STATE OF MICHIGAN

COURT OF APPEALS

SAMIR ISHO and SHEMOUN ISHO, as Personal Representative of the Estate of JOHN ISHO, Deceased,

Plaintiffs-Appellants,

v

CITY OF STERLING HEIGHTS and STERLING HEIGHTS POLICE OFFICERS,

Defendants-Appellees.

UNPUBLISHED
March 5, 1999

No. 204063
Macomb Circuit Court
LC No. 95-003944 NO

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a May 27, 1997 final order granting summary disposition in favor of Sterling Heights police officers in this wrongful death case.[1] Specifically, plaintiffs appeal from a prior order entered on January 13, 1997, denying plaintiffs' motion to amend their complaint to add a claim of trespass-nuisance as an exception to governmental immunity. We affirm.

John Isho was killed and Samir Isho was injured in an automobile accident when the car driven by John Isho collided with a parked truck in the far left lane of northbound Mound Road, south of Metropolitan Parkway, near the entrance to the Detroit News plant in the city of Sterling Heights. At the time, newspaper workers were on strike and picketers were blocking the entrance to the plant. As a result, the Sterling Heights Police Department devised a plan to allow delivery vehicles to park in the far right and left lanes of northbound Mound Road in order to wait until the police cleared the entrance to the plant to allow the vehicles to enter with minimal confrontation. The police blocked northbound Mound Road every hour to allow the vehicles to enter the plant. Mound Road is within the exclusive jurisdiction of the Macomb County Road Commission.

Plaintiffs initially filed a complaint alleging that defendants were liable for injuries sustained by John and Samir Isho based on the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), and gross negligence, MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Presumably,

because they discovered that defendants had no jurisdiction over Mound Road and could not be liable under the highway exception to governmental immunity, plaintiffs filed a motion for leave to file a second amended complaint in order to add a cause of action in trespass-nuisance, alleging that the actions of defendants constituted a trespass-nuisance because they trespassed on a road where the police devised a system to allow vehicles to park on northbound Mound Road and caused interference with the orderly flow of traffic under the jurisdiction of the Macomb County Road Commission by not obtaining permission from the road commission to do so. The trial court denied plaintiffs' motion on the basis that the amendment would be futile.

Plaintiffs next filed a motion for rehearing and reconsideration, arguing that the trial court erred in determining that an amendment to their complaint would be futile. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), claiming that the city of Sterling Heights was immune from liability because it did not have jurisdiction over Mound Road. The trial court subsequently denied plaintiffs' motion for reconsideration and granted defendants' motion for summary disposition.

Plaintiffs argue that the trial court erred in denying their motion for leave to amend the complaint to add a claim of trespass-nuisance. The trial court determined that plaintiffs' proposed amendment would be futile because they would not be able to sustain a claim of trespass-nuisance since there was no trespass on private property.

Whether the trial court properly denied plaintiffs' motion to amend their complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). The relevant court rule in this case, MCR 2.118(A)(2), provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility. *Weymers*, *supra* at 658. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

As governmental agencies, defendants are generally immune from tort liability, unless their actions fall within an exception to governmental immunity. MCL 691.1407(1); MSA 3.996(107)(1); MCL 691.1402; MSA 3.996(102). Our Supreme Court has recognized a limited trespass-nuisance exception to governmental immunity. *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). Trespass-nuisance is 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. *Id*. To establish trespass-nuisance, the plaintiff must show condition (nuisance or trespass), cause (physical intrusion), and causation or control (by government). *Id*.

The trial court ruled that the trespass-nuisance exception does not apply where there is no intrusion onto private land, relying on this Court's decision in *Bronson v Oscoda Twp (On Second*

Remand), 188 Mich App 679, 683; 470 NW2d 688 (1991), where this Court held that the trespass-nuisance exception to governmental immunity is inapplicable where there is no invasion of a private property interest. There being no intrusion onto private land in the present case, the trial court ruled that plaintiffs could not state a claim of trespass-nuisance, and that amendment of the complaint would be futile. Plaintiffs contend that the Supreme Court cases of *Pound v Garden City School Dist*, 372 Mich 499; 127 NW2d 390 (1964), *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988) and *Li v Feldt (After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992), establish that a trespass on public property will sustain a claim of trespass-nuisance.

