STATE OF MICHIGAN

COURT OF APPEALS

BLUE HARVEST, INC., BLUEBERRY HERITAGE FARMS, INC., BRADY FARMS, INC., DAVID REENDERS BLUEBERRIES, L.L.C., d/b/a CROSSROADS BLUEBERRY FARM, PAUL NELSON BLUEBERRIES, L.L.C., and REENDERS BLUEBERRIES, L.L.C.,

Plaintiffs-Appellees/Cross-Appellants,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant/Cross-Appellee,

and

OTTAWA COUNTY ROAD COMMISSION,

Defendant-Cross-Appellee.

FOR PUBLICATION
April 29, 2010

No. 281595
Ottawa Circuit Court
LC Nos. 04-051026-CZ
04-002340-MZ
Advanced Sheets Version

Before: METER, P.J., and MURRAY and BECKERING, JJ.

BECKERING, J. (*concurring*).

I concur in the result reached by the majority in this matter, but write separately to elaborate on the majority's analysis and why we are compelled to dismiss plaintiffs' claims.

In reaching its conclusion that there is no trespass-nuisance exception to the doctrine of sovereign immunity, the majority relies in part on *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), which predates *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). In *Pohutski*, our Supreme Court held that the first sentence of MCL 691.1407(1) contains no trespass-nuisance exception to governmental immunity for cities. *Pohutski*, 465 Mich at 689-690. MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this

> act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The *Pohutski* Court cited *Ross*, a pre-*Hadfield*[1] case, for the propositions that because the state created the courts, it is not subject to the courts, that the governmental tort liability act "'was intended to provide uniform liability and immunity to both state and local governmental agencies' when involved in a governmental function," and that by enacting the second sentence of MCL 691.1407(1), the Legislature meant to ensure that "'by restoring to municipal corporations immunity for governmental functions and making uniform the immunity of all governmental entities for governmental functions [in the first sentence], it was not thereby waiving the state's common-law absolute sovereign immunity for non-governmental functions . . . .'" *Pohutski*, 465 Mich at 681-683, 693, citing and quoting *Ross*, 420 Mich at 598, 605, 614, and *Ross*, 420 Mich at 669 (LEVIN, J., dissenting in part). The Court specifically refrained, however, from interpreting or applying the second sentence of MCL 691.1407(1), stating that the second sentence did not apply because the state was not a party, and therefore, it would not "explicate fully the meaning of the second sentence" or make any "determinations regarding common-law [trespass-nuisance] exceptions to the state's governmental immunity." *Pohutski*, 465 Mich at 688 n 1, 689. The Court also stated that, "at most, the language of the second sentence requires an historical analysis of the state's sovereign immunity, but we have no occasion to undertake such an analysis here." *Id*. at 688 n 1 (emphasis omitted). In concluding that the second sentence contains no trespass-nuisance exception to sovereign immunity, the majority in this case also cites *Ross*, reiterating and expanding upon the propositions previously cited in *Pohutski*. Although *Ross* predated *Pohutski* and was superseded in part on other grounds by MCL 691.1407(5), the portions of *Ross* cited in the majority opinion remain good law.

I agree with the majority's outcome primarily, however, because an historical analysis of sovereign immunity before July 1, 1965, reveals no indication that a common-law exception existed with respect to trespass-nuisance claims against the state. As noted by the majority, plaintiffs cite only *Hadfield*, 430 Mich 139, in support of their contention that the second sentence of MCL 691.1407(1) preserves the common-law exception for trespass-nuisance claims against the state. The *Hadfield* Court conducted an extensive historical analysis in its decision; however, the 13 cases referenced in that decision do not shed any light on the concept of sovereign immunity. Significantly, the defendants in those cases, which focus primarily on "nuisance" claims, fall under the "political subdivision" definition of MCL 691.1401(b), not the "state" definition of MCL 691.1401(c). See *Pennoyer v Saginaw*, 8 Mich 534 (1860) (the defendant was a city); *Sheldon v Village of Kalamazoo*, 24 Mich 383 (1872) (the defendant was a village); *Ashley v Port Huron*, 35 Mich 296 (1877) (the defendant was a city); *Rice v City of Flint*, 67 Mich 401; 34 NW 719 (1887) (the defendant was a city); *Seaman v City of Marshall*, 116 Mich 327; 74 NW 484 (1898) (the defendant was a city); *Ferris v Detroit Bd of Ed*, 122 Mich 315; 81 NW 98 (1899) (the defendant board of education was a political subdivision); *Kilts*

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[1] *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), overruled by *Pohutski*, 465 Mich at 695.

