STATE OF MICHIGAN

COURT OF APPEALS

WAYNE KELPIEN and GLORIA KELPIEN, Plaintiffs-Appellees, v CITY OF GREENVILLE, Defendant-Appellant.	UNPUBLISHED May 28, 2009 Nos. 285290, 285319 Montcalm Circuit Court LC No. 08-010036-CH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals by right from the circuit court's order denying its motion for summary disposition predicated on governmental immunity in connection with claims of trespass and nuisance, and appeals by leave granted from that same order's denial of its motion for summary disposition predicated on lack of evidentiary support in connection with a claim that it failed to respond properly to a request under the Freedom of Information Act[1] (FOIA). We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Defendant engaged a private entity to install a water test well in a public right of way fronting land owned by plaintiffs. Asserting that the well and its installation intruded on their property rights, plaintiffs asked defendant to remove it, but without success. On January 4, 2008, plaintiffs filed a FOIA request for "information on the test water well labeled MW2 located on our 80.85 acres, located at address 62511 South Fitzner Road." Defendant, through its City Manager, timely replied with a letter stating that no such well was located on plaintiffs' property, but adding that a well labeled MW2 was "located in the Right-Of-Way of Fitzner Road in that vicinity." Plaintiffs then, on January 18, 2008, filed a FOIA request for information relating to the well described in defendant's letter, but five days later filed the instant action.

[1] MCL 15.231 *et seq.*

The complaint, styled as one for quiet title, sets forth claims of trespass, nuisance in fact, and nuisance per se, with a fourth count seeking attorney fees and costs in connection with the first FOIA request. Defendant reports that, in light of the lawsuit, it hesitated to disclose information relating to it, see MCL 15.243(v), but in time defendant complied with plaintiffs' second FOIA request, apparently to plaintiffs' satisfaction.

Defendant sought summary disposition, citing governmental immunity in connection with the tort claims, and asserting that there was no material question of fact that defendant had properly responded to the first FOIA request. The trial court denied the motions without prejudice, on the grounds that they were premature and that further discovery was required.

II. Standards of Review

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

MCR 2.116(C)(7) authorizes motions for summary disposition premised upon "immunity granted by law . . . ." A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all evidence and pleadings in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004).

"In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

III. Trespass and Nuisance

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). Plaintiffs cite none of the statutory exceptions to governmental immunity in support of their tort claims, but argue that immunity does not apply because defendant exceeded its governmental authority in placing a water testing well on a roadway. The trial court, citing *Cleveland v Detroit*, 324 Mich 527; 37 NW2d 625 (1949), agreed that there was a question of fact whether defendant's installation of a test well to monitor ground water quality constituted a lawful use of the highway.

Cleveland concerned a municipality's use of the subsurface of a public street for a parking structure. The plaintiff owned land abutting the street and asserted ownership rights to the street's middle, subject to the public easement for uses consistent with a roadway, and argued that the underground parking structure exceeded the scope of that easement. *Id*. at 529-530. The Supreme Court held that it need not concern itself with whether the plaintiff in fact had ownership rights to the middle of the boulevard, on the ground that the use in question was fully consistent with any public highway easement to which that claim of ownership was subject. *Id.* at 535-536. The Court reiterated caselaw to the effect that the customary rights of the public in streets had long extended beyond mere passage and repassage, noting that "'with the growth of population in our cities have come increased needs for heating, lighting, draining, sewerage, water, et cetera, and with these has come also a corresponding extension of the public rights in

the streets.'" *Id.*, quoting *Detroit City Railway v Mills*, 85 Mich 634, 653; 48 NW 1007 (1891). The *Cleveland* Court further noted that sewers were dug, soil removed, and culverts and drains constructed, all without any duty to compensate abutting landowners. "'It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it.'" *Cleveland, supra* at 536, quoting *Detroit City Railway, supra*. Whether an abutting landowner owns to the center of the street or not, he or she has no cognizable complaint over such uses provided only that he or she retains convenient ingress and egress. *Cleveland, supra* at 536.