The decision in *Bronson* is binding precedent pursuant to MCR 7.215(H)(1). Further, the Supreme Court in *Li*[2], only held that there is no public nuisance exception to governmental immunity. The Supreme Court in *Hadfield* recognized a trespass-nuisance exception to governmental immunity, but language in that opinion supports this Court's holding in *Bronson*. Noting that "there is a strong link between the common-law trespass-nuisance exception and the Taking Clause of the constitution", *Hadfield, supra* at 168-169, the Court further stated that the "earliest cases to recognize governmental liability involved some type of direct invasion by the government entity of the plaintiffs' land." *Id.* at 155. The Court then engaged in an historical analysis of the development of trespass-nuisance, and stated, "[g]eneralizing from these early cases, it appears that where an invasion or intrusion onto a plaintiff's land occurred, the defendants were often found liable, regardless of whether the municipality acted directly, . . . or whether its agents acted intentionally or negligently to produce the invasion." *Id.* at 161. Finally, the Court noted:

> Although *Herro [v Chippewa Co Road Comm'rs*, 368 Mich 263; 118 NW2d 271 (1962)] emphasized the "taking" rationale and the need for some invasion of a private property interest, the plaintiff in *Herro* was merely a visitor on the land. Therefore, *Herro* makes clear that the plaintiff in an action claiming the trespass-nuisance exception need not be the owner of the land on which the invasion occurs. [*Hadfield, supra* at 164.]

Further, the Supreme Court's decision in *Pound* did not invoke the trespass-nuisance exception. The facts of *Pound* were that the plaintiff was injured on a public sidewalk where water from a school building had drained onto the sidewalk, creating a coating of ice on the sidewalk. The governmental entity being sued, the school district, did not have jurisdiction over the sidewalk and the Court clearly found this fact to be crucial. *Id.* at 502. The Court in *Li* explained that *Pound* did not establish any public nuisance exception to governmental immunity, but established, at most, a narrow *corollary* to the narrow trespass-nuisance exception. *Li, supra* at 474.

Thus, *Pound*, *Hadfield,* and *Li* do not support plaintiffs' contention that a claim of trespass-nuisance can be established where the government's trespass or intrusion occurs on public property. The trial court, therefore, did not err in relying on *Bronson* to require a trespass onto private property where plaintiffs attempted to allege a claim of trespass-nuisance.

Moreover, even if we were to assume that plaintiffs' have properly relied on *Pound* to allege some other trespassory nuisance exception to governmental immunity, there is no trespass in this case.

See, e.g., *Peterman v Dep't of Natural Resources*, 446 Mich 177, 204-207; 521 NW2d 499 (1994). The Sterling Heights police officers were not trespassing on Mound Road, nor were the vehicles that were operating out of the newspaper plant. Even if the police officers were first required to obtain the permission of the road commission to devise traffic control devices on the road,[3] the police officers were clearly not trespassing on Mound Road itself. This distinction is crucial, because, although the traffic devices could be considered to be physical intrusions on Mound Road under the control of a governmental entity, the police officers were lawfully on Mound Road.

Accordingly, plaintiffs are also unable to show that there is any type of trespass in this case since the police officers were lawfully attempting to direct traffic on Mound Road. The trial court did not abuse its discretion in denying plaintiffs' motion to amend the complaint to add a claim of trespass-nuisance, such a claim being futile under the facts of this case.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Talbot

I concur in result only.

/s/ Gary R. McDonald

[1] The trial court granted summary disposition in favor the city of Sterling Heights in an order dated April 3, 1997.

[2] In *Li v Feldt (After Remand)*, 434 Mich 584; 456 NW2d 55 (1990), the Supreme Court held that there is no intentional nuisance exception to governmental immunity.

[3] See MCL 257.608; MSA 9.2308, MCL 257.609; MSA 2309 and MCL 257.610; MSA 2310 which essentially provide that local authorities cannot place or maintain any traffic-control device on any county road without the permission of the county road commission and that all such traffic devices must conform to the state manual and specifications.