STATE OF MICHIGAN

COURT OF APPEALS

GERALD HUTCHINSON, Personal Representative of the Estate of KATHERINE HUTCHINSON, the Estate of CHRISTINE HUTCHINSON, and the estate of TIFFANY HUTCHINSON,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY, f/k/a DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellee.

UNPUBLISHED
January 12, 2001

No. 217774
Court of Claims
LC No. 98-017020-CM

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(8) and (C)(10). Plaintiff also challenges the trial court's refusal to allow the filing of a second amended complaint to allege a trespass-nuisance theory of recovery. We affirm.

I.

Facts and Proceedings

This action arose out of the drowning deaths of plaintiff's wife and two daughters at a park on an inland lake owned by the state, but leased to a township. Evidence showed that the shoreline of the lake had been used by swimmers for many years and was referred to as "the swimming area." On November 28, 1995, the Department of Environmental Quality ("DEQ") issued a dredging permit to the township for the improvement of the existing Department of Natural Resources ("DNR") boat launch. The permit allowed the removal of 138 cubic yards from an area 25' by 75' and to a depth of four feet.

The area was dredged by the DEQ and, on February 26, 1996, a DEQ employee informed the department's area park manager that, rather than dredge the area as specified in the permit, an

area 75' by 400' had been dredged to a depth of eight feet with a total of 4,000 cubic yards of lake bottom removed. The DEQ determined that the over-dredging had not damaged fish habitat and the matter was not pursued. The DEQ did not notify the township of the over-dredging.

Two weeks before the Hutchinsons drowned, a child nearly drowned near the boat launch. The township erected a milk-jug buoy line to keep swimmers away from the area, but the line was incorrectly positioned with the drop off within the marked swimming area. Plaintiff's wife drowned while attempting to rescue her children. Divers located the Hutchinsons more than an hour after being summoned to the scene.

Plaintiff, as personal representative, filed a multiple count complaint in the Court of Claims against the DEQ and four individual DEQ employees.[1] Count I of the complaint alleged that the over-dredging was done pursuant to department policy or custom in violation of the due process clause of the Michigan Constitution. Count II alleged gross negligence against the individual state employees. Count III sought to hold the DEQ liable for the acts of the township under a joint venture theory. The remaining counts alleged liability under the Recreational Land Use Act, the Consumer Protection Act and a third-party beneficiary theory.

Defendant moved for summary disposition under MCR 2.116(C)(4), (C)(7), (C)(8) and (C)(10). Defendant argued, in part, that, even if Michigan did recognize an exception to governmental immunity for constitutional claims, plaintiff failed to plead facts showing that the DEQ had a custom or policy mandating the unconstitutional conduct of its employees and that, even if the DEQ had such a policy, it was not unconstitutional. Moreover, defendant claimed that plaintiff had an adequate remedy against the individual defendants for gross negligence and, therefore, could not assert a claim under the constitution. Plaintiff responded that the DEQ's policy of over-dredging in violation of permits was evidenced by a DEQ employee's statement that he had not read the permit before beginning the dredging operation. Plaintiff also referenced the DEQ memorandum regarding the potential harm to fish habitat caused by the dredging and the near drowning that occurred earlier. The trial court agreed with defendant and granted summary disposition under MCR 2.116(C)(8).

The DEQ denied the existence of a joint venture between the state and the township because there was no profit motive for maintaining the public beach or boat launch. Plaintiff conceded that there was no written lease or permit evidencing the joint venture, but argued that the DEQ and the township benefited from the venture because it furthered their obligations to provide recreational facilities for their citizens. The trial court disagreed and ruled that, absent a profit motive or a motive to benefit themselves, there was no joint venture. The trial court granted summary disposition on count III under MCR 2.116(C)(8) and (C)(10). The court also dismissed the individual defendants, as well as plaintiff's claim under the Recreational Use Act.

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[1] Plaintiff also filed a circuit court action against the township and six individuals employed by the township or the DEQ. This Court denied leave to file an interlocutory appeal of the trial court's denial of four individual defendants' motion for partial summary disposition. The outcome of that action is unknown.

On motion for reconsideration, the court also granted summary disposition of the gross negligence claim reasoning that a state agency cannot be held vicariously liable for the gross negligence of its employees. Thereafter, plaintiff filed a first amended complaint developing the gross negligence argument, to which defendant filed a motion for summary disposition arguing that the matter had already been decided by the court. Plaintiff also sought leave to file a second amended complaint to allege a trespass-nuisance claim and violations of the due process clause of the United States Constitution.

The trial court denied leave to add the federal constitutional claim. The court also denied leave to add the trespass-nuisance claim on its finding that the narrow exception to governmental immunity must fall within the parameters of an historically-recognized cause of action. The trial court ruled that a trespass-nuisance claim required an invasion of private property, which had not occurred here. The court denied plaintiff's motion for leave to add the trespass-nuisance claim because the amendment would have been futile.[2]

II.

