STATE OF MICHIGAN

COURT OF APPEALS

ROBERT POSTMA,

Plaintiff-Appellant,

v

COUNTY OF OTTAWA,

Defendant-Cross Plaintiff-Appellee,

and

WASTE MANAGEMENT OF MICHIGAN, INC.,

Defendant-Cross Defendant-Appellee.

UNPUBLISHED
September 2, 2004

No. 243602
Ottawa Circuit Court
LC No. 01-039937-CE

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Plaintiff sought to develop his property into residential lots, building a pond as a centerpiece, but his plans were thwarted when the Michigan Department of Environmental Quality (MDEQ) denied his application for a permit to mine sand. Plaintiff sued both Ottawa County and Waste Management alleging trespass, intruding nuisance, and claiming defendants' actions violated the Michigan Environmental Response Act (MERA),[1] MCL 299.601 *et seq*. The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to produce evidence that groundwater contamination emanating from defendants' property had actually polluted the groundwater under plaintiff's property. Plaintiff appeals by right. We affirm as to Ottawa County. We affirm in part, and reverse in part, as to defendant Waste Management.

[1] 1994 PA 451 repealed the MERA effective March 30, 1995, and replaced it with Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq*. See *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 47 n1; 645 NW2d 319 (2002).

I. Factual and Procedural Background

Ottawa County owns property on 168th Avenue in Park Township formerly used as a landfill. Waste Management owns the Holland Lagoons, another former waste disposal site also located on 168th Avenue. Both defendants' properties have been listed as United States Environmental Protection Agency (USEPA) Superfund sites and have contaminated groundwater in the area of plaintiff's property. The exact nature of the contaminants is not clear; they may include metals, pesticides, chloroform, dichloroethane, and trichloroethylene. Pursuant to an administrative consent order, Waste Management began response activates in 1994 that continue.

In 1977, plaintiff began purchasing parcels of land across 168th Avenue from defendants' sites, and acquired approximately 28 acres, including plaintiff's home. In 1999, plaintiff started pursuing plans to develop his property. Plaintiff initially desired to build an addition onto his home to create a six-resident adult foster care facility. As part of this development, plaintiff intended to build a 3.9-acre pond to improve the aesthetics of the property. Later, plaintiff decided to develop four residential lots around the pond instead of the adult foster care facility. Plaintiff obtained conditional approval from Park Township to subdivide his property. While constructing the pond, plaintiff planned to mine sand as part of a business venture. But he needed a permit from the MDEQ to do so. MCL 324.63704. Plaintiff applied for the permit on December 28, 1999, and included a plan for sand removal and an environmental impact statement.

On May 16, 2000, Judith Gapp of the Superfund Section of the MDEQ sent a letter to Kirk Briggs, administrator of the Park Township zoning board, regarding plaintiff's request to build the pond. According to Gapp, the MDEQ believed that the proposed pond "would be in the area of groundwater contamination coming from the Southwest Ottawa County Landfill and Waste Management Holland Lagoons Superfund sites." Further, based on data from defendants' sites, the MDEQ believed plaintiff's proposed pond would pose "a potential threat to human health and the environment due to the potential for contaminated groundwater to be present in the pond." Gap stated that the MDEQ and defendants were conducting further investigations to assess the contaminants, determine their impacts, and search for additional contaminants. Moreover, the MDEQ believed that plaintiff's proposed pond "is in the area of groundwater that DEQ feels should be restricted for drinking water use." Gap concluded that the MDEQ did not recommend approving plaintiff's proposed pond.

At its regular meeting of May 22, 2000, the Park Township zoning board of appeals reviewed plaintiff's appeal of the building inspector's denial of a permit to build the proposed pond. Based on the letter from the MDEQ and input from Tom Lapinsky of the Ottawa County Health Department, the zoning board denied plaintiff's appeal; however, the board allowed plaintiff the opportunity to reapply if he were able to satisfy the environmental concerns of the MDEQ and the health department. Plaintiff arrived at the meeting after the board's decision and was informed of it at the end of the meeting. On learning of the letter from the MDEQ, plaintiff stated he had only been informed that iron was in the groundwater plume and that he had "no iron right in my house, which is right in the forefront of the whole thing." Further, plaintiff noted that the plume of contaminates would be far below where he intended to excavate. The

zoning board informed plaintiff he could reapply if the MDEQ and the health department withdrew their objections to his proposed pond project.

