STATE OF MICHIGAN

COURT OF APPEALS

CHARLES L. WILLEMS and MARY R. WILLS WILLEMS, Plaintiffs-Appellees, v CHARTER TOWNSHIP OF MERIDIAN, Defendant-Appellant.	UNPUBLISHED March 18, 2004 No. 247291 Ingham Circuit Court LC No. 02-000715-CH

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

This case stems from plaintiffs' allegations that a sewer maintained by the defendant township is wrongfully located on plaintiffs' property and constitutes a trespass on plaintiffs' property. The township appeals as of right the order denying its motion for summary disposition. We reverse and remand for entry of an order granting the township summary disposition.

Plaintiffs reside at 1387 Hickory Island Drive in Meridian Township and also own property with the common address of 1381 Hickory Island Drive (hereinafter Lot 34), which is a vacant parcel on which plaintiffs intend to build. Sometime in the summer of 1963, an underground sanitary sewer system was installed under a ten-foot wide platted alley adjacent to Lot 34. In August 1997, through resolution 176-97, the Ingham County Road Commission intended to abandon the alley, and this abandonment was recorded with the Ingham County Register of Deeds. However, according to the abandonment, all easements for public utilities were reserved to and would remain with the respective owners within the right-of-way and those owners would have a continued right to occupy the alley within the right-of-way.

On June 29, 2000, plaintiffs had Lot 34 surveyed and in July 2001, several township employees, believed to be a maintenance crew, advised plaintiff Charles Willems that he had to pull the survey stakes set up by the surveyor. On the same date, the township employees removed asphalt and allegedly discovered that the sanitary system manholes were not located within the easement west of Lot 34 but were instead located within the boundary of Lot 34. Plaintiff sent a letter to the Township Board of Trustees requesting replacement of the survey stakes and later requested that the sewer and manholes be relocated within the easement and be resurveyed to show the proper location.

Apparently, in October 2001, the township had the subject property and easement area surveyed and the survey indicated that the sewer was properly located within the easement. However, in November 2001 and March 2002, plaintiffs mailed additional correspondence to various township employees reiterating their request that the sewer be relocated within the easement and be resurveyed. In response, Township Manager Gerald Richards informed plaintiffs that the township did not intend to move the sewer.

Plaintiffs commenced the instant action on May 8, 2002. They entitled count I of the complaint "Trespass," and averred that a portion of the sewer owned, operated, and maintained by the township was located on plaintiffs' property and that the location of the sewer on plaintiffs' property constituted a trespass. Plaintiffs labeled count II of the complaint "Intentional Trespass," and averred that the township's refusal to remove the sewer line from plaintiffs' property amounted to an intentional trespass. The township responded that the sewer was located within the easement and cited governmental immunity as an affirmative defense.

The township filed a motion for summary disposition pursuant to MCR 2.116(C)(7), citing *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), for the rule that there are no common law tort exceptions to the doctrine of governmental immunity. In response, plaintiffs argued that the resolution abandoning the alley was legally flawed and also argued that the essence of their case was a takings claim and that as such, the *Pohutski* decision, which dealt with common law torts, did not apply. Following oral arguments, the trial court denied the township's motion for summary disposition, stating

> All parties agree that based on the case cited in the defendant's brief, the *Wade* case, that the Court has to view the survey more favorably done toward the defendant, in which case the Court is going to deny the motion for summary disposition pursuant to MCR 2.116(C)(7), and that this is a factual issue to determine whether the common law cause of action is based on the taking clause of the Michigan Constitution and, therefore, falls outside of the *Pohutski* case and the defense of governmental immunity. . . .

Now, on appeal, the township argues that the trial court erred in failing to grant the township's motion for summary disposition because under *Pohutski*, there is no common law tort exception to government immunity. Plaintiffs argue that their claim is based on an unconstitutional taking of their property, and thus, *Pohutski* does not apply.

A motion brought under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). The nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor, and the motion should not be granted unless no factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). "'The court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.'" *Id.*, quoting *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). We review de novo the trial court's grant or denial of a motion for summary disposition. *Amburgey*, *supra* at 231.

With regard to tort liability of a governmental agency, 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.

The parties agree that the operation and maintenance of a sanitary sewer system is a proper governmental function. Thus, the township is immune from tort liability unless otherwise provided in the act.

In *Pohutski*, *supra*, the Supreme Court determined whether any of the statutory exceptions to governmental immunity permit a trespass-nuisance exception. In doing so, the Court analyzed the five statutory exceptions to governmental immunity: the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the proprietary function exception, MCL 691.1413; and the governmental hospital exception, MCL 691.1407(4). Guided by the principle that the immunity conferred on governmental agencies is broad and the statutory exceptions are to be narrowly construed, see *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), the Court determined 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. In essence, the Court found that the Legislature did not allow for the pursuit of any common law tort theories against a governmental agency, beyond any suggested in the five statutory exceptions.

Accordingly, pursuant to *Pohutski*, we conclude that neither trespass nor intentional trespass is one of the five exceptions to immunity set forth in the governmental tort liability act; thus, there is no trespass exception to governmental immunity.[1]

In *Pohutski*, the Court declined to discuss the parties' argument 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. Accordingly, in this case, plaintiffs argue on appeal, as they did in their response to the township's motion for summary disposition, that *Pohutski* does not apply and the trespass-nuisance cause of action has a constitutional basis that defeats a claim of governmental immunity. In denying the township's motion for summary disposition, the trial court agreed that it was a factual issue whether the common law cause of action is based on the takings clause of the Michigan Constitution and thus falls outside of the *Pohutski* holding.

In this case, plaintiffs pleaded only two counts in their complaint, trespass and intentional trespass.[2] Plaintiffs alleged only that the township's sewer was located on plaintiffs' property

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[1] We note that the Supreme Court in *Pohutski* limited its decision to prospective application. *Pohutski* was decided April 2, 2002, and plaintiffs in this case filed suit May 8, 2002; thus, the *Pohutski* decision is applicable.

[2] In contrast, in *Pohutski*, the plaintiffs filed suit alleging trespass, nuisance, trespass-nuisance,
(continued…)

and thus constituted a trespass, and the township's refusal to remove the sewer line from plaintiff's property constituted an intentional trespass. Plaintiffs did not allege a trespass-nuisance or any intentional taking claim. Plaintiffs did not attempt to raise any constitutional takings issue until the township filed its motion for summary disposition. Because plaintiffs failed to plead allegations of an unconstitutional taking in their complaint, we decline to address the issue.

Accordingly, pursuant to *Pohutski*, we find plaintiffs' claims of trespass and intentional trespass are not any of the exceptions to immunity set forth in the governmental tort liability act. Therefore, the trial court erred in denying the township summary disposition.

Reversed and remanded for entry of an order granting the township summary disposition. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage

(…continued)

negligence, and unconstitutional taking.