STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH STEVENS, TONY DECK, BEVERLY HENKEL, VIRGINIA HERNANDEZ, BARRY KELLEY, RUSSELL SOLES, DENISE SOLES, DORIS WALKER, and ELIZABETH CLINE, Plaintiffs-Appellees,	UNPUBLISHED December 20, 2007
v	No. 272329 Genesee Circuit Court
CITY OF FLINT, Defendant-Appellant.	LC No. 00-069124-NZ

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Plaintiffs filed this trespass-nuisance action in December of 2000 after defendant's sewer system failed, causing raw sewage to back up in plaintiffs' homes. In a prior appeal, this Court affirmed the trial court's decision granting plaintiffs partial summary disposition on the issue of defendant's liability. *Stevens v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2005 (Docket No. 252399). After a jury trial on damages, the trial court entered a judgment awarding plaintiffs both economic and noneconomic damages in accordance with the jury's verdict. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying its motion to limit plaintiffs' recovery of noneconomic damages. Specifically, defendant argues that plaintiffs were not entitled to recover emotional damages for a trespass-nuisance claim. We disagree. Because defendant did not object to plaintiffs' damages before the trial court on the same ground that it presents on appeal, this issue is not preserved.[1] *Klapp v United Ins Group Agency (On Remand)*,

[1] Defendant filed a pretrial motion to limit damages, which the trial court denied. That motion, however, was limited to the question whether plaintiffs' noneconomic damages were limited to those available under 2001 PA 222. It did not raise the question whether emotional damages (continued…)

259 Mich App 467, 475; 674 NW2d 736 (2003); *Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994) (an objection on one ground is insufficient to preserve an appellate attack on a different ground). Review of an unpreserved issue may be granted if failure to consider the issue would result in manifest injustice. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Manifest injustice occurs if the defect constitutes plain error requiring a new trial or it pertains to a basic and controlling issue. *UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005), rev'd in part on other grds 474 Mich 1097 (2006), on remand 273 Mich App 26 (2006).

In *Pohutski v City of Allen Park*, 465 Mich 675, 685, 689-690; 641 NW2d 219 (2002), our Supreme Court held that a claim for trespass-nuisance was not an exception to governmental immunity, overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). The Court specifically stated, however, that its decision was to be applied prospectively only to cases filed on or after April 2, 2002.[2] *Pohutski, supra* at 699. Because this action was filed in 2000, *Hadfield* controls. The *Hadfield* Court defined trespass-nuisance as 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 found that there was a limited trespass-nuisance exception to governmental immunity. *Hadfield*, *supra* at 145, 169.

Defendant argues that this Court should consider the type of damages available for takings claims in determining whether emotional damages are available for trespass-nuisance claims. This Court rejected such an approach, however, in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), stating in relevant part:

> The *Hadfield* Court justified its holding with the close association in case law between trespass-nuisance as an exception to sovereign immunity on the one hand and the constitutional prohibition against taking private property for public use on the other hand. *Id*. at 156-169. Indeed, the *Hadfield* Court opined that "the 'Taking' Clause of the constitution formed the basis of the trespass-nuisance exception as it evolved prior to 1964." *Id*. at 165. Regarding *Buckeye* [*Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970)], the *Hadfield* Court observed that, "although the plaintiff had alleged nuisance and this Court found nuisance, the holding was premised on the fact that an unconstitutional taking had occurred," and that the *Buckeye* Court treated the two causes of action as synonymous. *Id*. at 168. But the Court also noted that "direct reliance on [the Taking Clause] should not be confused with the assertion of the trespass-nuisance exception . . . [because] other trespass-nuisance cases that cited the taking provision of the constitution merely employed that provision as a rationale for the

(…continued)

were historically available for a trespass-nuisance claim and the trial court did not address it. Therefore, defendant's argument on appeal is unpreserved.

[2] To the extent defendant argues that 2001 PA 222 precluded an award of emotional damages in this case, we reject this claim in light of our Supreme Court's statement in *Pohutski*, *supra* at 698, that 2001 PA 222 was not to be given retroactive effect. Because plaintiffs filed this action in 2000, 2001 PA 222 is inapplicable here.

> judicially created rule that would impose liability in a tort setting involving governmental immunity." *Id*. at 165 n 10. Our Supreme Court later would again emphasize that a constitutional taking and the tort of trespass-nuisance are distinct actions. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994). In sum, although judicial decisions have closely associated trespass-nuisance with the Taking Clause, it remains a tort.
>
> The two causes of action are differentiated by their sources and by the damages recoverable. [*Hinojosa, supra* at 545-546 (footnote omitted).]

