

STATE OF MICHIGAN
COURT OF APPEALS

VINCENT MARTINI and JUDITH LEE
MARTINI, Individually and as Next Friends for
JEFFREY MARTINI, JENNIFER MARTINI and
JAMES MARTINI, Minors,

Plaintiffs-Appellants,

v

GROSSE ILE TOWNSHIP, COUNTY OF
WAYNE, WAYNE COUNTY ROAD
COMMISSION, WAYNE COUNTY DRAIN
COMMISSION and WAYNE COUNTY DRAIN
BOARD,

Defendants-Appellees,

and

HOMEPRO OF SOUTHEAST MICHIGAN, JEAN
PAUL PILOT, THOMAS MCCONNELL,
MARILYN MCCONNELL, WILLIAM KRAUSS,
KRAUSS CONSTRUCTION, WILLIAM
KRAUSS COMPANY, KRAUSS BUILDERS,
INC., KRAUSE COMPANY & KRAUSE
COMPANY and EARTHTECH, INC.,

Defendants.

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the circuit court's orders granting summary disposition in favor of defendants Wayne County and Grosse Ile Township. We affirm.

Plaintiffs instituted this action seeking damages under a theory of trespass-nuisance because of repeated flooding in their basement. The trial court granted defendants' motions for

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LC No. 96-628137-NO

summary disposition, finding that plaintiffs' claim was barred by governmental immunity. We review the trial court's ruling de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997); *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995).

Michigan recognizes "a limited trespass-nuisance exception to governmental immunity." *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). "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 constitutes a compensable injury." *Citizens Ins Co, supra* at 486-487. A 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 result[s] in person or property damage." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988) (Brickley, J.). To establish a prima facie case of trespass-nuisance, the plaintiff must show the following elements: "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Id.*

"A governmental entity is not liable for damage caused by a nuisance unless that entity has either created the nuisance, owns or controls the property from which the nuisance arose, or employed another that it knows is likely to create a nuisance." *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992). Control "may also be found where the governmental defendant 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). A finding of control over a nuisance requires something more than merely issuing permits that enable another to create a nuisance "or regulating activity on the property which gives rise to the nuisance." *Kuriakuz, supra*; *McSwain v Redford Twp*, 173 Mich App 492, 498; 434 NW2d 171 (1988).

Assuming that a question of fact exists with regard to whether the county had jurisdiction over the sewer system, we find that the trial court nevertheless properly granted the county's motion because there was no evidence that it did anything to cause the flooding of plaintiffs' basement. Plaintiffs attribute the flooding to the 1994 drainage system repairs/improvements. However, the county did nothing more than authorize the township to undertake those repairs/improvements, which is an insufficient connection upon which to base liability. *Id.*

We also find that the court properly granted summary disposition to the township. Even if the drainage work increased the amount of water flowing to the catch basin, the evidence showed that the storm sewer was operating properly and there was no evidence of any back-up or blockage. Because there was no evidence of a failure of the township's equipment that caused or contributed to the flooding, nor evidence that the township created the floodwaters or discharged them from its own property, we find that the element of causation/control is lacking.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

I concur in result only.

/s/ E. Thomas Fitzgerald