The MDEQ's Geological Survey Division officially denied plaintiff's application for a sand mining permit by letter dated September 18, 2000. The letter states in part:

> During the review process for this application, it was discovered that there are two USEPA Superfund sites of known groundwater contamination to the east-northeast of your proposed project location. These sites are the Southwest Ottawa County Landfill . . . and the Waste Management Lagoon . . . . Hydrogeological information available at this time indicates that the plume of contaminated groundwater issuing from these sites is impacting the area of your proposed project. A pond created on your property could potentially expose persons, fauna, and flora to hazardous contaminants in the groundwater, some of which are known to be bio-accumulative, such as metals and pesticides. **For this reason, the GSD must deny your application**. [Emphasis in original.]
>
> The MDEQ stated two alternatives plaintiff could pursue to obtain a permit:
>
> 1) Modify your project to excavate sand short of encountering the water table, so as not to create a pond. You would need to limit your excavations to a reasonable vertical isolation distance above the seasonal high-water table.
>
> 2) Provide additional hydrogeological information that would demonstrate what impact the creation of a pond would have on the migrating groundwater contaminant plume. This would include data on vertical aquifer profiling; water sampling for the known contaminants; detailed maps showing the position of ANY on-site groundwater contamination; mathematical modeling of predicted changes in groundwater flow paths; and migration of contaminant plumes.
>
> > a. If modeling of this data demonstrates that there would be NO interception of contaminated groundwater, you should include in your application, sampling and monitoring plans for a period of time during and after pond creation.
> >
> > b. If modeling demonstrates that there WOULD be interception of contaminated groundwater, your application would need to show how these contaminated waters could be dealt with so as not to endanger the public, wildlife, and other resources of the State. Describe what security would be used to protect the public and wildlife, and/or what water remediation (cleaning) methods would be employed.

The MDEQ offered to review any "work plans" plaintiff might propose "to determine if it would likely be successful in obtaining the needed data." Plaintiff concluded that the cost of complying with the requirements of the MDEQ would prohibit his project so he filed the instant lawsuit.

During discovery, plaintiff testified regarding information received from an environmental consultant who had been working on the groundwater contamination remediation project for Ottawa County. Plaintiff was informed that the plume consisted of elevated levels of iron, calcium, and magnesium, and that the volatile organics detected in the water were relatively harmless. Moreover, plaintiff agreed that according to the information he received, it was fair to say that the plume was traveling south of his property at a depth of fifty to seventy feet. The water table was approximately fifteen feet from the surface in the area of plaintiff's proposed pond, and a local rule would require additional excavation to achieve a depth of fifteen feet for one-third of the pond. Accordingly, the contaminated plume would be below the proposed pond.

Plaintiff also testified he took a water sample from an old well located next to his house and south of his proposed development for testing by the Kent County Health Department, which also conducts testing for the Ottawa Health Department. The test results showed that the water tested was just at the detection limit for iron. Plaintiff therefore argued that the minimal iron content was more indicative of the nature of the contaminants in the plume near the parcels he planned to develop. But plaintiff did not submit these test results to the MDEQ as support for the proposition that his project was not in the area of the plume because he did not believe they met the testing requirements the MDEQ set forth in their September 18, 2000 letter.

Plaintiff was also questioned at length during his deposition about his alleged damages. Sometime after being denied a sand mining permit, plaintiff changed his plan from a four-lot development to a ten-lot development without the pond. Plaintiff received conditional approval for this plan on October 16, 2001. Moreover, plaintiff testified that he sold two of these lots on March 21, 2001 for $70,000 each.

Plaintiff further testified that he had not acquired appraisals to determine the potential value of his property if it were developed as either the original four-lot plan with a pond or his current plan of ten lots without the pond. Because he had received no appraisals, plaintiff was unable to state the value of his current project or the value of the difference between the four-lot pond project and the current project. Plaintiff stated that his estimates came "just from what my own feelings would be."

With regard to his inability to mine sand, plaintiff stated that he had received no signed contracts or estimates as to the value of the sand. Plaintiff had discussed sand mining with a proposed partner but had never formulated a written cost analysis. Plaintiff's proposed partner planned to excavate the sand, use it as filler for other construction sites, and market it for sale to other excavators. Plaintiff had no formal written estimates of the value of the potentially mined sand. Instead, plaintiff believed from his discussions with his proposed partner and another excavator, he could market the sand for $2 per cubic yard. Plaintiff estimated he would have been able to mine 250,000 yards of sand, grossing $500,000. Moreover, plaintiff stated that he believed the homes constructed on the pond would increase in value by $20,000 per home.

Calvin VanNoord, an appraiser whom plaintiff retained as an expert to estimate how much more his property would have been worth with a pond supported plaintiff's estimate. According to VanNoord, he reviewed a number of developments in the area of plaintiff's property to determine, on average, the difference in selling prices for homes located in developments with ponds as opposed to homes in developments without ponds. Based on his

findings, VanNoord opined that homes located in developments with ponds sell, on average, for twenty percent more than homes in developments without ponds. But VanNoord stated that he had not been asked to conduct a specific evaluation of plaintiff's property, made no assessment of plaintiff's development, and would not say that the developments he studied necessarily reflected the character or type of development plaintiff had planned. Moreover, VanNoord had not evaluated the cost or relative impact of plaintiff's developing his property with or without a pond, and had no opinion as to the economic viability of any of plaintiff's planned developments.

