IN THE COURT OF APPEALS OF IOWA

No. 1-933 / 11-0382
Filed February 1, 2012

ARLYN BASEL, JEAN BASEL, SHAWN WIEBELHAUS, ERIN WIEBELHAUS, DON NEMITZ and SANDRA NEMITZ,
Plaintiffs-Appellants,

vs.

CITY OF ANKENY,
Defendant-Appellee,

SNYDER & ASSOCIATES, INC.,
Defendant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The Plaintiffs appeal the district court's order granting summary judgment in favor of the defendant. **REVERSED AND REMANDED.**

Matthew E. Laughlin and Sara K. Franklin of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellants.

Mark W. Thomas and Laura N. Martino of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

I. Background Facts and Proceedings.

The Plaintiffs are homeowners in a residential subdivision named Wildflower Plat 2 located in Ankeny, Iowa. In 2009, the Plaintiffs filed suit against the City of Ankeny (City) and Snyder & Associates, Inc. (Snyder).[1] The Plaintiffs alleged that beginning in June 2008, rainfall caused repeated significant flooding in their homes' basements and on their properties. They claimed the flooding was caused by an inadequate storm sewer and drainage system, which Snyder designed and the City approved. The Plaintiffs asserted negligence and gross negligence, nuisance, and trespass claims against the City and Snyder, as well as inverse condemnation and 42 U.S.C. § 1983 claims against the City.

The City moved for summary judgment,[2] asserting the issues raised by the Plaintiffs had been decided in a previous district court case, *Egli v. City of Ankeny*, No. CL 110605 (Polk County District Court), and consequently the Plaintiffs' claims were barred by issue preclusion. In *Egli*, several of the Plaintiffs' neighbors brought suit against the City, alleging the City was negligent in providing Snyder with information regarding the extent of storm runoff water and/or approving the drainage design plan associated with the development in which the plaintiffs' homes are located. The jury found the City was not at fault.

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[1] The subdivision was developed by Wildflower Development Co. (Wildflower) and the homes were built and sold by Northwood Townhomes, L.L.C. (Northwood). Wildflower Development and Northwood Townhomes were also named as defendants, but were later dismissed with prejudice from the suit.

[2] The Plaintiffs and Snyder also moved for summary judgment. The district court found there were genuine issues of material fact with respect to the claims asserted by the Plaintiffs against Snyder, and denied summary judgment. This ruling is not at issue on appeal.

In March 2011, the district court found the Plaintiffs' claims against the city were barred by issue preclusion, as well as Iowa Code section 670.4(8) (2009), and granted the City's motion. The Plaintiffs sought interlocutory appeal, which the supreme court granted.

II. Standard of Review.

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. Iowa R. App. P. 6.907; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

> Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (internal citations and quotation omitted).

III. Issue Preclusion.

The Plaintiffs first assert their claims against the City were not barred by issue preclusion. "In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action." *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981) (footnote omitted). In order for issue preclusion to apply, four prerequisites must be established:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. (internal citations and quotations omitted). The doctrine may be used in an offensive (as a "sword") or defensive (as a "shield") manner. *Fischer v. City of Sioux City*, 654 N.W.2d 544, 546-47 (Iowa 2002). If used defensively against a nonparty to the former suit, the party against whom it is invoked must have been "so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." *Hunter*, 300 N.W.2d at 123. "[I]t is a due process violation for a litigant to be bound by a judgment when the litigant was not a party or a privy in the first action and therefore never had an opportunity to be heard." *Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991).

We first examine the Plaintiffs' assertion that they did not have a full and fair opportunity to litigate their claims in the *Egli* case. Our focus is on whether the interest of the plaintiffs in the *Egli* case is "sufficiently connected" to the interest of the Plaintiffs. *Opheim v. Am. Interinsurance Exch.*, 430 N.W.2d 118, 121 (Iowa 1988). The prior case was brought by the Plaintiffs' neighbors that live in the same subdivision. The City asserts that both sets of plaintiffs were attempting "to prove the City was negligent in approval of the drainage design plans" and the Plaintiffs do not assert the legal representation was in any way inadequate in the *Egli* case. Even assuming both sets of plaintiffs raised the same issues and attempted to show the City was negligent, the Plaintiffs must

have some additional connection to the plaintiffs in the *Egli* suit in order to be bound by that suit. *See Hunter*, 300 N.W.2d at 123. The City does not point to any other connection. While the City argues the Plaintiffs do not complain of the prior representation in the Egli case, because the Plaintiffs had no connection to the case, they did not have any control over the prosecution of it. *See Harris*, 471 N.W.2d at 820. We find the Plaintiffs did not have a full and fair opportunity to litigate their claims. We reverse the district court's ruling the Plaintiffs' claims against the City are barred by issue preclusion.

IV. Immunity.

The Plaintiffs next assert the City was not immune from suit pursuant to Iowa Code section 670.4(8). This section provides a municipality shall be immune from liability for:

> Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards. This subsection shall not apply to claims based upon gross negligence.

Iowa Code § 670.4; *Fischer*, 695 N.W.2d at 34.

> Section 670.4(8) not only provides the city with a state-of-the-art defense with respect to the design and construction of public improvements but also states the finder of fact measures the extent of the city's duty for nonconstitutional torts by the generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. It is the plaintiff's burden to establish the city did not construct or

> reconstruct the improvement in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction.

Fischer, 695 N.W.2d at 34 (internal quotation marks and citations omitted).

If the Plaintiffs prove the drainage system was not "constructed . . . in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction," then the City would not have immunity from any of the Plaintiffs claims.[3] The Plaintiffs assert there was a genuine issue of material fact as to whether the "storm water system designed by Snyder and approved by the City was not in accordance with recognized engineering standards."

The record before the district court included an affidavit from the Plaintiffs' expert that explained the drainage system did not follow generally accepted principles at the time of development and cited to the Iowa Statewide Urban Design and Specifications, thus generating a genuine issue of fact. The City responded with an attack on the expert's experience. The attack goes to the weight of the evidence. There has been no determination that such opinion is not admissible in evidence. It is the duty of the fact finder to determine the weight to give the expert's testimony. *See id.* at 36 (explaining that in determining whether a drainage system was constructed in accordance with a generally recognized engineering standard, both parties presented experts and

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[3] The district court did not specify to which claims this ruling was applicable, and even if the City had immunity it would not apply to all of the Plaintiffs' claims. Section 670.4 specifically states it does not apply to claims of gross negligence. Further, the City does not dispute Plaintiffs' assertion that immunity would not apply to their inverse condemnation and § 1983 claims.

the fact finder determined what expert opinion to accept). An issue of material fact was created as to whether the City was immune from liability for the Plaintiffs' claims under section 670.4(8). The district court erred in finding the Plaintiffs' claims against the City were barred by section 670.4(8).[4]

We reverse the entry of summary judgment in favor of the City and remand.

REVERSED AND REMANDED.

[4] The City also argues that we can affirm on several other grounds. As the Plaintiffs argue, these issues were not raised in the City's motion for summary judgment. Because they were not properly raised before the district court, we cannot consider them on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *Cf. Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 774-75 (Iowa 2009) ("An erroneous decision by the district court can be affirmed on appeal based on a different ground that was *properly raised* at trial." (emphasis added)).