STATE OF MICHIGAN

COURT OF APPEALS

SHIMON AMIR,

Plaintiff-Appellee,

v

CITY OF OAK PARK,

Defendant-Appellant.

UNPUBLISHED
March 30, 2001

No. 219325
Oakland Circuit Court
LC No. 97-002513-NZ

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff summary disposition pursuant to MCR 2.116(C)(9) and (10) as to the issue of liability. At issue in this case is whether governmental immunity protects defendant from trespass-nuisance claims and whether defendant's conduct amounts to a trespass or nuisance. We affirm.

Plaintiff's personal property was destroyed, and he was unable to occupy his leased residence for five months, after police deployed tear gas into his residence in an attempt to apprehend a suicidal gunman located in the residence above plaintiff's. Plaintiff sued defendant city to recover damages for his destroyed property and for deprivation of the use of his leased residence. He sued on theories of inverse condemnation and trespass-nuisance. Because trespass-nuisance is dispositive of the case, we need not address the theory of inverse condemnation.

Plaintiff resided in the lower level of a two-family flat. On December 16, 1996, police were called to the flat because a suicidal gunman had barricaded himself in the second floor residence. The police requested that plaintiff vacate his first floor residence while they negotiated with the gunman. Plaintiff informed police that the two residences were separate from each other. Thereafter, the police took control of plaintiff's home and used it as a "command post." Ten hours later, the police abandoned the flat and destroyed it by throwing more than twenty-five tear gas grenades at all levels of the flat. Plaintiff's furniture, clothing, food, and artwork were permeated by tear gas. All of the windows to plaintiff's residence had to be boarded up for five weeks, and during this time the chemical from the tear gas destroyed the remainder of his possessions.

Defendant brought a motion for summary disposition and argued, among other issues, that plaintiff's trespass-nuisance claim was barred by governmental immunity. Defendant also contended that plaintiff's claim was merely an attempt to recharacterize a negligence or intentional tort claim, for which there is no exception to governmental immunity. The trial court denied defendant's motion.

Plaintiff subsequently filed a motion for summary disposition. The trial court granted plaintiff's motion, pursuant to MCR 2.116(C)(9) and (10), on the issue of liability. These motions are the basis of this appeal.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(9) tests whether the opposing party failed to provide a valid defense to the stated claims. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998), lv den 461 Mich 854 (1999). A MCR 2.116(C)(9) motion "is tested by the pleadings alone, with the court taking all well-pleaded allegations as true and determining whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 245-246.

A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Such a motion tests the factual sufficiency of the complaint. *Spiek, supra* at 337.

Defendant first argues that governmental immunity is absolute in this case because MCL 691.1407(1); MSA 3.996(107)(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. [Emphasis added.].

Defendant focuses on the second sentence and opines that preexisting immunity law only applies to the state and not to other governmental entities. Defendant argues that there are no governmental immunity exceptions that apply to them and therefore their immunity is absolute. This argument is without merit. The exceptions to governmental immunity that existed before the act have been applied to all governmental entities, not just the state, despite the use of the term "the state" in the second sentence of subsection 7(1). *Glancy v City of Roseville*, 457 Mich 580, 585-586; 577 NW2d 897 (1998); *Li v Feldt* (After Remand), 434 Mich 584, 592-593 n 8; 456 NW2d 55 (1990); *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 168-169; 422 NW2d 205 (1988). This Court is bound by the Supreme Court's rulings. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581, lv den 462 Mich 906 (2000).

Trespass-nuisance is a recognized exception to governmental immunity. See *Hadfield, supra*; *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164; 545 NW2d 657, reh den 451 Mich 1240 (1996). The Michigan Supreme Court defines trespass-nuisance:

> "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." To establish trespass-nuisance the plaintiff must show "condition (nuisance or trespass), cause (physical intrusion), and causation or control (by government)." [*Continental Paper & Supply Co, Inc, supra* at 164; (quoting *Hadfield*, *supra* at 169.]

See also *Peterman v DNR*, 446 Mich 177, 205; 521 NW2d 499 (1994). A compensable injury results from "'a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity.'" *Id.* at 206 quoting *Hadfield, supra* at 145. This Court has also implemented the *Hadfield* formula when determining whether a trespass-nuisance claim exists. See e.g. *Peters v Dep't of Corrections*, 215 Mich App 485, 487; 546 NW2d 668 (1996), lv den 453 Mich 955 (1996).

In the instant case, defendant argues that plaintiff does not have a viable trespass-nuisance claim because no claim akin to the facts of this case existed at common law. This argument is frivolous. Neither the *Hadfield* Court, or subsequent courts applying the principles set forth therein, have required that a modern day recovery under trespass-nuisance be based on a specific fact pattern recognized at common law. To the contrary, the *Hadfield* Court outlined a formula, using then existing common law cases, to determine when trespass-nuisance could defeat governmental immunity. If the facts of a particularized case fit within the parameters of the cause of action, as identified by the *Hadfield* Court, the trespass-nuisance claim survives.

Utilizing the pertinent formula, summary disposition in favor of plaintiff was proper. Plaintiff alleged, and defendant could not and did not refute, the existence of a trespass-nuisance. The police action of throwing gas canisters into plaintiff's apartment, breaking the windows and permeating plaintiff's property with fumes, provided support for the claim. See *Peterman, supra* at 205-206, where pollution and infiltration of sickening odor have supported claims of trespass-nuisance. The damage at issue was the natural result of the tear gas deployment.

In addition to defendant's physical intrusion onto and into plaintiff's property, there was definitely governmental causation or control in this case. "Control may be found *where the defendant creates the nuisance*, owns or controls the property from which the nuisance arose, or employs another to do work that he knows is likely to create a nuisance." *Baker v Waste Mgmt of MI, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995) (emphasis added). Here, there is no doubt that defendant's police created the nuisance, the tear gas permeation and destruction.

The facts of plaintiff's case clearly fit within the trespass-nuisance exception to governmental immunity. There was a direct trespass and interference with plaintiff's use or enjoyment of land that resulted from a physical intrusion caused by a governmental entity. Thus, there was a compensable injury. Defendant failed to provide any evidence negating the trespass-nuisance claim or that there were material issues of fact with regard to that claim. Consequently, summary disposition was appropriate.

Additionally, defendant's claim that plaintiff's action is simply a negligence or intentional tort action and, as such, is barred by governmental immunity, is disingenuous. Trespass-nuisance

is a recognizable tort and the facts of plaintiff's case fit within its parameters. *See Continental Paper & Supply Co, Inc, supra*; *Hadfield, supra*.

Finally, defendant cites no applicable authority to support its position that necessity is a defense to trespass-nuisance. In setting out the trespass-nuisance exception to governmental immunity, our courts have never articulated that the necessity of the trespass or nuisance would deny a plaintiff compensation.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Jessica R. Cooper