Defendants deposed their own expert, Daniel Emperor, who testified that he did not believe plaintiff would be able to develop his property into ten lots if the pond were constructed. According to Emperor, if the pond were constructed, the land it would occupy would prevent plaintiff from developing two of the lots and would compromise two others. Emperor opined it would still be physically possible for plaintiff to construct homes on these sites, but they would not be worth as much as plaintiff believes because both the homes and their yards would have to be smaller. Further, Emperor noted other potential problems with plaintiff's plan to develop the ten-lot plan with a pond. According to Emperor, because the pond would lessen the size of some of the lots, purchasers would have difficulty locating septic systems on the lots, the slopes of the pond would have to be adjusted, and some of the lots would have too small of a "building envelope." Based on Emperor's testimony, defendants contend that plaintiff's development would actually be worth more without a pond than with a pond because of decreased development costs and because he would be able to develop more and larger homes.

On May 31, 2002, defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). On June 25, 2002, plaintiff moved for leave to amend his complaint pursuant to MCR 2.118 in order to substitute a claim under NREPA for his MERA claim. Both motions were heard on August 5, 2002, with defendants' motion for summary disposition being addressed first.

With respect to plaintiff's trespass claim, defendants argued that plaintiff had not shown that defendants either acted intentionally or that the groundwater was actually contaminated. Defendants also argued that, in the alternative, if defendant has so proven, contamination in groundwater does not equate to a tangible, physical object that interferes with plaintiff's right to exclusive possession because it does not occupy plaintiff's property, does not interfere with plaintiff's right to exclude others, and plaintiff does not own the groundwater.

Next, defendants asserted that although Michigan courts have recognized that groundwater contamination may give rise to a nuisance claim, plaintiff had failed to present a genuine issue of material fact to overcome the absence of a significant harm resulting from an unreasonable interference because he had offered no admissible evidence to show that the groundwater beneath his property is contaminated. Defendants contended to support his nuisance claim, plaintiff would have to show some proof of a physical invasion, which he did not intend to do. Defendants asserted that plaintiff only intended to offer proof that the MDEQ had stated that it was concerned that his property might be contaminated and, therefore, had denied his sand mining permit. Moreover, defendants argued that plaintiff had in fact admitted that the County's hydrogeologist had informed him that she believes the plume of contaminates in the groundwater was traveling in a path that is south of plaintiff's property. Furthermore, defendants

asserted that plaintiff's own testing of his well revealing no contamination corroborated the County's assessment. In sum, defendants argued that because plaintiff did not intend to introduce expert testimony as to an invasion, he could not proceed on his nuisance claim.

Finally, defendants argue plaintiff's proofs regarding damages were insufficient. With respect to plaintiff's claims that the values of his proposed developments was diminished by the inability to construct a pond, defendants asserted that VanNoord only offered a theoretical opinion that was based on a general review of developments with ponds as opposed to those without, and not on plaintiff's development plans. Moreover, defendants argued that plaintiff had no expert testimony to establish that his proposed ten-lot development with a pond would be worth more than the ten-lot development without a pond that he is currently building and that he had not shown that it was feasible to build a ten-lot development with the pond.

Regarding plaintiff's claim of lost profits from his proposed sand mining business, defendants asserted that plaintiff's estimates were based merely on unfounded revenue projections without any investigation into the costs associated with mining. Moreover, defendants asserted that under Michigan law, plaintiff may not present a lost profit analysis because his business is yet unformed and is merely prospective. Further, even if plaintiff were allowed to present a lost profit analysis for a prospective business, he did not intend to call an expert and is prohibited from testifying as to his own perception of damages.

Plaintiff argued that a trespass need not be intentional, and that contaminated groundwater can constitute a trespass because cases have found sewage floating past a plaintiff's property and leaving deposits along the shores to be a trespass. Also, plaintiff argued that a tangible, physical intrusion of contaminated groundwater is not a necessary element of a claim for private or public nuisance.

As to his damages, plaintiff asserted that VanNoord's testimony was based not on a theoretical conclusion, but on an assessment of various comparable properties in the area of plaintiff's proposed development, and that he intended to use VanNoord's testimony to show that his inability to construct a pond resulted in a twenty percent loss of value to any homes he would construct, whether in his four-lot or ten-lot plan. With regard to the lost profits from the removal of the sand, plaintiff argued that the value of the sand was not an issue because defendant's expert, Emperor, had agreed that $2 per cubic yard is a fair value for the sand and also conceded that engineering studies plaintiff had completed determined the amount of sand that can be removed. Therefore, plaintiff argued that the only variable is the cost to remove the sand and that plaintiff and others had been listed as witnesses to testify as to the cost of sand removal.

Further, plaintiff countered defendants' arguments that his damages were analogous to a prospective business because plaintiff's sand mining operation would not be an ongoing business requiring ongoing lost profits projections. Instead, plaintiff argued that his mining proposal called for a fixed amount of sand to be mined within a specific amount of time.

