MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Town of Edgewood, Indiana,
Appellant-Defendant,

v.

Paul Hensley, et al.,
Appellees-Plaintiffs.

March 23, 2021

Court of Appeals Case No. 20A-SC-1543

Appeal from the Madison Circuit Court

The Honorable Kevin M. Eads, Magistrate

Trial Court Cause No. 48C04-2005-SC-852

Bailey, Judge.

Case Summary

[1] The Town of Edgewood, Indiana ("the Town") appeals a small claims judgment entered in favor of Paul Hensley, his wife, Betty Hensley, and his daughter, Stephanie Grimm ("Grimm"), (collectively, "the Claimants") upon a negligence claim. We affirm.

Issues

[2] The Town presents two issues for review:

I. Whether the Town is immune from liability for damages incurred as a result of a successive fire that began in the Town's shrubbery and migrated to neighboring property; and

II. Whether the evidence established contributory negligence by Grimm in her selection of a parking space and retention of her keys.

Facts and Procedural History

[3] No evidentiary transcript is available, and we thus derive the limited facts from trial exhibits which are available and a Certification of Evidence pursuant to Indiana Appellate Rule 31. Paul Hensley owned and operated a barber shop next door to the Town Hall. A row of shrubbery owned by the Town caught on fire in the spring of 2017. A tenant near the barber shop rushed to move her vehicle and no one was injured. On June 17, 2018, the shrubbery again caught on fire. This time, a vehicle parked on the barbershop lot caught on fire and its

tires burned into the asphalt, in turn burning an exposed electrical power line. The vehicle and its contents were destroyed, and the barbershop was deprived of electrical power for one and one-half days, causing temporary cancellation of services.

[4] On November 19, 2018, the Claimants filed a Notice of Tort Claim, stating that the Town had "maintained and failed to eliminate a fire hazard." (App. Vol. II, pg. 14.) The Claimants asserted that the Town was on notice of the danger because of the earlier fire and because of observations of the Town's business invitees smoking in the vicinity. They identified the alternative alleged causes of the fire as "spontaneous combustion in decaying shrubbery and mulch or human action by business invitees." (*Id.* at 15.) On May 28, 2020, the Claimants filed a Notice of Small Claim, asserting that the Town had "negligently maintained real property resulting in a fire." (*Id.* at 11.)

[5] On July 22, 2020, after having conducted an evidentiary hearing by Zoom, the small claims court issued an order awarding the Claimants $3,696.00 in aggregate damages.[1] The trial court's order stated that the "exact cause" of the fire had not been established, but "whatever the immediate and unidentified agency of the spark, it clearly appears that the Town was the owner of the tinder." (Appealed Order at 2-3.) The Town now appeals.

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[1] The order included itemization of $685.00 for electrical repair, $232.00 for loss of business revenue, $2,500.00 for Grimm's vehicle, and $279.00 for its contents.

Discussion and Decision

Standard of Review

[6] Indiana Small Claims Rule 8(A) provides:

> The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

[7] A small claims judgment is reviewed under a "clear error" standard. *Fortner v. Farm Valley-Applewood Apartments*, 898 N.E.2d 393, 398 (Ind. Ct. App. 2008). A judgment in favor of a party having the burden of proof will be affirmed if the evidence was such that a reasonable trier of fact could conclude that the elements of the claim were established by a preponderance of the evidence. *Id.* This court gives due deference to the trial court's opportunity to judge the credibility of the witnesses, does not reweigh the evidence, and considers only the evidence and reasonable inferences therefrom that support the trial court's judgment. *Id.* A deferential standard of review is particularly appropriate in small claims actions, which have the objective of dispensing speedy justice in proceedings "designed to be less formally structured than plenary proceedings." *Id.*

[8] The rules of substantive law apply in small claims proceedings. Ind. Small Claims Rule 8(A). To prevail upon a negligence claim, 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) compensable injury proximately caused by the breach of duty. *Smith v. Walsh Constr. Co. II, LLC*, 95 N.E.3d 78, 84 (Ind. Ct. App. 2018), *trans. denied*. In general, the element of duty is a question of law for determination by the court, while breach and proximate cause present questions of fact for a factfinder. *Id.* Here, the Town did not contest the existence of its duty to an adjoining landowner.[2] As to breach and causation, the small claims court acted as factfinder.

[9] The Town also raised the affirmative defense of immunity, presenting a threshold question for the trial court. Although factual development may be required, the question of immunity is one of law, which is reviewed de novo. *Bartholomew Cnty. v. Johnson*, 995 N.E.2d 666, 672 (Ind. Ct. App. 2013).

Immunity

[10] Under the Indiana Tort Claims Act, governmental entities are subject to liability for torts committed by their agencies or employees unless one of the

[2] One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or a thing or a third person in whose security the possessor has a legally protected interest. *Restatement (Second) of Torts § 165 (1965).*

immunity provisions of the Act applies. *City of S. Bend v. Dollahan*, 918 N.E.2d 343, 350 (Ind. Ct. App. 2009) (citing I.C. § 34–13–3–3), *trans. denied*.

