STATE OF MICHIGAN

COURT OF APPEALS

JAY N. SIEFMAN and KATHY KAY SIEFMAN,

Plaintiffs-Appellants,

v

GEORGE W. KUHN, EDWARDS RELIEF DRAINS DRAINAGE DISTRICT, and WEST BLOOMFIELD CHARTER TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
October 3, 2000

No. 214538
Oakland Circuit Court
LC No. 97-001284-CE

JUDITH DORAN,

Plaintiff-Appellant,

v

GEORGE W. KUHN, EDWARDS RELIEF DRAINS DRAINAGE DISTRICT, and WEST BLOOMFIELD CHARTER TOWNSHIP,

Defendants-Appellees.

No. 214539
Oakland Circuit Court
LC No. 98-006111-CE

LEE SILVERMAN,

Plaintiff-Appellant,

v

GEORGE W. KUHN, EDWARDS RELIEF DRAINS DRAINAGE DISTRICT, and WEST BLOOMFIELD CHARTER TOWNSHIP,

No. 214540
Oakland Circuit Court
LC No. 98-005492-CZ

Defendants-Appellees.

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs Jay and Kathy Siefman, Judith Doran, and Lee Silverman, appeal as of right from an order of the Oakland Circuit Court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs are owners of property located along the Franklin branch of the Rouge River, also known as Pebble Creek. The Oakland County Drain Commissioner's office constructed the Edwards Relief Drain in the early 1970s to provide storm water relief to West Bloomfield Township. The terminus of the drain is located on property owned by individuals who are not parties to this action. Plaintiffs live downstream, east of the terminus of the drain. It is undisputed that the high velocity of the water leaving the drain has caused severe erosion on plaintiffs' properties. Plaintiffs filed the instant lawsuit alleging that defendants were liable for the damage caused to their properties. The trial court granted summary disposition of plaintiffs' claims pursuant to MCR 2.116(C)(10). The court also concluded that defendant George W. Kuhn, the Oakland County Drain Commissioner, was immune from liability as one of the highest appointive executive officials of Oakland County, pursuant to MCL 691.1407(5); MSA 3.996(107)(5).

Plaintiffs first argue that the trial court erred in dismissing their claims brought under the Michigan Environment Protection Act (MEPA), MCL 324.1701 *et seq*.; 13A.1701 *et seq*. without making detailed findings of fact. We disagree. Whether the trial court's findings of fact were sufficient is a question of law, which we review de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Plaintiffs cite *Nemeth v Abonmarche Development, Inc*, 457 Mich 16; 576 NW2d 641 (1998) and *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975), to support their position that the trial court's findings were insufficient. In those cases, the Court held that a trial court must "'take care to set out with specificity the factual findings upon which they base their ultimate conclusions'" when addressing a MEPA claim. *Nemeth, supra* at 24-25, quoting *Ray, supra* at 307. Specifically, "the trial court must find facts on which the plaintiff claims to have made a prima facie case under the MEPA, that is, what conduct of the defendant 'has or is likely to pollute, impair, or destroy the air, water or other natural resources." *Nemeth, supra* at 25; quoting *Ray, supra*.

However, neither *Ray* nor *Nemeth* involved a motion for summary disposition. "Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4); *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987). Moreover, when ruling on a motion for summary disposition under MCR 2.116(C)(10), the trial court may not make credibility determinations or determine facts. *Skinner v Square D Co*, 445

Mich 153, 161; 516 NW2d 475 (1994). Therefore, we conclude that the trial court was not required to make detailed findings of fact regarding the MEPA claim.

Plaintiffs next argue that the trial court erred in granting summary disposition in favor of defendants George Kuhn and the Edwards Relief Drain Drainage District pursuant to MCR 2.116(C)(10) with respect to the trespass-nuisance claim. We disagree.

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* The motion should be granted if the documentary evidence shows that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

Under the trespass-nuisance exception to governmental immunity, damages may be awarded for injury to persons or property caused by "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 145; 422 NW2d 205 (1988). The trespass or intrusion must be caused by a physical intrusion that is set in motion by the government or its agents. *Id.* at 169; *Continental Paper & Supply Co, Inc v City of Detroit,* 451 Mich 162, 164; 545 NW2d 657 (1996). The elements of a trespass-nuisance are 1) condition (trespass or nuisance), 2) cause (physical intrusion), and 3) causation or control by the government. *Id.*

Here, the element in dispute is the element of causation or control by the county defendants. Control may be found where the governmental entity creates the nuisance, owns or controls the property from which the nuisance arose, or employs another to do work that it knows is likely to create a nuisance. *Continental Paper, supra* at 165, n 7; *Kuriakuz v West Bloomfield Twp,* 196 Mich App 175, 177; 492 NW2d 757 (1992). Control may also be found where the governmental entity is under a statutory duty to abate the nuisance. *Baker v Waste Management of Michigan, Inc,* 208 Mich App 602, 606; 528 NW2d 835 (1995).