In its ruling, the trial court stated that based on its understanding of case law, plaintiff must prove that his groundwater is contaminated or will be adversely affected by constructing the pond in order to prevail on either a trespass or a nuisance claim, and plaintiff did not intend

to call any expert to do so. The trial court, noting other tangential difficulties with plaintiff's case, stated:

> I'm going to grant [defendants'] motion for summary disposition under the [MCR 2.116](C)(10) theory based on the fact that there is no evidence that his property is contaminated, and there is no evidence that if it were not contaminated and if he were able to prove what the DNR wanted him to prove, that they would not grant him the license or the permit to excavate the pond and further develop his property. So I'm going to grant the motion.

The circuit court issued its written order on August 23, 2002. Plaintiff appeals by right.

II. Standard of Review

This Court reviews de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Because the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). MCR 2.116(C)(10) tests the factual sufficiency of plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Id*.; MCR 2.116(G)(5). Where the proffered evidence fails to establish that a disputed material issue of fact remains for trial, summary disposition is properly granted to the party so entitled as a matter of law. MCR 2.116(C)(10), (G)(4), (I)(1); *Maiden, supra*.

Further, because it is well settled that this Court will not reverse when the trial court reaches the correct result, albeit for a wrong reason, *Ellsworth v Hotel Corp*, 236 Mich App 185, 190; 600 NW2d 129 (1999), we also acknowledge the standard for reviewing summary disposition under MCR 2.116(C)(8). A motion under (C)(8) tests the legal sufficiency of the pleadings standing alone. *Maiden, supra* at 119. The motion must be granted if no factual development could justify plaintiff's claim for relief. *Id*.; *Spiek, supra* at 337.

III. Analysis

A. Nomenclature of Plaintiff's Claims

Plaintiff's complaint contains counts of trespass and intruding nuisance against both defendants Ottawa County and Waste Management. Intruding nuisance has been characterized as a misnomer for trespass-nuisance, which formerly was recognized as an exception to governmental immunity, and only applies to the state and local governments. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995), citing *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 154; 422 NW2d 205 (1988). The distinctions between the causes of action, however, are not always clear, and even decisions of this Court have, at times, confused them by analyzing claims against private individuals under trespass-nuisance without specifying whether the private individuals were acting as agents of the government. See *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344-345; 568 NW2d 847 (1997). Our Supreme Court subsequently overruled *Hadfield's*

recognition of a trespass-nuisance exception to governmental immunity in *Pohutski v City of Allen Park*, 465 Mich 675, 679, 690; 641 NW2d 219 (2002). But the Court applied its holding prospectively to cases filed on or after April 2, 2002. *Id*. at 699. Because plaintiff filed the present action on April 27, 2001, the trespass-nuisance exception to governmental immunity still applies to this case.

We note that Ottawa County did not plead governmental immunity as an affirmative defense in its answer to plaintiff's complaint. Nevertheless, our Supreme Court has recognized that governmental immunity is a characteristic of government of which a plaintiff must plead in avoidance and is an affirmative defense that may not be waived. *Mack v Detroit*, 467 Mich 186, 197-205; 649 NW2d 47 (2002). But because defendant Waste Management is not a governmental entity, plaintiff's claims against it fall under trespass and private or public nuisance. *Cloverleaf*, *supra* at 193. Plaintiff alleges numerous facts in support of its claims, but his mislabeling of his nuisance claim as intruding nuisance is not fatal because the complaint's factual allegations reasonably inform defendant of the nature of the claims to defend. MCR 2.111(B)(1); *Smith v Stolberg*, 231 Mich App 256, 258-261; 586 NW2d 103 (1998). Thus, we may treat plaintiff's claim for intruding nuisance as one for private nuisance. Moreover, even were we to find plaintiff's factual allegations as set forth in its complaint insufficient to reasonably inform defendant of "the nature of the claims to defend," certainly defendant learned through discovery the essence of plaintiff's complaints. MCR 2.118(C)(1) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

We will first address plaintiff's claims of trespass against defendant Waste Management and trespass-nuisance against defendant Ottawa County.

B. Trespass and Trespass-nuisance

"Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). The intrusion must also be intentional. "If the intrusion was due to an accident caused by negligence or an abnormally dangerous condition, an action for trespass is not proper." *Cloverleaf*, *supra* at 195, citing Prosser & Keeton, Torts (5th ed), § 13, pp 73-74.

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," and its elements are "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield*, *supra* at 169. For a claim of trespass-nuisance, plaintiff must present proof that defendants physically invaded his property by adding something to it. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 207; 521 NW2d 499 (1994). Moreover, unlike trespass, under the trespass-nuisance exception, the

defendant's intent to cause the trespass or nuisance is generally irrelevant. *Hadfield*, *supra* at 161; *Traver Lakes*, *supra* at 345.