Standard of Review

This Court reviews a motion for summary disposition for legal error. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Dismissal pursuant to MCR 2.116(C)(8) is appropriate when a party has failed to state a claim on which relief can be granted. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; all factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* at 324.

A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Spiek*, *supra* at 337. The motion may be granted pursuant to MCR 2.116(C)(10) when, except as to damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). The trial court must consider the documentary evidence submitted by the parties, and giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

III.

Analysis

[2] The parties stipulated to dismiss the breach of contract claim and therefore, the court's order is a final order for appeal purposes.

A.

Constitutional Tort

Governmental immunity is no defense when a plaintiff alleges that by policy or custom, the state has violated a right conferred by our state constitution. *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). The Court further held that a "claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Id*. *Smith* is considered to have recognized a narrow remedy against the state where plaintiff would otherwise be left with no remedy. *Jones v Powell*, 227 Mich App 662, 670; 577 NW2d 130 (1998), aff'd 462 Mich 329; 612 NW2d 423 (2000).

Justice Boyle's concurring opinion in *Smith* says that the state's liability for a constitutional claim should be imposed only where the state's actions would, but for the Eleventh Amendment, render the state liable under 42 USC 1983, pursuant to the standard of *Monell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Smith*, *supra* at 642 (Boyle, J.). In *Monell*, the Supreme Court ruled that a local government could be liable under 42 USC 1983 when the performance of an official policy or custom caused a person to be deprived of federal constitutional rights. *Monell*, *supra* at 694. This Court has adopted Justice Boyle's methodology in *Reid v Dep't of Corrections*, 239 Mich App 621; 609 NW2d 215 (2000); *Jones*, *supra*, 227 Mich App 671; *Cremonte v Michigan State Police*, 232 Mich App 240, 250-251; 591 NW2d 261 (1998); *Carlton v Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996).

Using this analysis, the state may be liable for a constitutional tort only when the execution of an official policy or custom caused a person to be deprived of constitutional rights. *Carlton*, *supra* at 505. Therefore, the state may be held liable for a violation of the state constitution only where a state policy or custom mandated an official's or employee's actions. *Reid*, *supra* at 621; *Carlton*, *supra* at 505. This Court has consistently ruled that a plaintiff has no constitutional tort claim if he has an alternative remedy, such as an action under the civil rights act. *Jones*, *supra* at 670-671; *77th Dist Judge v Michigan*, 175 Mich App 681, 696; 438 NW2d 333 (1989).

For example, in *Marlin v Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994), the plaintiff claimed that the defendant city had a custom or policy of holding the personal effects of deceased crime victims without attempting to locate the next of kin. The Court held that there had been no due process violation even if the city had a custom or policy, because the plaintiff could not establish the policy deprived her of her property. Because the first tier of Justice Boyle's test had not been met, the plaintiff failed to state a claim for damages based on a violation of the state constitution.

Even though plaintiff here specifically alleged that the DEQ had a policy or custom of over-dredging, of not warning of over-dredging and not protecting members of the public from this condition, plaintiff failed to establish how such a practice constitutes a violation of due process. Plaintiff has not established a constitutional right to swim at a public beach free of

hazards caused by over-dredging of boat ramps. Accordingly, the trial court did not err in granting summary disposition for failure to state a claim.

Because we find that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(8), we also find that there was no abuse of discretion in refusing to allow plaintiff to amend the complaint to add language claiming the lack of adequate remedy pursuant to MCR 2.116(I)(5). It would have been futile to grant leave to amend the complaint to add specific language concerning lack of an adequate remedy because the first prong of Justice Boyle's test was not met.

B.

Trespass Nuisance

Plaintiff avers that the trial court erred in disallowing the filing of a second amended complaint to add a trespass-nuisance claim. A trial court's decision regarding a motion to amend pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend pleadings should be freely given when justice so requires. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). We conclude that the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint to add a trespass-nuisance claim because here there is no trespass by the government on another's land.

Under the governmental immunity act, governmental agencies are immune from tort liability when engaged in the exercise or discharge of a governmental function. MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq*. The statute has been characterized as providing a broad grant of immunity with narrow statutory and common-law exceptions. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 146-148; 422 NW2d 205 (1988); *Dampier v Wayne Co*, 233 Mich App 714, 729; 592 NW2d 809 (1999).