We conclude that the trial court erred in failing to appreciate that the placement of a water testing well, the purpose of which is to monitor groundwater quality, is similar in character and fully consistent with such uses as constructing sewers and drains. A "governmental function" is "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Municipalities are authorized by both statute and constitution to operate such public utilities as water and sewage departments, and so enjoy governmental immunity in connection with doing so. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483-484; 722 NW2d 906 (2006), citing Const 1963, art 7 § 24; MCL 117.4f(c). Monitoring of groundwater quality potentially relates to operation of either utility. Further, MCL 117.4h(4) authorizes a city to provide in its charter for "the use, control and regulation of streams, waters and water courses within its boundaries . . . ." A municipality's explicit authorization to provide water and sewage, and to control or regulate water courses, impliedly authorizes the installation and use of water testing wells.

Plaintiffs characterize as ultra vires defendant's actions in issuing a permit for a private entity to install the water testing well in the portion of the public roadway over which plaintiffs claim ownership rights. However, "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989) (footnote omitted). As discussed above, operating a water testing well is duly authorized municipal activity.

For these reasons, governmental immunity applies to bar plaintiffs' tort claims. This applies to their claims for injunctive relief as well as monetary damages. See *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 283-284; 717 NW2d 391 (2006). The trial court thus erred in denying defendant summary disposition on those claims.

IV. FOIA

A prevailing party in a FOIA suit is entitled to an award of reasonable attorney fees, costs, and disbursements. MCL 15.240(6). A plaintiff prevails for this purpose if the action was reasonably necessary to compel disclosure, and if the action had a substantial causative effect on the delivery of the information to the plaintiff. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004). See also *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). Whether a defendant's actions were reasonable is no defense to a prevailing party's claim for attorney fees. *Local Area Watch, supra* at 150.

At issue here is defendant's response to plaintiffs' first January 4, 2008, FOIA request, not the request that followed on January 18. The trial court opined that defendant's compliance with that request could not be determined without further discovery to establish the extent of plaintiffs' ownership of the land upon which the subject well was installed, citing *Werner v Hinz*, 172 Mich 360; 137 NW 662 (1912) and *Hall v Wantz*, 336 Mich 112; 57 NW2d 462 (1953),[2] and whether this action was reasonably necessary to cause defendant to deliver the information sought, citing *Scharret, supra*.

In fact, further discovery was unnecessary. It is clear from the record that plaintiffs own the abutting property, and the case law is clear that "a landowner with property abutting a highway . . . retains the fee in the property." *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271, 297; 398 NW2d 297 (1986). Accordingly, there were no outstanding questions of fact. Plaintiffs were the fee owners of the land under the well.[3] Accordingly, plaintiffs FOIA request accurately characterized the well as being on their land, making defendant's initial denial wrongful, even if reasonable. *Local Area Watch*, *supra* at 150.

However, in the course of its denial, defendant conceded the existence of a well labeled MW2 in the vicinity of plaintiffs' property, making it easy for plaintiffs to ask about that specific well if, indeed, that was the well in which they were interested. That timely gesture had the effect of allowing plaintiffs to clarify which well they wanted information on, regardless of whether MW2 was located on, or simply near, plaintiffs' property. Plaintiffs then filed a second request. However, the time to answer plaintiffs' second request had not yet expired when plaintiffs filed suit. Based on defendant's actions, there is simply nothing in the record to support a determination that plaintiffs needed to commence action to obtain the information they sought. Defendant was timely responding to plaintiff's requests and providing helpful information when there was some question, at least in defendant's mind, as to which well plaintiffs' were referring. Indeed, it actually appears that plaintiffs' decision to file suit prior to the expiration date of the second request actually resulted in a delayed response because the action triggered the disclosure exception of MCL 15.243(v) for "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties."

Because the record indicates that there are no outstanding issues of fact and plaintiffs cannot prove that litigation was necessary in order to obtain a response to their FOIA request, the trial court erred in denying defendant's request for summary disposition.

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[2] "The rights of a riparian owner are somewhat similar to those of an abutting owner in the case of highways and streets. The latter owns the fee to the middle of the highway or street, subject only to the easement in the public to use the same for highway or street purposes." *Hall, supra* at 117, citing *Werner, supra*.

[3] We note that this ownership interest does not entitle plaintiffs to any compensation relative to the well, however. See *Eyde Bros, supra*, relying on *Cleveland, supra* at 537.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro