5, 2008. Wylde testified that his team first exposed the newly-installed water main. Wylde then excavated plaintiffs' private sewer line. The sewer line was located five feet away from the 8-inch water main. Wylde testified that plaintiffs' private sewer line was not broken. Wylde then removed a piece of the private sewer line and observed only a small trickle of water escape the pipe, which was to be expected since ground water collects in private sewer lines. Wylde advised plaintiffs that, if

there was a problem between their exposed private sewer line and the water main, the water would drain. Wylde testified that he checked for blockages in the private sewer line going in the direction toward plaintiffs' home and toward the water main as well. Using a flashlight pointed toward the water main, Wylde said he observed no blockages in the line. Wylde testified that he inserted a 25-foot tape measure into the pipe going toward plaintiffs' home to detect for a blockage, but none was found. As a result, Wylde concluded that the sewer blockage was located closer to plaintiffs' house. After the inspection, Wylde's team fixed the pipe that had been removed.

¶11 Wylde further testified that when there is a blockage in a sewer line the water cannot pass and it is forced back. In instances when the amount of water entering a drain system is much greater than what is flowing out of the combined sewer and water system, an entire neighborhood would flood. Wylde opined that tree roots may have caused a blockage in plaintiffs' private sewer line between the house and the water main. Wylde, however, further opined that the backup in the basement was caused by drain water penetrating the foundation of plaintiffs' home. According to Wylde, defendant's installation of the water main did not cause plaintiffs' basement to flood. Wylde stated that "if there was a blockage when I opened the pipe, the water, regardless of whether there was something over the top of the drain or not, that pipe would be filled."

¶12 In her deposition, Beatrice Wyma testified that she was a consultant hired by the City's department of water. In that capacity, she performed on-site water inspections. Wyma testified that she was on-site for the installation of the water main on South Prospect Avenue in August and September of 2008. Wyma also testified that she received notice of the water sewage backup at plaintiffs' address. Once she was at plaintiffs' address, Mrs. Wash reported to Wyma

that a member of the sewer department initially responded in the early morning hours of September 5, 2008, to her call regarding the backup, but the individual left after noticing the equipment for the water main project. Wyma testified that she entered plaintiffs' basement on September 5, 2008, and observed two to three inches of standing water, maybe up to four inches in some areas.

¶13 Wyma testified that, on the same date, she observed the contractors excavate the street to expose the water main and no problems were identified. The contractors then continued excavating toward plaintiffs' house by excavating the parkway. Wyma testified that, once plaintiffs' private sewer line was exposed, she observed a 4-inch gap between two pipes. The two pieces of pipe had become dislodged at the joint and there was stone and debris between the gap. One of the contractors then inserted a steel tape inside the pipe to "see if there was any debris stuck in there, and a little bit of water trickled out." Meanwhile, Mrs. Wash stated that her "basement started draining." However, there was "nothing coming through" the exposed private sewer line. Wyma testified that there must have been "something broken or dislodged" closer toward plaintiffs' house. Wyma was unable to determine where the blockage was in plaintiffs' private sewer line. According to Wyma, no other complaints of sewage backups were filed within the neighborhood.

¶14 Richard D'Ambrosia, an engineering expert hired by defendant, filed a report containing his "professional engineering consultant opinion." D'Ambrosia ultimately concluded that the flooding in plaintiffs' home was the result of a city sewer surcharge that was caused by the "very intense rainfall *** on September 4, 2008." D'Ambrosia opined that the flooding was "not in any way related to or caused by the watermain work that was being performed" by defendant. In

the report, D'Ambrosia stated that his professional opinion was "clearly supported by relevant documents."

¶15 In so concluding, D'Ambrosia stated that plaintiffs' allegations were "contrary to the documentation findings as well as basic Engineering principles." D'Ambrosia highlighted numerous facts, such as: (1) the main water line work was performed five feet from where plaintiff's private sewer line was exposed; (2) the private sewer line was not broken, clogged, or full of water; (3) if there was a clogged or blocked sewer drain caused by defendant's work on the water main, drainage would have been a problem almost immediately, yet the flooding incident did not occur until months after the water main work was completed; (4) where the standing water in the basement was reduced from two feet to several inches during the time from the rain fall on September 4, 2008, until defendant investigated and replaced the private sewer line on September 5, 2008, "a likely scenario" was that a drain in the basement was blocked by debris or loose floor tiles; (5) if the private sewer line was clogged, as was alleged, water could not enter plaintiffs' basement due to backflow from the surcharged city water; and (6) the weather records, rain gauge data, and "Combined Sewer Overflow" records indicated the city sewer surcharged throughout the area causing backups and the surcharge suggested drainage throughout the area was slow to recover.