Michigan recognizes a trespass-nuisance exception to the immunity statute because such a cause of action existed before July 1, 1965, the effective date of the act. *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996); *Hadfield*, *supra* at 145, 205, 209, 213. 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 results in personal or property damage. *CS&P, Inc v Midland*, 229 Mich App 141, 145; 580 NW2d 468 (1998). To establish trespass-nuisance, a plaintiff must show: (1) a condition constituting a nuisance or trespass, (2) cause, being the physical intrusion, and (3) causation or control by the state or local government. *Continental Paper*, *supra* at 164; *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). The party raising a claim of trespass-nuisance need not be the owner or tenant of the property invaded. *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263, 265; 118 NW2d 271 (1962); *Bronson v Oscoda Twp*, 188 Mich App 679, 682-683; 470 NW2d 688 (1991).

In *Veeneman v Michigan*, 430 Mich 139, 192; 422 NW2d 205 (1988), one of the cases consolidated with *Hadfield*, the plaintiff's son was killed while riding a dune buggy in a state park. *Id*. at 192. The plaintiff alleged that the state had committed a nuisance by failing to

regulate the operation of ORVs used in the park, failing to provide adequate medical provisions and failing to inspect the ORVs when the state was aware of previous deaths and injuries. *Id*. at 193. The Supreme Court ruled that the plaintiff's action did not fall within the trespass-nuisance exception to governmental immunity since there were no allegations of trespass. *Id*. at 194-195. The import of the ruling is that the government cannot commit a trespass-nuisance on its own land. Instead, it is when a noxious force put into play by the state enters or affects the property of another that the cause of action arises.

Further in *Bronson, supra* at 681, the plaintiff became paralyzed when, while diving in Lake Huron, he struck a sandbar. The plaintiff sued the township claiming that its placement of the pier had created the sandbar and that the sandbar was a nuisance. *Id*. This Court, citing *Hadfield*, ruled that the plaintiff's action could not be sustained because it involved no interference or invasions onto private land. *Id.* at 683. The panel reasoned that both *Hadfield* and *Herro* mandated that a trespass-nuisance claimed be based on an interference of private land. *Id.* at 683. This Court noted that because the bottomland of Lake Huron belongs to the state, there could be no trespass-nuisance claim. *Id*. at 683 n 4.

Under the reasoning of *Veeneman* and *Bronson*, the trial court did not err in granting summary disposition of plaintiff's trespass-nuisance claim because there was no trespass of private property. Plaintiff ignores that there is only one parcel of land involved here, instead of two. Merely because the DEQ agreed to dredge a portion of the property does not create two different parcels for the purposes of trespass-nuisance. Like the *Veeneman* case, there was no trespass and all the property involved was public. While plaintiff argues that, pursuant to the lease between the township and the DEQ, the DEQ went beyond its permission to be on the land this argument ignores that a single parcel of land is at issue here.

C.

Joint Venture

Plaintiff claims that the trial court erred in ruling that the DEQ and the township were not joint venturers. While the trial court erred in its reasoning for granting summary disposition of plaintiff's joint venture claim, the court's ruling is affirmed because there is no question of fact that an element of a joint venture – a community interest and control over the subject matter of the enterprise – is lacking.

A joint venture is an association to carry out a single business enterprise for a profit and is governed by the rules of partnerships. *Brewer v Stoddar*, 309 Mich 119, 128; 14 NW2d 804 (1944); *Gleichman v Famous Players-Lasky Corp*, 241 Mich 266, 270-271; 217 NW 43 (1928). To constitute a joint venture, the parties must contribute to a common undertaking and have some control over the subject matter or property right of contract. *Reed & Noyce, Inc v Municipal Contractors, Inc*, 106 Mich App 113, 117; 308 NW2d 445 (1981). It is fundamental that one member of a joint venture can be bound by the actions of the other member. *Davidson v State*, 42 Mich App 80, 84; 201 NW2d 296 (1972). A joint venture has six elements:

(a) an agreement indicating an intention to undertake a joint venture,

(b) a joint undertaking of,

(c) a single project for profit,

(d) a sharing of profits as well as losses,

(e) contribution of skills or property by the parties,

(f) community interest and control over the subject matter of the enterprise. [*Berger v Mead*, 127 Mich App 209, 215; 338 NW2d 919 (1983).]

This Court has ruled that governmental bodies may enter into joint ventures despite the absence of a profit motive. *Berger*, *supra* at 216-217; *Beattie v East China Charter Twp*, 157 Mich App 27, 29; 403 NW2d 490 (1987). Therefore, the trial court erred in ruling that an absence of profit motive barred a joint venture between units of government.

However, summary disposition of plaintiff's claim is affirmed because there is no genuine issue of fact that the township had no control over the dredging project. Therefore, there was no joint venture with regard to the dredging. See *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978). According to township official Stamper, DEQ did all the dredging and the township had no knowledge that the dredging went beyond the permit limit until after the Hutchinsons' deaths.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey