

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UNPUBLISHED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.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I concur with the majority opinion except as to part III (C)(2), which addresses the intruding nuisance claim pleaded against Waste Management of Michigan, Inc. (WMMI). For the reasons set out below, the trial court did not err in dismissing the intruding nuisance claim against WMMI, a private defendant. Furthermore, the majority incorrectly re-labels plaintiff's claim as a private nuisance, instead of an intruding nuisance, thereby allowing an unpleaded claim to proceed to trial against WMMI.

The majority correctly notes that intruding nuisance is a misnomer for a trespass-nuisance claim. Slip op at p 11, citing *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995), in turn citing *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 154; 422 NW2d 205 (1988), overruled on other grds, *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). However, as WMMI points out, trespass-nuisance was only relevant for purposes of evading governmental immunity,¹ and therefore did not and does not

¹ Trespass-nuisance is no longer an exception to statutory governmental immunity. *Pohutski v Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002).

apply against a private defendant such as WMMI. *Cloverleaf, supra* at 193; *Antoniano v City of Dearborn Heights*, 224 F Supp 2d 1129, 1142 (ED Mich 2002). Accordingly, the trial court was compelled to dismiss the claim as a matter of law. *Id.*

The majority instead addresses the claim as if it were one for a private nuisance. It does so on the basis that plaintiff's mislabeling of Count III is not fatal because the allegations within the complaint reasonably inform WMMI of the nature of the claim. I respectfully disagree with this proposition for two reasons. First, plaintiff's allegations do not put WMMI on notice that it would be defending a private nuisance claim, for the heading and allegations within Count III reveal a precise claim and allegations of intruding nuisance. Specifically, plaintiff's complaint contained four explicit counts, two each against both defendants: Count I alleged "Intruding nuisance by Ottawa County," Count II alleged "Trespass by Ottawa County" and Count IV alleged "Trespass by Waste Management of Michigan Inc." Count III, which is the count at issue, is clearly labeled as a claim for an "intruding nuisance" and contains clear allegations attempting to prove the existence of an intruding nuisance:

COUNT III – INTRUDING NUISANCE BY WASTE MANAGEMENT OF
MICHIGAN, INC.

29. Plaintiff incorporates by reference the allegations set forth above in paragraphs 1 through 28 as fully stated herein.

30. Defendant Waste Management of Michigan, Inc. had a duty to prevent the contamination and pollution of the groundwater *and the physical intrusion of the contamination and pollution from the Waste Management Lagoon onto plaintiff's property.*

31. Defendant Waste Management of Michigan, Inc. had a duty to design, construct, maintain, repair, operate and control the Waste Management Lagoon so as to prevent the pollution and contamination of the groundwater, *and the physical intrusion of the contaminated and polluted groundwater onto plaintiff's property.*

32. Defendant Waste Management of Michigan, Inc. knew or should have know that its Waste Management Lagoon would not function properly and did not provide adequate or reasonable means to prevent the pollution and contamination of the groundwater, *and the physical intrusion of the groundwater onto plaintiff's property from the Waste Management Lagoon.*

33. Defendant Waste Management of Michigan, Inc. breached its duty by failing to design, construct, maintain, repair, operate and control the Waste Management Lagoon, or take other reasonable acts and measures, so as to prevent the pollution and contamination of the groundwater, *and the physical intrusion of polluted and contaminated groundwater onto plaintiff's property from the Waste Management Lagoon.*

34. The polluted and contaminated groundwater created by the leaching and discharge of the Waste Management Lagoon directly interferes with plaintiff's use and enjoyment of his property and business.

35. The polluted and contaminated groundwater, *and physical intrusion of the polluted and contaminated groundwater onto plaintiff's property from the Waste Management Lagoon, constitutes an intruding nuisance.*

36. Defendant Waste Management of Michigan, Inc. created the nuisance, owned or controlled the Waste Management Lagoon or employed others to do work that it knew was likely to create the nuisance.

37. Due to the *physical intrusion of the polluted and contaminated groundwater onto plaintiff's property* from defendant's Waste Management Lagoon, plaintiff has sustained, and continues to sustain, severe damages, including, but not limited to, the inability to mine the sand on his property for sale, create a pond and develop home sites around the pond (emphasis added).

In my estimation, the foregoing convincingly demonstrates that plaintiff unequivocally alleged an intruding nuisance against WMMI. Each of the paragraphs pleaded under Count III contain the factual assertion that WMMI caused a "physical intrusion of the polluted and contaminated groundwater onto plaintiff's property." These are specific and legally significant allegations, and are tailored to meet the proofs required to establish an intruding or trespass-nuisance. See *Hadfield, supra* at 145. Indeed, it is the very nonexistence of the physical intrusion element that distinguishes the elements of a private and trespass-nuisance. In my view, therefore, plaintiff specifically alleged an intruding nuisance, and the pleadings did not put WMMI on reasonable notice otherwise.²

Second, the majority does not explain the connection between trespass-nuisance being a misnomer for intruding nuisance, and the conclusion that plaintiff actually brought a private nuisance claim. There is certainly no case law indicating that courts are to construe a wrongly filed intruding nuisance claim as a private nuisance, and as set forth above, the allegations themselves belie a claim of private nuisance.

At this stage of the proceeding, plaintiff is stuck with the allegations contained in the complaint and cannot now seek to litigate a different claim. I would therefore affirm the trial court in its entirety.

/s/ Christopher M. Murray

² Plaintiff did not file a motion to amend the complaint in the circuit court.