STATE OF MICHIGAN

COURT OF APPEALS

LINDA MCCLELLAN, Personal Representative of the Estate of MARVIN CORBIN, deceased,

Plaintiff-Appellant,

v

CITY OF FLINT, a Municipal Corporation, FRED WATTS Individually and as Director of its Department of Public Works, GEORGE MCMULLEN, Individually and as its Assistant Sewer Maintenance Supervisor, RANDY MCCONNELL, Individually and as its Water Distribution and Sewer Maintenance Supervisor, LARRY SWIHART, Individually and as its City Engineer/Street Superintendent, and CHUCK SMITH, Individually and as its Director of Water Department, Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
October 26, 2001

No. 217573
Genesee Circuit Court
LC No. 91-10461-NO

LINDA MELLENTINE, Personal Representative of the Estate of PATRICK HOYE, deceased,

Plaintiff-Appellant,

v

CITY OF FLINT, a Municipal Corporation, FRED WATTS Individually and as Director of its Department of Public Works, GEORGE MCMULLEN, Individually and as its Assistant Sewer Maintenance Supervisor, RANDY MCCONNELL, Individually and as its Water Distribution and Sewer Maintenance Supervisor, LARRY SWIHART, Individually and as its City Engineer/Street Superintendent, and CHUCK SMITH, Individually and as its Director of Water Department, Jointly and Severally,

No. 217574
Genesee Circuit Court
LC No. 91-10463-NO

Defendants-Appellees.

CHARLES HOYE, Personal Representative of the Estate of MICHAEL HOYE, deceased,

Plaintiff-Appellant,

v

CITY OF FLINT, a Municipal Corporation, FRED WATTS Individually and as Director of its Department of Public Works, GEORGE MCMULLEN, Individually and as its Assistant Sewer Maintenance Supervisor, RANDY MCCONNELL, Individually and as its Water Distribution and Sewer Maintenance Supervisor, LARRY SWIHART, Individually and as its City Engineer/Street Superintendent, and CHUCK SMITH, Individually and as its Director of Water Department, Jointly and Severally,

Defendants-Appellees.

No. 217575
Genesee Circuit Court
LC No. 91-10872-CZ

Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right the January 19, 1999 and February 2, 1999 orders of the trial court granting defendants summary disposition on all counts as to all plaintiffs. Plaintiffs brought these actions against defendants on behalf of the estates of Marvin Corbin, age 17; Patrick Hoye, age 17; and Michael Hoye, age 13, following their drowning deaths in a storm sewer owned by defendant City of Flint and maintained by all defendants.[1] We affirm.

I. Underlying Facts

On the afternoon of July 18, 1990, Marvin, Patrick and Michael (plantiffs' decedents), entered a five foot storm sewer that was located in Kearsley Park in the City of Flint. At the Kearsley Park outfall, the sewer was closed off with metal grillwork comprised of several metal

[1] For ease of reference, Marvin Corbin, Michael Hoye, and Patrick Hoye will be referred to by their first names.

rods. According to defendants, this grillwork had been added to the sewer so that water from the storm sewer could still enter Gilkey Creek, but at the same time, prevent individuals from accessing the sewer. Despite this, both parties acknowledged that from time to time the rods of the grillwork would be bent or pried and that these openings were large enough to allow individuals to enter.[2] Thus, the teenagers in this case entered the storm sewer either by sliding through the grillwork or by entering through an unlocked or unsealed manhole cover.

While the teenagers were inside the sewer, an extremely quick and excessive rainfall, lasting one-half hour and measuring somewhere between one-half and one and one-half inches, hit Flint.[3] This rainfall properly drained into the street gutters and into the storm sewer. As a result, the storm sewer was filled with a tremendous amount of water, which caused the teenagers to be pinned inside the grillwork, and drown. It is unknown whether the decedents drowned before reaching the grillwork or as a result of being unable to escape the rushing water once reaching the grillwork.

II. Procedural History

Following the decedents deaths, plaintiffs brought separate actions against defendants,[4] alleging, among other things, gross negligence, nuisance per se, and violations of 42 USC § 1983.[5] The cases were originally brought separately and assigned to three different judges in Genesee Circuit Court; however, eventually all three cases were consolidated before Genesee Circuit Judge Thomas C. Yeotis. While the case was before Judge Yeotis, defendants brought two separate motions for summary dispositions. With the exception of plaintiffs' public nuisance claim, these motions were denied.[6]

Following consolidation, defendants again moved for summary disposition. These motions were again denied based on the court's determination that there remained factual

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[2] It is also undisputed that the City of Flint was responsible for the maintenance and upkeep of the storm sewer within Kearsley Park and that the individual defendants were city officials and employees responsible for ensuring proper maintenance of Flint's water and sewer system.

[3] The time and measurements were provided by defendants numerous times and they have not been disputed by plaintiffs. All named defendants were sued both individually and in their official capacities as city officials or employees.