v Kent Co Bd of Supervisors, 162 Mich 646; 127 NW 821 (1910) (the defendant county board of supervisors was a political subdivision); *Attorney General, ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913) (litigation between municipalities); *Donaldson v City of Marshall*, 247 Mich 357; 225 NW 529 (1929) (the defendant was a city); *Robinson v Wyoming Twp*, 312 Mich 14; 19 NW2d 469 (1945) (the defendant was a township); *Rogers v Kent Co Bd of Co Rd Comm'rs*, 319 Mich 661; 30 NW2d 358 (1948) (the defendant was a political subdivision); *Defnet v Detroit*, 327 Mich 254; 41 NW2d 539 (1950) (the defendant was a city); *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263; 118 NW2d 271 (1962) (the defendant was a political subdivision). As such, the defendants in those cases could not be afforded sovereign immunity. See *Myers v Genesee Co Auditor*, 375 Mich 1, 6; 133 NW2d 190 (1965) ("Sovereign immunity is a specific term limited in its application to the State and to the departments, commissions, boards, institutions, and instrumentalities of the State.") (emphasis omitted). Plaintiffs cite no caselaw establishing that any exceptions to governmental immunity with respect to political subdivisions before 1965 are to be imputed to sovereign immunity as well.

Additionally, I note that footnote 2 of the majority opinion briefly addresses plaintiffs' argument that their trespass-nuisance claim rises to the level of an unconstitutional-taking claim and is, therefore, exempt from sovereign immunity. The footnote states: "We need not decide whether such a taking claim would be exempt from sovereign immunity because, as noted later in this opinion, plaintiffs have failed to set forth the necessary allegations to constitute an unconstitutional-taking claim." While I agree with this statement, it is worth noting that while trespass-nuisance and unconstitutional-taking claims are similar, they remain distinct actions.

In *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), this Court discussed the distinction between claims for trespass-nuisance and unconstitutional taking. The *Hinojosa* Court first discussed the applicability of *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970),[2] noting:

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[2] In *Buckeye*, 383 Mich at 632, on April 10, 1963, a fire started in buildings owned by the state and spread to neighboring properties. The plaintiffs sued the state, asserting that the condition of the buildings "constituted a nuisance to the premises and properties insured by plaintiffs." *Id*. The trial court concluded that there was a nuisance, but that the state had sovereign immunity as to the nuisance action. *Id*. at 633. In reversing the trial court and the Court of Appeals, our Supreme Court essentially converted the plaintiffs' nuisance claim to an unconstitutional-taking claim. The Court noted that sovereign immunity does not apply to taking claims, *id*. at 641, and justified its holding on public policy grounds, stating: "Courts of other states have applied similar provisions in their state constitutions to factual situations corresponding to those of this case," *id*. at 642. The Court quoted the Massachusetts Supreme Judicial Court:

> "This private nuisance was nonetheless one merely because the city had acquired the lot through foreclosure for nonpayment of taxes. Public policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and, particularly in an urban area, that there be no oases of nonliability where a private nuisance may be maintained

(continued…)

> The liability imposed on the state [in *Buckeye*] was for the tort of nuisance, not to justly compensate an owner for the taking of private property for public use. Nevertheless, the *Buckeye* Court relied on the Taking Clause as its rationale for concluding that common-law sovereign immunity did not shield the state from liability for nuisance. [*Hinojosa*, 263 Mich App at 543.]

This Court also noted:

> Regarding *Buckeye*, 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. . . . But the Court also noted that "[d]irect 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 judicially created rule that would impose liability in a tort setting involving governmental immunity." . . . Our Supreme Court later would again emphasize that a constitutional taking and the tort of trespass-nuisance are distinct actions. [*Id*. at 545-546, quoting *Hadfield*, 430 Mich at 165 n 10, 168.]

This Court underscored that although judicial decisions have closely associated trespass-nuisance with the Taking Clause, the former action remains a tort. *Hinojosa*, 263 Mich App at 546. See also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994) (a constitutional taking and the tort of trespass-nuisance are distinct actions).

The *Hinojosa* Court concluded:

> In the case at bar, the trial court correctly dismissed plaintiffs' tort claim of trespass-nuisance because our Supreme Court in *Pohutski* overruled *Hadfield*, finding that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity." *Pohutski*, *supra* at 689-690. But the majority in *Pohutski* pointedly declined to address whether facts that previously might have supported liability for a trespass-nuisance could establish an unconstitutional taking. The *Pohutski* Court stated:
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> "The parties have addressed whether trespass nuisance is not a tort within the meaning of the governmental immunity statute, but rather an unconstitutional taking of property that violates Const 1963, art 10, § 2. The trial courts in these

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(…continued)

with impunity." [*Id*. at 643-644, quoting *Kurtigian v City of Worcester*, 348 Mass 284, 291; 203 NE2d 692 (1965).]