Thus, this Court has held that trespass-nuisance is a tort. Emotional damages are recoverable in tort claims, *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 251 n 32; 531 NW2d 144 (1995), citing *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982), and include both mental anguish and emotional distress, *McClain v Univ of Michigan Bd of Regents*, 256 Mich App 492, 498-500; 665 NW2d 484 (2003). Emotional distress requires a showing of physical injury as a result of mental distress. *Id*.; *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703; 368 NW2d 257 (1985). Mental anguish damages are not limited to a physically-manifested injury, but rather, entitle one to damages for mental pain and anxiety which naturally flow from the injury, including shame, mortification, and humiliation. *Ledbetter*, *supra* at 703.

In *Adkins v Thomas Solvent Co*, 440 Mich 293, 297; 487 NW2d 715 (1992), the plaintiffs brought a nuisance claim for property depreciation caused by the contamination of their ground water. In analyzing the plaintiffs' claims, our Supreme Court noted that nuisance requires an invasion of the use and enjoyment of land. *Id*. at 302. Bearing this in mind, the Court found that, "there are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, *disturbance in the comfort or conveniences of the occupant including his peace of mind*, and threat of future injury that is a present menace and interference with enjoyment." *Id*. at 303 (emphasis added). Fears or anxieties that result from a trespass-nuisance can certainly be considered a disturbance of one's peace of mind. The Court further stated that "while nuisance may be predicated on conduct of a defendant that causes mental annoyance, it will not amount to a substantial injury unless the annoyance is significant and the interference is unreasonable in the sense that it would be unreasonable to permit the defendant to cause such an amount of harm without paying for it." *Id*. at 309-310. Thus, it follows that emotional damages are recoverable at common law for the tort of trespass-nuisance if the claim for emotional damages is supported by the evidence.[3]

[3] Although it is unpublished and thus nonbinding, *Bielat v South Macomb Disposal Authority*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147), is also instructive.

II

Because it was incumbent on plaintiffs to establish factual support for their claims for emotional damages, we reject defendant's argument that plaintiffs' testimony regarding how the sewer backup affected them emotionally was irrelevant and unduly prejudicial. Although defendant argues that such testimony was calculated to elicit sympathy from the jury, the trial court specifically instructed the jury not to base its decision on sympathy and the jury is presumed to have followed this instruction. *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 64; 597 NW2d 534 (1999), vacated in part on other grounds 463 Mich 893 (2000).

III

Defendant finally argues that the trial court erred in permitting its former employee, Hans Kuhlmann, to testify about its failure to install retention ponds. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). An abuse of discretion exists if the trial court's decision falls outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

At trial, defendant argued that plaintiff Deborah Stevens was comparatively at fault for her damages because she knew her basement flooded every time it rained, and had previously successfully sued defendant regarding backups caused by its sewer system, yet she failed to take precautions to prevent future damages. "[C]omparative fault can be based on the plaintiff's failure to take reasonable measures which might have prevented or reduced the injury caused by the defendant's negligence." *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 624; 563 NW2d 693 (1997) (citation omitted). Defendant presented testimony from Stevens and Kuhlmann on the issue of comparative fault. Later, on cross-examination, plaintiffs elicited testimony from Kuhlmann regarding defendant's failure to install retention ponds. Defendant now argues that the trial court improperly admitted that portion of Kuhlmann's testimony because it was relevant only to the issue of liability, which was decided at the summary disposition stage of the proceedings. We disagree.

MCL 600.6304 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

Under MCL 600.6304(2), plaintiffs were entitled to explore the nature of defendant's conduct and its relation to the claimed damages. Subsection (2) specifically required the jury to consider the nature of defendant's conduct in apportioning the percentage of fault. Kuhlmann testified that while he worked for defendant, he recommended that defendant install retention ponds to stop the sewers from backing up in residents' homes. According to Kuhlmann, the cost of the proposed project was reasonable. We find that Kuhlmann's testimony was relevant to determining the percentage of fault that the two parties bore. Evidence that defendant previously asserted that the flooding was a one-time incident and promised to fix the problem, and then failed to do so despite having an opportunity, was an appropriate consideration for the jury if it reached the apportionment phase.

Defendant further asserts that Kuhlmann's testimony was unfairly prejudicial because it had no witnesses prepared to testify about the viability of installing retention ponds. The fact that defendant was unprepared to respond to evidence that it should have anticipated, however, does not render the evidence unfairly prejudicial and subject to exclusion under MRE 403.[4] The trial court did not abuse its discretion in allowing the testimony.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

[4] Kuhlmann revealed his retention pond proposal at his deposition.