COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1106 **Cir. Ct. No. 2014CV230**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

SOCIETY INSURANCE, IDF, LLC AND AFFILIATED CLINICAL SERVICES, INC.,

PLAINTIFFS-APPELLANTS,

V.

CITY OF WEST BEND AND LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In this sewer backup case, Society Insurance, IDF, LLC, and Affiliated Clinical Services, Inc., appeal from an order dismissing their

claims against the City of West Bend and League of Wisconsin Municipalities Mutual Insurance. For the reasons that follow, we affirm.

¶2 On November 25, 2012, the City of West Bend's sewer line backed up and flooded the lower level of a property owned by IDF, LLC, and occupied by Affiliated Clinical Services, Inc. The backup was caused by a blockage from tree roots in a section of sewer line between two manholes (manhole #48 and manhole #53). At the time of the flooding, both IDF and Affiliated were insured by Society Insurance, which paid for the damages.

¶3 Society, IDF, and Affiliated (collectively, Society) subsequently filed suit against the City and its insurer, League of Wisconsin Municipalities Mutual Insurance. The complaint alleged that the City was negligent because it failed to exercise ordinary care in the maintenance and inspection of its sewer system. It further alleged that the negligence created a nuisance.

¶4 The matter proceeded to a bench trial. There, the circuit court heard evidence of the blockage and the damage that it caused. The court also heard evidence of the City's practices for maintaining and inspecting its sewer system. Prior to the backup, the City had a "goal" of maintaining/inspecting a quarter of its sewer system every year so that the entire system would be maintained/inspected over a four-year period. The goal was not required by law or written policy. Rather, it was just something that the City set out to do. Despite its goal, the City acknowledged that it had not maintained/inspected the section of sewer line between manhole #48 and manhole #53 since at least July 2007. The City did not know why this section was missed in its four-year rotation. The section had no history of blockages or problems with tree roots.

¶5 At the close of the bench trial, the City and its insurer moved to dismiss Society's claims. The circuit court granted the motion. In doing so, the court indicated that it was not convinced that negligence had been proven.[1] It observed:

> I think to make a finding like that, there would need to be some evidence of what is the standard of ordinary care…. [T]here was no testimony here regarding a standard of care that's required by municipalities in maintaining their sanitary sewers. There was no testimony here that four years is the magic number for maintenance and inspection, and if you do it less frequently than that, you're negligent, or if you do it as frequently or more frequently than that, you are okay.
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> ….
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> [A]lthough the duty of ordinary care does include the obligation to keep the sanitary sewer free of obstruction and in proper working order, that does not mean that every single time that there is a result, such as a backup that causes damages, that the municipality is negligent.

The court entered an order dismissing the matter. This appeal follows.

¶6 On appeal, Society contends that the circuit court erred in dismissing its claims against the City and its insurer. It submits that the City's failure to inspect the section of sewer line between manhole #48 and manhole #53 in accordance with its customary practice constituted negligence.

¶7 Under Wisconsin law, everyone "has a duty to exercise ordinary care under the circumstances." ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶30, 291 Wis. 2d 283, 717 N.W.2d 17. If a person fails to act in a way "that a

[1] Alternatively, the circuit court concluded that the City was entitled to immunity. Because we affirm the court's finding regarding negligence, we do not address the question of immunity.

reasonable person would recognize as creating an unreasonable risk of injury or damage," that person is "not exercising ordinary care under the circumstances, and is therefore negligent." ***Id.***

¶8 As a general rule, the existence of negligence is a question for the fact finder. ***Casper v. American Int'l S. Ins. Co.***, 2011 WI 81, ¶92, 336 Wis. 2d 267, 800 N.W.2d 880. Because the circuit court acted as fact finder in this case, we are bound by its findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2015-16).[2]

¶9 On this record, we cannot say that the circuit court's finding regarding negligence was clearly erroneous. As noted, the section of sewer line between manhole #48 and manhole #53 had no history of blockages or problems with tree roots. *See* ***Milwaukee Metro. Sewage Dist. v. City of Milwaukee***, 2005 WI 8, ¶79, 277 Wis. 2d 635, 691 N.W.2d 658 (in the absence of circumstances indicating a defective condition, a water distributor is not negligent for failing to inspect buried water mains). Moreover, the City's goal of maintaining/inspecting its sewer system every four years was just that: a goal. It was not tied to any requirement or standard of care. Consequently, the court could reasonably conclude that the City's failure to inspect the section of sewer line between manhole #48 and manhole #53 in accordance with its customary practice did not constitute negligence. Given that finding, the court's dismissal of Society's claims was proper.

By the Court.—Order affirmed.

[2] All references to the Wisconsin Statutes are to the 2015-16 version.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).