We conclude that the trial court correctly granted defendants' motion for summary disposition on plaintiff's claims of trespass against Waste Management and trespass-nuisance against Ottawa County because plaintiff failed to produce evidence that the groundwater underneath his property was contaminated. MCR 2.116(G)(4); *Maiden*, *supra* at 120-121. Plaintiff's contention that the letter from the MDEQ denying his sand mining permit was sufficient to support his trespass and trespass-nuisance claims is without merit. In the letter, the MDEQ merely states it believes defendants' facilities had contaminated groundwater in the area of plaintiff's property; the MDEQ does not state it has determined that the groundwater below plaintiff's property is contaminated. Moreover, the MDEQ clearly implies that it was not certain that contaminates would ever reach groundwater under plaintiff's property. Plaintiff could reapply for a sand mining permit if his testing demonstrated that the groundwater under his property was not contaminated or that creation of a pond would not adversely impact "the public, wildlife, and other resources of the State" by intercepting existing contamination in the groundwater.[2]

In addition, plaintiff testified in his deposition that he had received information that the contamination plume was traveling south of his property and contained mostly iron. Plaintiff also testified that the results he obtained from the groundwater samples he sent to the Kent County Health Department showed only minimal iron contents. Further, plaintiff himself stated at the meeting of the Park Township zoning board that these results were favorable, that the plume was not moving in the direction of his property, that any contaminants in the plume would "only be iron," and that there is no iron in the groundwater at his house. Plaintiff offered no documentary evidence to show any contaminants other than iron in his groundwater, no evidence to show that iron is a contaminant, and, in fact, impliedly admitted that it is not.

Plaintiff also argues that the trial court erred because his witness list included geologists and other MDEQ and EPA scientists who would testify about the contamination in the groundwater in the area. This argument fails because establishing contamination in the area does not establish an intrusion of the groundwater under plaintiff's property. Plaintiff's mere promise to support his claim by introducing evidence at trial is insufficient to withstand summary disposition under MCR 2.116(C)(10). *Maiden*, *supra* at 121.

Moreover, even if plaintiff were to establish pollution of the groundwater beneath his property, his trespass claim would still fail as a matter of law. In *Adams* the plaintiffs brought claims of both trespass and nuisance against the operators of a mine based on allegations of accumulating dust, noise, and vibrations. This Court, in holding that dust particles are generally considered intangible and cannot give rise to an action for trespass, stated:

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[2] MCL 324.63705(d) requires that an environmental impact statement for a sand mining permit include the "effects of the proposed sand dune mining activity on groundwater supply, level, quality, and flow on site and within 1,000 feet of the proposed sand dune mining activity."

> Dust particles do not normally occupy the land on which they settle in any meaningful sense; instead they simply become a part of the ambient circumstances of that space. If the quantity and character of the dust are such as to disturb the ambiance in ways that interfere substantially with the plaintiff's use and enjoyment of land, then recovery in nuisance is possible. [*Id*. at 69-70.]

We believe that this case is analogous to that in *Adams* and that contaminants in groundwater, even more so than dust that settles on land, simply becomes "a part of the ambient circumstances of that space" and will not support an action in trespass. *Id*. at 69-70.

Furthermore, we believe that defendant Waste Management correctly asserts that even if plaintiff could prove the groundwater under his property is contaminated and that groundwater contaminants equate to physical, tangible objects, plaintiff's claim of trespass is without merit because this Court has recognized that one does not have ownership or exclusive possession over water beneath one's property. See *United States Aviex Co v Travelers Ins Co*, 125 Mich App 579, 590-592; 336 NW2d 838 (1983), citing *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917).

In sum, plaintiff's trespass claim against defendant Waste Management fails because there is no evidence of an intrusion. For the same reason, plaintiff's claim of trespass-nuisance against defendant Ottawa County also fails. Where there is no trespass there can be no trespass-nuisance. *Peterman*, *supra* at 207. Plaintiff's trespass claim also fails as a matter of law because a claim of pollution does not establish a tangible invasion of exclusive possession.

C. Nuisance Claims

1. Ottawa County

We conclude that all remaining claims against Ottawa County were properly dismissed either under MCR 2.116(C)(8) because plaintiff failed to plead in avoidance of governmental immunity, *Mack*, *supra* at 198, or under MCR 2.116(C)(10) because plaintiff failed to establish an intrusion required to satisfy the trespass-nuisance exception. See Part III(B), *supra*.

MCL 691.1407(1) broadly grants tort immunity to governmental agencies:

> 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. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The statute provides six exceptions to governmental immunity: (1) damages caused by an unsafe highway, MCL 691.1402; (2) negligent operation of a motor vehicle, MCL 691.1405; (3) dangerous or defective public buildings, MCL 691.1406; (4) provision of medical care except in a hospital owned or operated by the Department of Community Health or the Department of Corrections, MCL 691.1407(4); (5) a sewage disposal system event, MCL 691.1417(3); and (6) performance of a proprietary function, MCL 691.1413. *Pohutski, supra* at 689, 697. These exceptions are to be narrowly construed. *Id.* at 690; *Maskery v University of Michigan Bd of*

Regents, 468 Mich 609, 614; 664 NW2d 165 (2003). Plaintiff does not allege "the overflow or backup of a sewage disposal system onto real property," MCL 691.1416(k), nor allege that Ottawa County was engaged in "activity which is conducted primarily for the purpose of producing a pecuniary profit," MCL 691.1413. Plaintiff simply has alleged nothing to indicate that Ottawa County was not "engaged in the exercise or discharge of a governmental function" in connection with its property in Park Township. Accordingly, plaintiff has not pleaded a claim against Ottawa County to avoid governmental immunity.[3] *Mack*, *supra* at 198.