Our Supreme Court held that "[t]here is no sovereign immunity applicable to a situation of nuisance as we have in this case." *Buckeye*, 383 Mich at 644.

> cases have yet to address the taking claims. Therefore, we decline to discuss those claims at this time." [*Id*. at 699.]
>
> Thus, although presented the opportunity, our Supreme Court declined to adopt Justice KELLY's views that *Buckeye* "acknowledged that the trespass-nuisance exception has a constitutional basis," and that "[g]overnmental immunity is not a defense to a constitutional tort claim, hence not to a claim based on trespass-nuisance." *Pohutski*, *supra* at 709 (KELLY, J., dissenting), citing *Thom v State Hwy Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965). We conclude, therefore, that the issue whether trespass-nuisance as alleged here may constitute a constitutional taking was not decided in *Buckeye*. Hence, we must consider other decisions addressing the application of the Taking Clause. [*Hinojosa*, 263 Mich App at 547-548.]'

The *Hinojosa* Court held that the plaintiffs failed to state a cause of action for a "'taking'" or "'inverse condemnation.'" *Id*. at 548.

In sum, courts of this state have held that trespass-nuisance and unconstitutional taking are distinct actions. Our Supreme Court has not yet addressed whether facts that might establish liability for trespass-nuisance could establish an unconstitutional-taking claim. See *id*. at 547. It is clear, however, that while our Legislature has the constitutional authority to modify or abolish the ability to bring trespass-nuisance claims against the state, an unconstitutional-taking action may not be limited except as provided by the Michigan Constitution. [*Id*. at 546.] Thus, if plaintiffs alleged a taking, they may have a cause of action. As stated by the majority, however, we need not address that issue because plaintiffs failed to set forth the allegations necessary to establish an unconstitutional taking.

Finally, in regard to plaintiffs' inverse-condemnation claim, I agree with the majority's conclusion that the difference between the injuries suffered by plaintiffs and similarly situated property owners is best categorized as one of degree, and not of kind, and therefore, plaintiffs' claim must fail. I acknowledge, however, that this is a close call requiring careful consideration.

The majority compares this case to *Spiek v Dep't of Transp*, 456 Mich 331, 333-334; 572 NW2d 201 (1998), wherein the plaintiffs brought an inverse-condemnation action against the defendant for locating an interstate highway service drive adjacent to their residential property. The plaintiffs' complaint alleged that the service drive produced

> "an essential change in the neighborhood [that] . . . violated restrictive covenants in the subdivision . . . [and] caused grave and serious damage to the value of the . . . property by increasing dramatically the levels of noise, vibrations, pollution and dirt in the once-residential area . . . [thus] destroying the desirability of the . . . property as an area for living and . . . destroying the acceptability of the property for residential purposes." [*Id*. at 334.]

As noted in the majority opinion for this case, the *Spiek* Court held that damages are not recoverable for a "legalized nuisance" such as "the persistent passing of trains on a railroad, or planes in the air, or vehicles on the road" unless "the plaintiff alleges that the property is directly affected in a manner that is unique or peculiar in comparison to the property of other similarly

situated persons . . . ." *Id*. at 345-346. The plaintiff must allege an injury "different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Id*. at 348. Significantly, the *Spiek* Court further stated:

> In the context of traffic flow, a degree of harm threshold, as opposed to the well-established difference in kind threshold, would be unworkable both in a practical sense and from the standpoint of public policy because it would depend on the amount of traffic traveling a particular highway at a particular time that may change over time because of factors unrelated to and out of the control of the state. For example, demographic changes and economic changes affecting commercial and industrial development may determine the degree of harm, rather than the actual location of the highway in a particular place by the state. To require the state to litigate every case in which a person owning land abutting a public highway feels aggrieved by changing traffic conditions would wreak havoc on the state's ability to provide and maintain public highways and place within the judicial realm that which is inappropriate for judicial remedy. Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways. Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate. [*Id*. at 349.]

The *Spiek* Court reversed the decision of the Court of Appeals and reinstated the Court of Claims order granting summary disposition to the defendant, concluding that the plaintiffs had failed to state a claim upon which relief could be granted because they did not allege harm to their property that differed "in kind from the harm suffered by all living in proximity to a public highway in Michigan." *Id*. at 350. Rather, the plaintiffs' complaint alleged "the same type of incidental and consequential harm as is experienced by all persons similarly situated to plaintiffs in that they reside near a public highway." *Id*.

