

STATE OF MICHIGAN
COURT OF APPEALS

CORD-KAZ, LLC., and KAZ-CORD, LLC.,

Plaintiffs-Appellants,

v

GENESEE COUNTY ROAD COMMISSION,
JOHN D. DALY, III, Ph.D., TIMOTHY D.
SABIN, and JOHN BENNETT,

Defendants-Appellees.

UNPUBLISHED
November 2, 2004

No. 248016
Genesee Circuit Court
LC No. 01-071331-CZ

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendants' motion for summary disposition, and we affirm.¹

After their parking lot suffered damage as a result of flooding, plaintiffs brought this action under theories of gross negligence and trespass-nuisance. The trial court granted defendants' motion for summary disposition, because it found that there was no evidence that the individual defendants caused or contributed to the problem or had knowledge of the problem. The trial court also ruled that plaintiffs failed to present evidence to establish the elements of trespass-nuisance.²

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

¹ This appeal is being decided without oral argument pursuant to MCR 7.214(E).

² Any claim against defendant Bennett was extinguished when plaintiffs agreed to dismiss the third amended complaint.

In relevant part, MCL 691.1407(2) provides that an individual governmental employee is immune from tort liability where the employee's conduct does not amount to gross negligence or where the conduct is not the proximate cause of the injury. Gross negligence is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Robinson v Detroit*, 462 Mich 439, 458; 613 NW2d 307 (2000). And, to be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be the one most immediate, efficient and direct cause preceding the injury. *Id.*, 462.

If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under MCL 691.1407(2)(c), the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

The trial court recognized the central problem of plaintiffs' case: although plaintiffs communicated with employees of the road commission, there is no evidence that plaintiffs had communicated with defendant Sabin. Also, there is no evidence how the concrete glob was formed in the drain. Thus, there can be no showing that defendant Sabin's inaction was the proximate cause of the injury, and the trial court properly granted summary disposition.³

Although the trespass-nuisance exception to immunity was abrogated in *Pohutski v Allen Park*, *supra*, that decision was only given prospective effect. *Pohutski*, *supra*, 699. Thus, plaintiffs' case is governed by the prior law set forth in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). *Hadfield* makes clear that trespass-nuisance is an 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 that resulted in personal or property damage.

Again, plaintiffs presented no evidence to show that defendants were responsible for the creation of the nuisance. Because plaintiffs failed to provide any factual support for an element of their cause of action, the trial court properly granted summary disposition. *Maiden*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell

³ On appeal, plaintiffs concede that defendant Daly was entitled to immunity under MCL 691.1407(5) as an appointed executive official. The trial court did not reach the question whether defendant Sabin was entitled to immunity under MCL 691.1407(5). It is unnecessary to reach this question where the court properly found that plaintiffs failed to plead a case of gross negligence.