[4] Plaintiffs original complaints listed only the City of Flint; George McMullen, Flint's Superintendent of Sewers; and Fred Watts, Flint's Director of Department of Public Works. Plaintiffs then filed a second amended complaint on July 20, 1992 adding defendants Randy McConnell, Flint's Water Distribution and Sewer Maintenance Supervisor; Larry Swihart, Flint's City Engineer/Street Superintendent; and Chuck Smith, Flint's Water Department Director. All named defendants were sued both individually and in their official capacities as city officials or employees.

[5] Plaintiffs also brought claims sounding in negligence, willful and wanton misconduct, public nuisance and strict liability; however, the dismissal of these counts have not been appealed by plaintiffs.

[6] As stated previously, plaintiffs have not challenged the dismissal of their public nuisance claim.

questions as to whether defendants were grossly negligent and as to whether the grillwork on the sewer was a nuisance per se. The court also ruled that defendants owed plaintiffs a duty because there were special circumstances created by defendants. Defendants filed a motion for reconsideration of this ruling; however, Judge Yeotis retired before ruling on that motion.

As a result of Judge Yeotis' retirement, the cases were reassigned to Judge Judith A. Fullerton. At that time, defendants renewed their motions for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), which the trial court granted.[7] In granting these motions, the court ruled that the grillwork on the sewer was not, as a matter of law, a nuisance per se because it was not a dangerous condition at all times and served a useful purpose and that plaintiffs failed to show a violation of 42 USC § 1983. In addition, with respect to plaintiffs gross negligence claim, the trial court granted defendant city of Flint summary disposition pursuant to the governmental immunity statute, MCL 691.1407(1),[8] and granted the remaining defendants summary disposition pursuant to MCR 2.116(C)(8) and (10) based on its determination that the public duty doctrine applied.

III. Standard of Review

This Court's review of summary disposition decisions reached by a trial court is de novo, *The Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000), and in reviewing

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[7] Plaintiffs objected to defendants motions because they had already been denied by the court on the same facts but Judge Fullerton determined that she was not bound by the previous decisions regarding defendants summary disposition motions. On appeal, plaintiffs have not raised this issue in their questions presented; nor have plaintiffs cited any authority indicating that Judge Fullerton erred in her determination that she was not bound by the previous decision of Judge Yeotis. Thus, this issue has been waived. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 268 (2000); *Monroe Beverage Co, Inc v The Stroh Brewery Co*, 224 Mich App 366, 369 n 2; 568 NW2d 687 (1997). Nonetheless, we note

> a prior denial of summary disposition is not dispositive of [an] issue because an order may be modified before entry of the final judgment, *and a successor judge, as in this case,* is empowered to make a revision to reflect a more correct adjudication of the rights and liabilities of the litigants (emphasis added). [*Meagher v Wayne State University*, 222 Mich App 700, 718; 565 NW2d 401 (1997).]

See also MCR 2.604 and *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 204 n 4; 446 NW2d 648 (1989). Thus, based on the court rules and these cases, Judge Fullerton properly determined that she was not bound by Judge Yeotis' previous decision regarding defendants' motion for summary disposition.

[8] MCL 691.1407(1) states, in pertinent part:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

the evidence presented, we give the nonmoving party the benefit of all reasonable inferences. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995). In deciding summary disposition motions pursuant to MCR 2.116(C)(7), this Court reviews all affidavits, pleadings, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party and a (C)(7) motion should only be granted if no factual development could provide a basis for recovery. *Cole v Lambroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). In addition, an MCR 2.116(C)(8) motion is appropriate when there is no legally sufficient claim set out in the pleadings by the plaintiff. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Further, a motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek*, *supra* at 337; *Singerman v Municipal Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997).

IV. Analysis

A. Plaintiffs' Gross Negligence Claim

On appeal, plaintiffs do not challenge the grant of summary disposition to city of Flint based on governmental immunity. Instead, they contend that the trial court erred by granting the remaining defendants[9] summary disposition pursuant to the public duty doctrine. Plaintiffs also contend that the individual defendants were not entitled to summary disposition based on governmental immunity because their actions fell within the gross negligence exception of the governmental immunity statute, MCL 691.1407(2)(c).[10] Conversely, defendants contend that they are immune from suit pursuant to § 1407(2).

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[9] For the remainder of subsection (A), the term "defendants", unless otherwise noted, will refer to all defendants except the City of Flint.

[10] MCL 691.1407(2) states:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each . . . employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment or service . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge or a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision,

(continued…)

Under the governmental immunity statute, government employees that act in a grossly negligent way, cannot escape tort liability if their gross negligence is "the proximate cause of the injury or damage." MCL 691.1407(2)(c). In *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), our Supreme Court interpreted the meaning of the term "the proximate cause" as used in § 1407(2)(c). There, the Court stated that:

> The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury. [*Robinson*, *supra* at 458-459.]

Thus, pursuant to *Robinson*, even assuming that defendants affirmative actions of constructing and maintaining the grillwork on the storm sewer amounted to gross negligence, such gross negligence was not *the* proximate cause of plaintiffs' injuries. Because the record establishes that the decedents knowingly entered a storm sewer, even though they knew or should have known that the storm sewer was not to be easily accessible, decedents actions constitute at least a proximate cause of their own tragic deaths. Accordingly, since defendants actions were not "the proximate cause" of plaintiffs injuries, defendants were entitled to summary disposition under MCR 2.116(C)(7). *Robinson*, *supra*; MCL 691.1407(2)(c). Given our finding, we need not determine whether the public duty doctrine should be expanded to defendants in this case. See *Maiden v Rozwood*, 461 Mich 109, 130-131; 597 NW2d 817 (1999).