In this case, plaintiffs allege that the spreading of salt on public highways and primary county roads adjacent to their blueberry fields ultimately results in reduced blueberry production. According to plaintiffs, after the salt is spread, passing vehicles and the wind throw salt water onto their fields, causing damage to blueberry bushes and reduced production from those bushes. The spreading of salt on the roads may be categorized as a "legalized nuisance" comparable to locating a highway service drive near residential property, resulting in increased levels of noise, vibration, pollution, and dirt from traffic flow. See *id*. at 345. Therefore, like the plaintiffs in *Spiek*, plaintiffs in this case must allege an injury "different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Id*. at 348. Plaintiffs' injury must be unique or peculiar. See *id*. at 346.

As our Supreme Court articulated in *Spiek*, it would be unworkable to apply a degree-of-harm threshold, rather than a difference-in-kind threshold, in the context of traffic flow. *Id*. at 349. It would also be unworkable under the facts of this case. The road commissions responsible for spreading salt do so to prevent the formation of ice on public highways and primary county roads during the winter months. The amount of salt spread on the roads directly correlates to the severity of the weather. According to plaintiffs, once the salt is spread, salt

water is thrown onto their fields by passing vehicles and the wind. Thus, the degree of harm suffered by plaintiffs is largely dependent on the weather over the course of the winter, which is out of defendants' control, and traffic flow, which may also be affected by factors out of defendants' control. Requiring the state and county road commissions to litigate every case in which vegetation is damaged by salt spray would seriously impede their ability to protect Michigan's citizens from the hazards presented by ice-covered roads. I agree with the *Spiek* Court that under facts such as these, a legislative remedy is more appropriate than a judicial remedy. The legislative branch is the appropriate branch to weigh the safety hazards presented by ice-covered roads against the environmental and economic impact of salt usage and, if deemed necessary, order that the spreading of salt be reduced or replaced with an alternative method of deicing the roads.

Plaintiffs claim that the harm they suffer is of a different kind than the harm suffered by those similarly situated. Plaintiffs liken their situation to that experienced by the respondents in *United States v Causby*, 328 US 256, 258-259; 66 S Ct 1062; 90 L Ed 1206 (1946), wherein the persistent intrusion of low-flying army and navy aircraft accessing the glide path of a runway by passing approximately 83 feet over the respondents' property, 67 feet above their house, 63 feet above the barn, and 18 feet above the highest tree forced the respondents to give up using their property as a commercial chicken farm. The United States Supreme Court held that such conduct (which involved traveling below the navigable airspace of the United States)[3] amounted to a physical invasion of the property entitling the respondents to compensation for the taking of their property. *Id*. at 265-267. Plaintiffs argue that the respondents in *Causby* prevailed because their harm was distinguishable from others who suffered the mere normal inconveniences of modern air travel over their lands at higher altitudes. Plaintiffs contend that, like the respondents in *Causby*, they have suffered a unique injury, namely the destruction of their crops hundreds of feet from the roadsides as compared to other property owners who have suffered the incidental burning of some of their lawns. But, unlike the respondents in *Causby*, plaintiffs do not suggest that their properties have been singled out in some way. Rather, they claim that the harm they suffer—damage to their blueberry bushes—is unique because it is economic in nature. Plaintiffs engage in commercial blueberry production, and when their bushes are damaged and rendered less productive, the damage affects plaintiffs' economic viability. While there is merit to the argument that the harm suffered by plaintiffs is different from that suffered by a property owner who, for example, has lost merely a section of lawn or decorative plantings as a result of salt spray, I must agree with the majority that the difference between the injuries is best categorized as one of degree, and not of kind. First, as noted in the majority opinion, there is evidence that blueberry bushes are not the only type of vegetation affected by the spreading of salt on the roads. The report issued by the road salt commission indicates that salt usage damages roadside trees and ornamental plants. It may also negatively affect our ecosystems by raising the level of chloride in nearby bodies of water. Therefore, it is reasonable to presume that persons who use their roadside properties for the commercial production of trees or ornamental plants, or any

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[3] "[N]avigable airspace" was then defined as "'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.'" *Causby*, 328 US at 263, quoting 49 USC 180.

other type of commercial enterprise that may be negatively affected by the spreading of salt on the roads, would suffer the same kind of injury as plaintiffs. Moreover, in cases where a property owner loses merely decorative plantings or any other type of vegetation that was not intended to produce a profit, the owner loses not only the value of that particular vegetation, which may be substantial if, for example, the owner has costly ornamental plantings along the roadside, but also the option to use the roadside property to grow any new vegetation that would be damaged by salt spray, including cash crops.

Because the harm suffered by plaintiffs differs only in degree, and not in kind, from the harm suffered by those similarly situated, I agree with the majority that plaintiffs' inverse-condemnation claim must fail.

/s/ Jane M. Beckering