2. Waste Management

With respect to Waste Management, however, we conclude that the trial court erred by ruling that plaintiff was required to introduce evidence that the groundwater beneath his property is contaminated in order to maintain a claim for nuisance. Nuisance only requires a nontrespassory invasion of plaintiff's property rights, not his property. Moreover, defendants' contention that plaintiff has not shown significant harm resulting from an unreasonable interference with the use and enjoyment of his property is without merit.[4] Therefore, the trial court erred by granting summary disposition to Waste Management on plaintiff's nuisance claim.

In *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), citing 4 Restatement Torts, 2d, § 832, p 142, our Supreme Court recognized that contaminated groundwater may give rise to a claim for either public or private nuisance. But in the hearing below, plaintiff did not address the elements of public nuisance. Moreover, in his briefs to this Court, plaintiff neither states nor addresses the elements of public nuisance. Likewise, defendants have not addressed public nuisance in either the trial court or in this Court. So, we consider plaintiff's claim as only alleging private nuisance. *Adkins*, *supra* at 305-306.

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.* at 302, citing 4 Restatement Torts, 2d, § 821D, p 100. Our Supreme Court set forth the elements of a private nuisance claim from both the Restatement and Prosser & Keeton, Torts (5th ed), § 87, p 622-623 but did not reconcile the differences between the two. *Adkins*, *supra* at 305 n 9. We apply the elements of a private nuisance from the Restatement:

> [A]n actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with,

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[3] See, also, *Li v Feldt (After Remand)*, 434 Mich 584, 587, 595; 456 NW2d 55 (1990)(intentional nuisance is not an exception to governmental immunity), *Summers v Detroit*, 206 Mich App 46, 50; 520 NW2d 356 (1994)(attractive nuisance is not an exception to governmental immunity), and *Li v Feldt (After Second Remand)*, 439 Mich 457, 474 (Cavanagh, C.J.), 484 (Griffin, J.); 487 NW2d 127 (1992)(public nuisance is not an exception to governmental immunity).

[4] Even though we conclude that Ottawa County enjoys governmental immunity, we continue to refer to "defendants" because Waste Management and Ottawa County raised the same arguments in the trial court and this Court.

> (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Id*. at 304, citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115; see also *Cloverleaf*, *supra* at 193.]

Plaintiff argues that the trial court erred in dismissing his nuisance claim because it found that he had presented no evidence that the groundwater below his property is contaminated. The crux of plaintiff's argument is that in order to maintain a claim of private nuisance, he need not show that the contaminated groundwater invaded his property, but only that it invaded his property rights. Defendants, on the other hand, argue that plaintiff must introduce evidence that although it may not rise to the level of a trespass such as the dust in *Adams*, *supra* at 69-70, plaintiff must show that the contamination did, in fact, invade the groundwater to which he enjoys a right of reasonable use. *United States Aviex Co*, *supra.* Thus, plaintiff stresses the "nontrespassory" nature of nuisance claims while defendants stress the necessity of an "invasion." In support of their positions, the parties dispute the meaning of our Supreme Court's holding in *Adkins*, *supra*.

In *Adkins*, toxic substances emanating from the defendant's property contaminated the groundwater. The plaintiffs, twenty-two landowners who conceded that no contaminants had ever reached the groundwater below their property, sought damages in nuisance based on their claim that public concerns about the contaminants had lessened the value of their property. The trial court dismissed these claims because it concluded that any resulting damages were based on unfounded public perceptions that the groundwater beneath the plaintiffs' property was contaminated. *Adkins*, *supra* at 300. This Court reversed and remanded. It concluded that although the groundwater under plaintiffs' property was not, and would never become, contaminated, the plaintiffs were not required to show a physical intrusion onto their land, and the trial court had erroneously held that the plaintiffs had not shown some damages. *Id*. at 301, citing 184 Mich App 693, 696; 459 NW2d 22(1990). In reversing this Court's decision, our Supreme Court in *Adkins*, *supra* at 306, n 12, clearly stated a physical intrusion is not necessary to support a nuisance claim:

> The Court of Appeals focused upon the lack of any physical intrusion onto plaintiffs' land, stressing that an interference with the use and enjoyment of land need not involve a physical or tangible intrusion. **We do not disagree with this rule of law**.[12] Nevertheless, we conclude that the trial court properly found that the plaintiffs failed to trace any significant interference with the use and enjoyment of land to an action of the defendants.

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[12] Both Prosser and Keeton's definition of nuisance and the definition provided by the Restatement of Torts specifies that an action for nuisance involves a *nontrespassory* invasion of property rights. 4 Restatement Torts, 2d, § 821D, p 100. Thus, **it is clear that a tangible physical intrusion is not necessary**. [Italics in original; bold added.]