B. Plaintiffs' Nuisance Per Se Claim[11]

Plaintiffs also argue that there was a material fact question regarding whether the storm sewer, as constructed, constituted a nuisance per se, and therefore the trial court erred in granting defendants summary disposition pursuant to MCR 2.116(C)(8) or (10). We disagree.

"Nuisance per se" is defined as "an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Palmer v Western Michigan University*, 224 Mich App 139, 144; 568 NW2d 359 (1997); *Fox v County of Ogemaw*, 208 Mich App 697, 700; 528 NW2d 210 (1995). In addition, *Fox*, *supra* indicated that a nuisance per se was "not predicated on the want of care, but is unreasonable by its very nature." *Id*. Here, the trial court ruled that the grillwork on the sewer

(…continued)

> "gross negligence" means conduct so reckless as to demonstrate a substantial lack or concern for whether an injury results.

[11] Only Plaintiff McClellan raised this issue in her brief on appeal; hence, plaintiffs Mellantine and Hoye have not properly presented this issue on appeal. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Nonetheless, because Plaintiff McClellan properly presented and argued this issue, and since the facts necessary for its resolution have been presented, *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991), we will, for the sake of consistency, address the issue with regard to all plaintiffs.

was not a nuisance per se because "until and unless anybody [sic] trespassed and/or a major rain came along causing a flood, the end cap on the sewer was not a dangerous condition." It is also apparent that the grillwork in question was not at all times a nuisance; rather, the grillwork, served a beneficial purpose by attempting to prevent unauthorized access to the sewers. See *Palmer, supra* at 144-145. Therefore, while defendants could have possibly designed the grillwork in a safer manner, their failure to do so did not constitute a nuisance per se and summary disposition pursuant to MCR 2.116(C)(8) and (10) was properly granted defendants. *Palmer, supra*.

C. Plaintiffs' 42 USC 1983 Claim

Plaintiffs further contend that the trial court erred in granting summary disposition to defendants on their § 1983 claim because there was a genuine issue of material fact as to whether defendants violated the decedents constitutional rights under the Fifth and Fourteenth Amendments. Again, we disagree. In *Thomas v McGinnis*, 239 Mich App 636; 609 NW2d 222 (2000), this Court stated that

> [i]n an action brought under 42 USC 1983, a government official performing discretionary functions is entitled to qualified or good-faith immunity insofar as [the official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . .To be clearly established, a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court. . . . Immunity is not available if the official knew or should have known that the actions would violate the plaintiff's constitutional rights or if the official acted with the malicious intention to deprive the plaintiff of his constitutional rights or otherwise injure the plaintiff. [*Id*. at 644-645 (Internal citations and quotation marks omitted.)]

In the instant case, the individual defendants were performing discretionary governmental functions with regard to placement and maintenance of the grillwork on the sewer. In addition, they did not violate any clearly established constitutional or statutory rights of the decedents by placing the grillwork on the sewer. Further, there is no evidence that defendants intentionally and maliciously attempted to deprive the decedents of their constitutional rights or otherwise intended to injure them. As stated in *Lewellen v Metropolitan Government of Nashville and Davidson County*, 34 F3d 345, 348 (CA 6, 1994),

> the defendants obviously did not make a deliberate decision to inflict pain and bodily injury on the plaintiff. The defendants may have been negligent, but, it is now firmly settled that injury caused by negligence does not constitute a "deprivation of any constitutionally protected interest."

The court went further to state that even "gross negligence is not actionable under § 1983 because it is not arbitrary in the constitutional sense." *Id*. at 351, quoting *Collins v Harker Heights*, 503 US 115; 112 S Ct 1061, 1071; 117 L Ed 2d 261. Accordingly, under *Thomas, Lewellen*, and the cases cited therein, summary disposition to the individual defendants was properly granted with regard to plaintiffs § 1983 claim.

The trial court also properly granted summary disposition to the City of Flint. While plaintiffs correctly state on appeal that municipalities are not immune from § 1983 liability if it can be shown that the municipality's custom or policy deprived individuals of their constitutional rights, *Monnell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2016; 56 L Ed 2d 611 (1978); *Pembaur v Cincinnati*, 475 US 409; 106 S Ct 1292; 89 L Ed 2d 452 91986), this argument does nothing to aid plaintiffs in the instant case because the municipality did nothing to violate the constitutional or statutory rights of decedents. Plaintiffs also correctly state that a municipality can be held liable for decisions made by its officials. *Monnell*, *supra*; *Bryan County Commissioners v Brown*, 520 US 397; 117 S Ct 1382; 137 L Ed 2d 626 (1997). However, here, since the individual defendants did not deprive the teenagers of constitutional or statutory rights, neither did the city of Flint.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder