

STATE OF MICHIGAN  
COURT OF APPEALS

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KARLA HART and TODD HITE,  
  
Plaintiffs-Appellants,

UNPUBLISHED  
October 30, 1998

v

PORTER TOWNSHIP and VAN BUREN COUNTY  
ROAD COMMISSION,

No. 205915  
Van Buren Circuit Court  
LC No. 96-042138 CZ

Defendants-Appellees.

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Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

In this trespass-nuisance action, plaintiffs appeal by right the stipulated order of dismissal. Plaintiffs contend that the trial court erred in denying their motion to amend their complaint to include the allegation that defendants negligently maintained the Frosty Acres Subdivision drainage system. We affirm.

Plaintiffs, the owners of a ginseng farm in Porter Township, commenced this action in 1996, alleging that runoff from the adjacent subdivision and neighboring roads irreparably damaged their crop. Plaintiffs asserted claims against defendants for trespass-nuisance, negligence, and inverse condemnation, alleging that defendants negligently approved the subdivision's drainage system. Conceding that their allegations failed to state a claim that fell within an exception to governmental immunity, plaintiffs moved to amend their complaint to allege negligent maintenance as the underlying theory for their trespass-nuisance claim. The trial court denied both the motion and plaintiffs' subsequent motion for reconsideration. On stipulation of the parties, the trial court then granted summary disposition for defendants under MCR 2.116(C)(8) and (C)(10) and dismissed the complaint.

Plaintiffs argue that the trial court abused its discretion in denying their motion to amend their complaint. We disagree. This Court reviews a trial court's decision whether to permit amendment for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Although "[l]eave shall be freely given when justice so requires," MCR 2.118(A)(2), the trial court does not abuse its discretion in denying a motion where amendment would be futile. *Id.* at 658. A proposed

amendment is futile when it is “legally insufficient on its face.” *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).

The Michigan Supreme Court recognized the trespass-nuisance exception to governmental immunity in *Hadfield v Oakland Co Drain Comm’r*, 430 Mich 139; 422 NW2d 205 (1988). Trespass-nuisance is a “trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage.” *Hadfield, supra* at 169. The elements of the cause of action are: “condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).” *Id.* Our Supreme Court expounded on the control element in *Continental Paper & Supply Co v Detroit*, 451 Mich 162, 165 n 7; 545 NW2d 657 (1996), quoting *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995):

Control may be found where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employs another to do work that he knows is likely to create a nuisance. It may also be found where the governmental defendant is under a statutory duty to abate the nuisance.

In this case, plaintiffs failed to allege facts in their proposed amended complaint that would support application of the trespass-nuisance exception to governmental immunity. Plaintiffs did not allege that defendants (1) caused the blockage of the drain, (2) owned or exclusively controlled the drain, or (3) employed others to work on the drain knowing that the work would cause the blockage. Although plaintiffs asserted that defendants had a duty to maintain the drainage ditch, they did not, and could not, identify the source of the alleged duty. Under the Drain Code, MCL 280.1 *et seq.*; MSA 11.1001 *et seq.*, any duty to maintain the drain involved in this case fell on the county drain commissioner, not defendants. MCL 280.196; MSA 11.1196. Accordingly, the trial court properly denied plaintiffs’ motion to amend their complaint.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Martin M. Doctoroff  
/s/ E. Thomas Fitzgerald