Accordingly, we agree with plaintiff that the groundwater underlying his property need not actually be polluted for plaintiff to suffer a substantial interference with "the occupation or use of land or an interference with servitudes relating to land." *Adkins, supra* at 303. Nevertheless, to "prevail in nuisance, a possessor of land must prove *significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property." *Adams, supra* at 67 (emphasis in *Adams*), citing *Cloverleaf, supra* at 193. Indeed, the plaintiffs in *Adkins* failed to establish a nuisance claim because they did not suffer significant harm. Because "property depreciation alone is insufficient to constitute a nuisance," *Adkins, supra* at 311, the Court held that the *Adkins* plaintiffs had not established significant harm, opining:

> The crux of the plaintiffs' complaint is that publicity concerning the contamination of ground water in the area (although concededly not their ground water) caused diminution in the value of the plaintiffs' property. This theory cannot form the basis for recovery because negative publicity resulting in unfounded fear about dangers in the vicinity of the property does not constitute a significant interference with the use and enjoyment of land. [*Id*. at 306 (footnote omitted).]

The *Adkins* Court also opined that permitting recovery for diminution of property values on the basis of pollution in the area might inappropriately skew the allocation of the polluter's resources necessary for cleanup activity and recognized the role of the Legislature in addressing environmental damage:

> If any property owner in the vicinity of the numerous hazardous waste sites that have been identified can advance a claim seeking damages when unfounded public fears of exposure cause property depreciation, the ultimate effect might be a reordering of a polluter's resources for the benefit of persons who have suffered no cognizable harm at the expense of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property. Thus, while we acknowledge that the line drawn today is not necessarily dictated by the spectral permutations of nuisance jurisprudence, if the line is to be drawn elsewhere, the significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature. [*Id*. at 318-319 (footnotes and citations omitted).]

The present case is similar to *Adkins* in that plaintiff, like the plaintiffs in *Adkins*, has not shown that the groundwater beneath his property is contaminated. But the present case is distinguishable from *Adkins* in that the plaintiffs in *Adkins* sought damages solely on the grounds that unfounded public perceptions of groundwater contamination would cause their property's value to fall. In contrast, plaintiff alleges significant interference with the use and enjoyment of his land by not being able to mine sand and construct a pond. Although this claim includes as an element of damages allegations that his property's value has diminished, plaintiff's claim is not based on general unfounded concerns of groundwater contamination in the area. It stems from the fact that defendants' actions have interfered with a specific use and enjoyment of his property due to his inability to construct a pond and mine sand. Moreover, plaintiff's claims of significant harm do not come from property depreciation as defendants assert, but from the interference with plaintiff's ability to add value to his property by developing residential lots

around a pond and the inability to mine sand. Furthermore, although plaintiff's claims of significant harm are disputed, plaintiff has created a material question of fact through the deposition testimony of VanNoord, who estimated that, on average, homes in developments with ponds sell for twenty percent less than homes in developments without ponds. This is admissible evidence that conflicts with testimony of defendants' expert, Emperor, who opined that plaintiff would realize greater profits by developing his property without a pond. Accordingly, we conclude plaintiff has created a material question of fact on the element of significant harm.[5]

D. Environmental Claim

Plaintiff also argues that the trial court erred in granting defendants' motion for summary disposition because he had stated a claim under the MERA, MCL 299.601 *et seq.*, and had sought leave to amend his complaint because MERA has been repealed and the NREPA replaced it, MCL 324.101, *et seq*. Count V of plaintiff's complaint alleges that pollution emanating from defendants' property has "physically intruded and invaded plaintiff's property" in violation of MERA. Plaintiff did not seek response costs but rather sought the same money damages he claimed for trespass and private nuisance. Plaintiff moved to amend his complaint, but only to cite NREPA rather than the repealed MERA.[6]

We find that plaintiff has abandoned this issue. First, plaintiff did not raise this issue in his statement of questions presented on appeal as required by MCR 7.212(C)(5). *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Second, in his brief, plaintiff merely states that MCL 324.20126a(c) expands the damages available to plaintiff from only response costs to the full value of the injury to natural resources. But plaintiff provides no argument or citation of authority regarding how alleged injury to groundwater underlying his property would permit recovery of damages based on the inability to mine sand or build a pond. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v McDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Although we conclude plaintiff has abandoned this issue, we briefly address its merits because we are remanding this case.

First, exhaustion of administrative remedies is not an issue in this case. Plaintiff argues the trial court erroneously applied the doctrine, pointing to the court's comment that "there is no evidence that his property is contaminated, and there is no evidence that if it were not contaminated and if he were able to prove what the DNR wanted him to prove, that they would not grant him the license or the permit to excavate the pond and further develop his property." We read from the trial court's comment that it simply found no evidence to support plaintiff's

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[5] We have addressed only whether a physical intrusion of the groundwater underlying plaintiff's property by contaminates is necessary to maintain a private nuisance action and whether plaintiff has created a question of fact to survive summary disposition on the element of significant harm. We express no opinion regarding the other elements necessary to establish a claim of private nuisance, including actionable culpability. See *Adkins, supra* at 304-305.