[11] There is evidence to support the trial court's determinations that the Town did not remove its shrubbery after the first fire and allowed a dry condition to continue "unaddressed" such that it could serve as "tinder." Appealed Order at 3. Although the ignition instrumentality is not identified, "an act of negligence need not be the only proximate cause, and liability arises if the act, concurring with one or more other causes, is a proximate cause of the injury. … A defendant is not relieved of liability because he is responsible for only one of such causes." *Nat'l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 366 (Ind. Ct. App. 1995), (citation omitted), *trans. denied*. *See also Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Ind. Horseshoe Co.*, 154 Ind. 322, 56 N.E. 766, 768 (1900) (observing that, where combustible material had been permitted to accumulate and remain, the landowner was "guilty of actionable negligence if injury resulted" from a migrating fire).

[12] The Town does not contend that the Claimants failed to establish an element of a negligence claim. Rather, the Town asserts that the trial court failed to correctly address the threshold question of whether the Town is immune from liability.

> Immunity assumes negligence but denies liability. Thus, the issues of duty, breach and causation are not before the court in deciding whether the government entity is immune. If the court finds the government is not immune, the case may yet be decided

> on the basis of failure of any element of negligence. This should not be confused with the threshold determination of immunity.

Peavler v. Bd. of Comm'rs of Monroe Cnty., 528 N.E.2d 40, 46-47 (Ind. 1988).

[13] "[A] governmental entity seeking immunity bears the burden of proving that its conduct falls within one of the exceptions set out in the Act." *Dollahan*, 918 N.E.2d at 351. The Town identifies two purported grounds for immunity, I.C. 34-13-3-3(8) (immunity from liability for failure to enforce a law) and I.C. 34-13-3-3(10) (immunity from liability for acts caused by anyone other than the Town or a Town employee). These claims of immunity are predicated upon the assumption that a non-employee visitor to the Town Hall threw smoking material into the shrubbery. However, the trial court found that there had been "speculation" – as opposed to proof – that a Town invitee discarded smoking material causing the fire. Appealed Order at 2. The trial court as factfinder did not identify a particular source of ignition, but rather it found that the Town "permitted a potential fire danger to remain unaddressed." *Id.* The order stated that the trial court had reviewed a video of the shrubbery and it had revealed dry and dead shrubs.[3] *Id.* The trial court summarized: "the Town was the owner of the tinder." *Id.* at 3.

[3] In the Certification of Evidence, the trial court referred to the video as the "best evidence" available, noting that it revealed "significant dead patches" in the shrubbery. (App. Vol. II, pg. 35.)

[14] As the Town observes, the Notice of Tort Claim included language indicating that the Claimants believed that Town invitees smoked near the Town's shrubbery and discarded smoking material there. But the Notice of Tort Claim is not evidence. Our review of the evidence reveals an absence of facts supporting a claim of immunity. As such, the trial court did not clearly err in rejecting the Town's claim of governmental immunity.

Contributory Negligence

[15] When a tort claim is brought against a governmental entity, the common law defense of contributory negligence remains applicable under Indiana Code section 34-51-2-2. *Hill v. Gephart*, 54 N.E.3d 402, 406 (Ind. Ct. App. 2016), *trans. denied*. Contributory negligence that has proximately caused the plaintiff damage, however slight, operates to bar an action against the governmental entity. *Id.* A plaintiff must exercise the degree of care that a reasonably careful and prudent person would exercise in like or similar circumstances. *Dorman v. Osmose, Inc.*, 873 N.E.2d 1102, 1110 (Ind. Ct. App. 2007), *trans. denied*. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." *Id.* Moreover, the plaintiff's negligence must either be the proximate cause or a concurring or co-operating proximate cause of the plaintiff's injury. *Id.* Whether the plaintiff has been contributorily negligent generally presents a question of fact. *Hill*, 54 N.E.3d at 406.

[16] The Town argues that, if dry or dead shrubbery presented an obvious fire hazard, Grimm was contributorily negligent for parking her vehicle near the bushes and leaving with her keys in her purse. The Town hypothesizes that the vehicle could have been safely and quickly moved during the second fire, as was the case in the first fire, had Grimm left the keys at the barber shop. In essence, the Town claims that Grimm had a duty to assess the condition of the Town's shrubbery, park her vehicle more remotely, and leave her keys in anticipation of another possible fire. The trial court found that Grimm's actions of parking her vehicle in a designated parking spot and leaving with her keys in her possession did not fall below the applicable standard of conduct. We will not invade the province of the factfinder. *Fortner*, 898 N.E.2d at 398.

Conclusion

[17] The Town has shown no clear error in the small claims judgment in favor of the Claimants.

[18] Affirmed.

Robb, J., and Tavitas, J., concur.