In support of their motion for summary disposition, defendants submitted evidence that the Franklin branch of the Rouge River, which runs through plaintiffs' properties, is not located within the Edwards Relief Drains Drainage District and is not under the jurisdiction or control of the Edwards Relief Drains Drainage District. Defendants also submitted evidence that any feasible engineering solution to the flooding and erosion problems would have to take place on private property downstream from the terminus of the drain, but that the property owners refused to grant easements allowing the drain commissioner to perform the required work. Significantly, defendants also submitted evidence that, even if the Edwards Drain did not exist, the same amount of water would have entered the natural watercourse due to development in the area and, therefore, the same volume of water would have entered plaintiffs' property.

In response, plaintiffs argued that, by building the Edwards Drain, the county set in motion the force that caused the damage to plaintiffs properties. Plaintiffs submitted affidavits of homeowners attesting to the flooding and erosion on their properties. Plaintiffs also submitted numerous permits issued by the Oakland County Drain Commissioner's Office allowing additional businesses to connect to the drain.

The documentary evidence submitted by plaintiffs was not sufficient to demonstrate a genuine fact issue with respect to whether the intrusion onto plaintiffs' land was caused by or under the control of the county defendants. Plaintiffs' evidence failed to refute defendants' evidence that the volume of water flowing onto plaintiffs' properties would have been the same regardless of whether the Edwards Drain had ever been built. Moreover, it is undisputed that the county defendants had no control over the portion of the river that passed through plaintiffs' properties. We therefore conclude that the trial court properly granted summary disposition of plaintiffs' trespass-nuisance claim in favor of the county defendants pursuant to MCR 2.116(C)(10).

Plaintiffs next argue that the trial court erred in granting summary disposition of their trespass-nuisance claim in favor of West Bloomfield Township pursuant to MCR 2.116(C)(10) after concluding that plaintiffs failed to raise a genuine fact issue with respect to whether the physical intrusion onto plaintiffs' properties was under the control of the township. We disagree.

Plaintiffs contend that the township had the control required for trespass-nuisance liability because, before the Edwards Drain was built, the township undertook an engineering study for the drain, petitioned the drain commissioner to construct the drain, and required new developments to discharge into the drain. However, we find no error in the trial court's conclusion that these activities do not demonstrate sufficient control over the drain to justify the imposition of trespass-nuisance liability. Issuing permits that allow another to create a nuisance is not sufficient to impose liability. *Kuriakuz, supra* at 177. Generally control over a nuisance must be something more than merely issuing a permit or regulating activity on the property that gives rise to the nuisance. *McSwain v Redford Twp*, 173 Mich App 492, 498; 434 NW2d 171 (1998). Furthermore, evidence that the township allowed new developments to connect to the drain is not sufficient to create a fact issue with respect to whether the township set in motion the physical intrusion onto plaintiffs' properties. Plaintiffs failed to demonstrate a genuine issue for trial with respect to whether the township caused or had control of the physical intrusion. Therefore, the trial court properly granted summary disposition of plaintiffs' trespass-nuisance claim in favor of the township.

Finally, plaintiffs argue that the trial court erred in granting summary disposition of their inverse condemnation claims pursuant to MCR 2.116(C)(10). Again, we disagree.

Private property may not be taken for public use without just compensation paid to the property owner. Const 1963, art 10, § 2; *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184; 521 NW2d 499 (1994). A "taking" has been defined as follows:

> Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction

> or diminution of value of property by an act of government, which directly and not merely incidentally, affects it, is to that extent an appropriation. [*Peterman, supra* at 190, quoting *Vanderlip v Grand Rapids*, 73 Mich 522, 535; 41 NW 677 (1889).]

The plaintiff in an inverse condemnation action has the burden of proving that the government's actions were a substantial cause of the decline of his property values and that the government "abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *In the Matter of Acquisition of Land - Virginia Park*, 121 Mich App 153, 161; 328 NW2d 602 (1982).

Here, in light of the evidence submitted by defendants, plaintiffs have failed to demonstrate a genuine issue of fact with respect to whether defendants were "a substantial cause" of the decline of plaintiffs' property values. We therefore conclude that the trial court properly granted summary disposition of plaintiffs' inverse condemnation claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Michael J. Kelly
/s/ Martin M. Doctoroff
/s/ Jeffrey G. Collins