¶16 In his report, D'Ambrosia further opined that the alleged backup was "due to a naturally occurring intense rainfall and if the pipe was blocked, the water would not have entered the basement in the first place. Also, the 12 plus inches of water in the basement was able to drain to several inches *** the following morning demonstrating that the drain was operational." D'Ambrosia maintained that any damage to the private sewer line discovered when it was excavated was not indicative of a blocked sewer. D'Ambrosia stated that the damage "could

have occurred during the excavation that day to uncover and view it or it could have existed for some time. The pressure caused by the sewer surcharge that resulted in the sewer backup could also have caused or exacerbated the damage found as well." According to D'Ambrosia, the intense rainfall exceeded the capacity of the main system and caused the "hydraulic head to rise above the basement floor level in the Wash residence which then resulted in sewerage backflow into the basement." D'Ambrosia clarified that all surrounding buildings and residences would not necessarily also experience a backup because each sewer "can exit at different elevations and due to other appurtenances that may be included such as valves, etc."

¶17 In an affidavit attached to D'Ambrosia's report, he averred that his opinions were based on a "reasonable degree of engineering certainty."

¶18 After the close of discovery, defendant filed a motion for summary judgment, claiming plaintiffs failed to produce any evidence establishing defendant caused the backup or failed to rebut D'Ambrosia's opinion. Defendant further argued plaintiffs could not prevail on their *res ipsa loquitur* claim because there was no evidence defendant controlled the sewer line that allegedly caused the backup. In response, plaintiffs argued that expert testimony was not necessary because the "engineering principles involved in this case are very basic, and easily understood by jurors." Plaintiffs maintained that defendant's water main work "must have" caused the sewer pipe to separate, thus allowing debris to enter and cause the backup. Moreover, plaintiffs argued that a question of fact existed barring the entry of summary judgment where defendant's representative "admitted responsibility for the incident" by forwarding a check in "partial settlement" of plaintiffs' claim. In a written order, the circuit court granted defendant's motion for summary judgment. The circuit court subsequently denied plaintiffs' motion for reconsideration. This appeal followed.

¶19 ANALYSIS

¶20 Plaintiffs contend the circuit court erred in granting summary judgment in favor of defendant.

¶21 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). However, if the plaintiff fails to establish any element of his claim, summary judgment is deemed appropriate. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). A party that opposes a motion for summary judgment must "present a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). We review a trial court's decision granting summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶22 Plaintiffs present four arguments on appeal: (1) the circuit court erred in concluding plaintiffs' failure to rebut D'Ambrosia's opinion was fatal to their complaint; (2) the circuit court erred in accepting D'Ambrosia's factual assertions; (3) the circuit court erred in finding plaintiffs failed to establish a causal connection between defendant's conduct and the sewage backup; and (4) the circuit court erred in finding the $15,000 "partial payment" check from defendant's insurance company was not evidence of defendant's liability. We address only those arguments

that are dispositive. We first turn to plaintiffs' contention that the circuit court erred in finding there was no causal link between defendant's actions and the flooding in their basement.

¶23 In order to establish their negligence claim, plaintiffs were required to allege facts establishing defendant owed them a duty of care, defendant breached the duty of care, and the alleged breach proximately caused plaintiffs' injuries. *Swain v. City of Chicago*, 2014 IL App (1st) 122769, ¶ 14. "The mere happening of an accident does not entitle a plaintiff to recover. A plaintiff must come forward with evidence of negligence on the part of defendant and with evidence that the defendant's negligence was a proximate cause of the plaintiff's injuries. Proximate cause can only be established when there is a *reasonable certainty* that the defendant's acts caused the injury." (Emphasis in original.) *Payne v. Mroz*, 259 Ill. App. 3d 399, 403 (1994). Proximate cause may not be based upon "mere speculation, guess, surmise or conjecture." *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542, 553 (2000). Generally, the issue of cause is a question of fact for the jury, but the lack of proximate cause may be determined by the court as a matter of law where the facts alleged failed to sufficiently demonstrate both cause in fact and legal cause. *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 10.

