STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA L. RIGDON and RONALD S. RIGDON,

Plaintiff-Appellants,

v

CITY OF DURAND,

Defendant-Appellee.

UNPUBLISHED
May 10, 2005

No. 252956
Shiawassee Circuit Court
LC No. 01-006437-NZ

TARA MCCARTNEY and RANDY MCCARTNEY,

Plaintiffs-Appellants,

v

CITY OF DURAND,

Defendant-Appellee.

No. 252957
Shiawassee Circuit Court
LC No. 01-006630-NZ

DOUGLAS WILLIAM SMITH and ELIZABETH CROSS SMITH,

Plaintiffs-Appellants,

v

CITY OF DURAND,

Defendant-Appellee.

No. 252958
Shiawassee Circuit Court
LC No. 01-006571-NZ

MITCHELL ZIEBA and ELLA ZIEBA,

Plaintiffs-Appellants,

v

No. 252959
Shiawassee Circuit Court
LC No. 01-006570-NZ

CITY OF DURAND,

Defendant-Appellee.

CAROL KITTLE,

Plaintiff-Appellant,

v

No. 252960
Shiawassee Circuit Court
LC No. 01-006770-NZ

CITY OF DURAND,

Defendant-Appellee.

DENNIS GENE KING and BETTY LOU KING,

Plaintiffs-Appellants,

v

No. 252961
Shiawassee Circuit Court
LC No. 01-006769-NZ

CITY OF DURAND,

Defendant-Appellee.

RICHARD RINKER and JOANN RINKER,

Plaintiffs-Appellants,

v

No. 252962
Shiawassee Circuit Court
LC No. 01-007388-NZ

CITY OF DURAND,

Defendant-Appellee.

MICHAEL PRITCHARD and KIMBERLY PRITCHARD,

Plaintiffs-Appellants,

v

No. 252963
Shiawassee Circuit Court

CITY OF DURAND, LC No. 01-007386-NZ

Defendant-Appellee.

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition with regard to their trespass-nuisance[1] claims. The trial court granted defendant's motion for summary disposition finding that plaintiffs had failed to plead in avoidance of governmental immunity by failing to offer evidence to show that defendant was the proximate cause of the their injuries. We affirm.

After experiencing sewer backups that brought untreated sewage into the basements of their homes, plaintiffs sued defendant under the trespass-nuisance exception to governmental immunity. Plaintiffs alleged that defendant negligently built, operated, and maintained the city sewer system, which did not provide a separate storm sewer system to handle runoff from the footing drains[2] serving plaintiffs' homes. When plaintiffs' homes were built, the builders connected the footing drains in their homes to defendant's sewer system. Therefore, when the combined volume of sewage and rainwater exceeded the sewer system capacity, backups occurred, causing raw sewage to enter plaintiffs' basements. Plaintiffs alleged that defendant approved the connections between the footing drains and the sewer system when it approved the subdivision plat map, which did not require the builders to construct a separate storm sewer system. The trial court found that plaintiffs had neither avoided government immunity nor shown that there were genuine issues of material fact that required a trial.

"This Court reviews a trial court's decision to grant summary disposition de novo." *Wickens v Oakwood Healthcare System*, 465 Mich 53, 59; 631 NW2d 686 (2001). The issue is whether plaintiffs succeeded in using the trespass-nuisance exception to plead in avoidance of governmental immunity, MCR 2.116(C)(7), and whether plaintiffs met their burden to show that a genuine issue existed regarding a connection between defendant and plaintiffs' damages. MCR 2.116(C)(10).

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[1] This case was stayed below while awaiting the Michigan Supreme Court's opinion in *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), issued on April 2, 2002. In that case, our Supreme Court abolished the trespass-nuisance exception to governmental immunity but allowed suits already filed to continue under the exception as it was defined in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988).

[2] Footing drains are underground drain tiles that drain storm water and snow melt from around basement walls.

Our Supreme Court summarized the elements of the trespass-nuisance exception to governmental immunity in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988):

> [P]laintiffs will successfully avoid a governmental immunity defense whenever they allege and prove a cause of action in trespass or intruding nuisance. Trespass-nuisance shall be defined as 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. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).

Plaintiffs argue that, under *CS&P, Inc v Midland*, 229 Mich App 141; 580 NW2d 468 (1998), "plaintiffs did not need to prove negligence as a predicate to establishing liability under the trespass-nuisance exception to governmental liability." *Id.*, 144. However, the cases are distinguishable. The *CS&P* majority implicitly found that the proximate cause element was satisfied in that case:

> Broken risers in the sewer on a street adjacent to the building caused a blockage, and diverted the water and sewage into the building. Midland admitted that it owned the sewer system, that it was responsible for maintaining, installing, and repairing sanitary sewers, and that the section of the sewer that failed had been cleaned and inspected, no problems having been found. [*Id.*, 143.]

Thus, the only question the Court considered in *CS&P* was whether plaintiffs also had to prove negligence to bring their claim. *Id.*, 144. This is in complete contrast to the case at bar, where plaintiffs offered no admissible evidence showing any failures in defendant's sewer system. Thus, where proximate cause has been established, plaintiffs need not also prove that a defendant's negligence caused the physical intrusion. But the reverse is not true because a physical intrusion does not constitute a showing that a defendant was the proximate cause of the intrusion leading to the injury. This is illustrated by *Kuriakuz v W Bloomfield Twp*, 196 Mich App 175; 492 NW2d 757 (1992).

In *Kuriakuz*, the circuit court held that the plaintiffs had pleaded in avoidance of governmental immunity by using the trespass-nuisance exception. This Court reversed providing the following:

> We agree with defendant township that the element of causation or control is missing in this case. Although the amended complaint is not entirely clear, it appears that plaintiffs base their claim against the township on its approval of the site plan without providing an easement for discharge of water. Their claim is based on a "but for" analysis: if the township had not approved the plan, the developers could not have created the nuisance that now causes damage to plaintiffs' property. This is not sufficient causation or control to impose liability on the township.

> A governmental entity is not liable for damage caused by a nuisance unless that entity has either created the nuisance, owns or controls the property from which the nuisance arose, or employed another that it knows is likely to create a nuisance. *McSwain v Redford Twp*, 173 Mich App 492, 499; 434 NW2d 171 (1988). Issuing permits that enable another to create the nuisance is not sufficient to impose liability. *Id.*
>
> Plaintiffs in this case have not shown that the township had an affirmative duty to construct a storm drainage system, and they have not shown that the township exercised or had the right to exercise control over the private system created by the condominium developers. We agree with the Court in *McSwain* that to remove the shield of governmental immunity in such a case would stretch the concept of liability for nuisance beyond all recognition. *Id.*, p 500. [*Id.*, 177-178.]

For the above reasons, the trial court did not err in dismissing plaintiffs' suit based on governmental immunity. Even when all of plaintiffs' factual allegations are taken as true, plaintiffs still offered no evidence that defendant was the proximate cause of the sewer backups.[3]

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[3] In light of this conclusion, we need not consider whether the court erred in holding that the statute of limitations barred any recovery for damages occurring more than three years before plaintiffs filed suit.