[6] See n 1, *supra*.

claim that contaminates emanating from defendants' property had "physically intruded and invaded plaintiff's property." Thus, because plaintiff failed to produce evidence of the factual predicate for his claim, the court properly granted summary disposition under MCR 2.116(C)(10), (G)(4).

Moreover, even if plaintiff were permitted to amend his complaint to allege a violation of the NREPA, he could not state a viable claim for the type of damages he seeks. "By enacting the NREPA, the Legislature reorganized, without fundamentally altering, the scattered array of existing legislation related to the environment in one all-inclusive statute." *Howell Twp v Rooto Corp*, 258 Mich App 470, 479; 670 NW2d 713 (2003), citing Senate Fiscal Agency Bill Analysis, SB 257, 320, July 19, 1994. Part 201 of the NREPA, formerly the MERA, is patterned after the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*. See *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 50; 645 NW2d 319 (2002). "Both the federal and state statutes provide for identification of contaminated sites and for prompt remediation . . . [and] . . . create a private cause of action to establish liability for costs of investigation and remediation of contaminated sites." *Id*.

The NREPA provision on which plaintiff relies, MCL 324. 20126a(1)(c), is identical to its MERA predecessor, MCL 299.612(2)(c),[7] and imposes liability for "the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from [a] release." As used in part 201 of NREPA, a "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of hazardous substance into the environment," MCL 324.20101(1)(bb), and "natural resources" as defined includes "groundwater," MCL 324.20101(1)(k). Thus, we assume that a private cause of action exists under Part 201 of NREPA for compensatory damages for injury to natural resources, including groundwater. See *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 6-7; 596 NW2d 620 (1999). But the problem with plaintiff's claim is that he does not seek damages for injury to the groundwater itself. Moreover, plaintiff does not own the groundwater underlying his property but only enjoys a right to its reasonable use. *United States Aviex Co, supra* at 590.

Indeed, we assume that the state owns the groundwater. See, e.g., *Kent Co v Home Ins Co*, 217 Mich App 250, 290; 551 NW2d 424; 568 NW2d 671 (1996)(assuming the people of Michigan own the groundwater), vacated in part on other grounds and remanded 456 Mich 858; 568 NW2d 671 (1997). The Legislature in the NREPA and in other statutes[8] has defined "waters of the state" to mean "groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state."[9] MCL 324.3101(y).

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[7] See *Pitsch v ESE Michigan, Inc*., 233 Mich App 578, 588; 593 NW2d 565 (1999).

[8] See MCL 286.872(t) (in the aquaculture development act), and MCL 287.706(33) (in the animal industry act).

[9] See, also, MCL 324.20301(e), which provides, "'[w]aters of the state' means *all groundwaters*, lakes, rivers, streams, and other watercourses including the Great Lakes and their connecting

(continued…)

Accordingly, any cause of action for injury to the groundwater underlying plaintiff's property would belong to the state, not plaintiff. MCL 324.20126a(4).[10]

For the foregoing reasons, we conclude the trial court properly dismissed plaintiff's environmental claim.

VI. Conclusion

In summary, we conclude that the trial court correctly granted summary disposition to defendants on plaintiff's trespass claim against Waste Management and trespass-nuisance claim against Ottawa County because plaintiff failed to produce evidence of a physical intrusion of property to which plaintiff enjoys the exclusive right of possession. Further, summary disposition in favor of Ottawa County as to all other claims by plaintiff against it was proper because plaintiff pleaded no other theory of liability in avoidance of governmental immunity. Plaintiff's environment claim fails as a matter of law because he does not seek and cannot obtain damages for injury to the groundwater underlying his property. Finally, we conclude the trial court erred by dismissing plaintiff's private nuisance claim against Waste Management because a physical intrusion of plaintiff's property is not a necessary element of that cause of action. Further, the record reflects that plaintiff has created a genuine use of material fact as to the element of significant harm. According, the trial court erred by granting summary disposition.

(…continued)

waterways within the jurisdiction of the state," and MCL 324.16704(1), which provides, in part, "[a] person shall not dispose of or cause the disposal of used oil by dumping used oil onto the ground; discharging, dumping, or depositing used oil into sewers, drainage systems, surface waters, *groundwaters, or other waters of this state*" (italics added).

[10] MCL 324.20126a(4) provides, "In the case of injury to, destruction of, or loss of natural resources under subsection (1)(c), liability shall be to the state for natural resources belonging to, managed by, controlled by, appertaining to, or held in trust by the state or a local unit of government. Sums recovered by the state under this part for natural resource damages shall be retained by the department, for use only to restore, repair, replace, or acquire the equivalent of the natural resources injured or acquire substitute or alternative resources. There shall be no double recovery under this part for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition, for the same release and natural resource."

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

I concur in result only.

/s/ William B. Murphy