¶24 Plaintiffs' theory of the case was that, when installing the water main, defendant forced a separation in plaintiffs' private sewer line and this gap created a blockage, causing the basement to flood during the heavy rainstorm on September 4, 2008. Plaintiffs' theory has no factual support. The facts establish that defendant installed a new water main under the street adjacent to plaintiffs' house. Approximately four to six weeks later, a heavy rainstorm occurred and plaintiffs' basement flooded. Reports indicated that plaintiffs had between one and two feet of standing water. The next day, defendant excavated the road to expose the water main and no issues were observed. Defendant then excavated under the parkway, five feet toward plaintiffs'

house, in order to expose plaintiffs' private sewer line. According to Wyma's deposition testimony, the pipe was intact but there was a four inch gap between two pipes with some visible debris and a trickle of water. Defendant performed tests to determine if there was a blockage between the water main and the exposed private sewer line and also from the exposed private sewer line and 22 to 25 feet toward plaintiffs' house. No blockages were found. Notwithstanding, the water receded from plaintiffs' basement.

¶25 Overall, none of the facts established that (1) defendant caused the separation in plaintiffs' private sewer line or (2) the separation created a blockage somewhere in the private sewer line. In fact, plaintiffs never established the location of the alleged blockage. Plaintiffs repeatedly speculated that defendant "must have" caused the gap in the private sewer line which then caused the flooding. Plaintiffs, however, cannot rely on speculation to establish a negligence claim. See *Castro*, 314 Ill. App. 3d at 553. Moreover, plaintiffs did not present any evidence establishing when the gap occurred in their private sewer line. As D'Ambrosia stated in his report, the gap could have occurred after the basement flooded. Further, plaintiffs' so-called evidence that their basement did not flood ten days after the date in question despite a heavier rainfall, that no other houses in their neighborhood flooded, that there was stones and debris in the gap, and that defendant was the only company performing excavation work in the area prior to the rainfall fails to establish that *defendant* negligently installed the water main, thereby causing plaintiffs' house to flood on the date in question.

¶26 Because we have concluded plaintiffs failed to establish a causal connection between defendant's work on the water main and the flooding in their basement, we need not determine whether their failure to provide an expert opinion to rebut D'Ambrosia's opinion was fatal to their claim. Additionally, plaintiffs' did not establish the doctrine of *res ipsa loquitur* where they

failed to provide evidence that the flooding would not have occurred absent negligence and that defendant had exclusive control over the cause of the flooding, which remained undetermined. See *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1011 (2008) ("[t]he doctrine of *res ipsa loquitur* requires that (1) the occurrence is one that ordinarily does not occur in the absence of negligence; and (2) the defendant had exclusive control of the instrumentality that caused the injury").

¶27 As a final matter, plaintiffs' contend that a $15,000 "partial payment" check sent by defendant's insurer to plaintiffs was an admission of liability. Typically, matters regarding settlements and negotiations are not admissible. *Liberty Mutual Insurance Co. v. American Home Assurance Co., Inc.*, 368 Ill. App. 3d 948, 960 (2006). The admissibility of evidence is within the sound discretion of the circuit court and will not be reversed absent a clear abuse of that discretion. *Id*. Here, the circuit court exercised its discretion in concluding that the check to plaintiffs from defendant's insurance company for $15,000 with the memo line stating "partial payment-property damage claim" was a settlement payment. We find no abuse of discretion.

¶28 Moreover, the cases cited by plaintiffs for support, *i.e.*, *Ross v. Danter Associates, Inc.*, 102 Ill. App. 2d 354 (1968), and *Gaslite Illinois, Inc. v. N. Illinois Gas Co.*, 46 Ill. App. 3d 917 (1976), are distinguishable. In *Ross*, the circuit court admitted as evidence, over the defendant's objection, a letter with a check enclosed that did not indicate the purpose of the check, finding the letter was not a settlement offer. *Ross*, 102 Ill. App. 2d at 365. The appellate court agreed. *Id*. Here, in contrast, defendant's insurance company expressly indicated that the $15,000 check was for "partial payment" of plaintiffs' property damage claim. Unlike in *Ross*, the circuit court in this case considered the check a settlement offer. In *Gaslite Illinois, Inc.*, the appellate court considered whether a check for partial payment was evidence of an agreement between the

parties or to settle the underlying claim. *Gaslite Illinois, Inc.*, at 46 Ill. App. 3d at 925-26. The *Gaslite Illinois, Inc.*, court concluded that the check was for actual services rendered, thus evidencing the parties' agreement. *Id*. Here, in contrast, the parties had no contractual relationship and the $15,000 check could not provide evidence of such.

¶29 CONCLUSION

¶30 We affirm the circuit court's order granting summary judgment in favor of defendant.

¶31 Affirmed.