# STATE OF MICHIGAN

# COURT OF APPEALS

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| KATHRYN SCHULTZ,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 13, 2004 |
| v | No. 245571<br>Ingham Circuit Court |
| CHARTER TOWNSHIP OF MERIDIAN,<br><br>Defendant-Appellant. | LC No. 02-000455-NZ |

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of its motion for partial summary disposition pursuant to MCR 2.116(C)(7). We affirm.

## I. Material Facts

On approximately May 15, 2001, or May 16, 2001, water and sewage allegedly entered plaintiff's basement through the sanitary sewage system operated by defendant (Plaintiff's Complaint and Jury Demand, filed March 27, 2002, lower court file I). On March 27, 2002, plaintiff filed a complaint[1] against defendant raising the following claims: count I for trespass, count II for nuisance, count III for trespass-nuisance based upon operational control, count IV for trespass-nuisance based upon ownership, and count V for unconstitutional taking (Complaint).

Defendant subsequently brought a motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). Defendant sought to have counts I through IV of plaintiff's complaint dismissed, reasoning that because the newly enacted statutory exception to governmental immunity was in effect when plaintiff filed her complaint, MCL 691.1416 *et seq*., it provided the sole remedy for plaintiff. (Defendant Meridian Township's Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(7) and (8), May 16, 2002, lower court file I.) In response, plaintiff countered that summary disposition was inappropriate because the statutory exceptions to governmental immunity did not apply to claims that accrued prior to the effective

[1] Although plaintiff's complaint was designated as a "class action" complaint, a class was never certified.

date of the act, January 2, 2002 (Plaintiffs' Response to Defendant's Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(7) and (8), June 20, 2002, lower court file I). The trial court denied defendant's motion for partial summary disposition (Appendix A). In denying defendant's motion, the trial court agreed that the statute and *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), did not prohibit an action under common law brought during the period between the effective date of the amendments and the date *Pohutski* was decided, i.e., Janurary 2, 2002, and April 2, 2002 (Appendix B).

## II. Analysis

On appeal, defendant contends that the trial court erred in denying its motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). Specifically, defendant argues that plaintiff's sole remedy is under MCL 691.1416 *et seq*.[2] because plaintiff filed her complaint after the effective date of that statute, which abrogates any common law exceptions relating to sewage disposal system events. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought pursuant to "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).[3]

MCL 691.1407(1) provides the following:

> 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.

Regarding MCL 691.1407(1), in overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), the *Pohutski* Court determined that the first sentence of the statute operates to render municipal corporations immune from tort liability except as otherwise provided in the act, but that the second sentence applied only to the state and not to governmental

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[2] Specifically, MCL 691.1417(2) provides, in pertinent part:

> Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

[3] The trial court did not indicate under what court rule it decided defendant's motion. However, because MCR 2.116(C)(7) specifically applies to motions brought on the basis of immunity, we will review defendant's motion under that subrule.

agencies. *Pohutski*, *supra* at 689. Thus, according to *Pohutski*, any exception to governmental immunity for governmental agencies such as municipal corporations must come from the statutory scheme. *Id*.

Until January 2, 2002, there were five statutory exceptions to governmental immunity, at which time 2001 PA 222[4] took effect. *Id*. at 689, 697-699. "2001 PA 222 amends the governmental tort liability act to provide a remedy for damages or physical injuries caused by a sewage disposal system event." *Pohutski*, *supra* at 697. Critical to this case, the *Pohutski* Court specifically held that MCL 691.1416 *et seq*. is not to be given retroactive application:

> 2001 PA 222 does not contain any language indicating it is meant to apply retroactively, but provides only that it is to take immediate effect. Section 19(1) provides that a claimant is not entitled to compensation under the statute unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within forty-five days after the date the damage or physical injury was or should have been discovered. Only two exceptions to the forty-five-day limit are available: if the claimant notified the contacting agency during the forty-five-day period or if the failure to comply resulted from the contacting agency's failure to comply with notice requirements. *Given the absence of any language indicating retroactive effect, the forty-five day notice limit, and the presumption that statutes operate prospectively, we conclude that 2001 PA 222 does not apply retroactively*. [*Pohutski*, *supra* at 698 (emphasis added).]

Since the *Pohutski* Court has already determined that MCL 691.1416 *et seq*. is prospective, the key issue in this case is whether the prospective application of the statutory scheme applies to all claims filed after the effective date of the statute regardless of the accrual date, as defendant argues, or if it applies to claims that accrued prior to January 2, 2002, but filed after the statute took effect, as plaintiff argues. We find that plaintiff's interpretation is correct, and that the statute does not apply to claims that had accrued prior to the effective date of the statute.

"Michigan courts have followed the general rule that the relevant inquiry in determining the applicability of a statute is the date on which the cause of action arose." *Hill v GMAC*, 207 Mich App 504, 513-514; 525 NW2d 905 (1994). Thus, if as in this case a statute is to be applied prospectively, the law at the time a claim accrues governs the case. See *Bradfield v Administrator or Personal Representative of Estate of Burgess*, 62 Mich App 345, 352; 233 NW2d 541 (1975); see also *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 573-574; 331 NW2d 456 (1982) (noting general rule that once a cause of action accrues, meaning that all the facts become operative and known, it becomes a vested right); *Devlin v Morse*, 254 Mich 113, 115-116; 235 NW 812 (1931) (Court refusing to apply newly enacted statute to the plaintiff's common-law claim that accrued before but was brought after the new act became effective); *Chesapeake & Ohio R Co v Public Service Comm*, 5 Mich

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[4] 2001 PA 222 has been codified as MCL 691.1416 *et seq*.

App 492, 506; 147 NW2d 469 (1967) ("The statutory amendment during the pendency of a suit has no bearing upon the rights of the parties fixed by law before its enactment."). Thus, pursuant to a long line of Michigan case law, we must utilize the accrual date rather than the filing date as the controlling date for purposes of prospective legislation. In other words, MCL 691.1416 *et seq*. does not apply to plaintiff's claim, which accrued prior to the effective date of the statute.

Defendant has failed to provide us with any case law opposite to that set forth above. Indeed, the cases defendant relies upon would only be helpful to defendant's position if MCL 691.1416 *et seq*. were retroactive. However, as noted, *Pohutski* precludes us from holding that these amendments apply retroactively. In sum, defendant's argument fails because (1) the only distinguishing feature between plaintiff in this case and those in *Pohutski* is that plaintiff in this case filed her complaint after the amendments were effective, and (2) defendant has neither distinguished nor provided contrary authority to the case law cited above, which holds that the controlling date is when the cause of action accrued, not when the case was filed.

Moreover, in *Pohutski*, our Supreme Court made it clear that in cases currently pending, and plaintiff's case was currently pending at the time *Pohutski* was decided, the *Hadfield* analysis would apply. *Pohutski*, *supra* at 698-699. Specifically, the Court stated:

> Thus, if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relied under *Hadfield* or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.
>
> Accordingly, this decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply. [*Id*.]

In discussing the Court's decision that *Pohutski* was to be given prospective application, the Court indicated that prospective application was necessary, in part, because there had been extensive reliance on *Hadfield's* interpretation of the governmental immunity act. The Court noted that "[i]n addition to reliance by the courts, insurance decisions have undoubtedly been predicated upon this Court's long-standing interpretation of § 7 under *Hadfield*: municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same." *Pohutski*, *supra* at 697.

Additionally, MCL 691.1417(4)(b) requires a claimant seeking compensation for property damage or physical injury from a governmental agency to demonstrate compliance with MCL 691.1419. That section, in turn, requires a claimant to provide notice to the governmental agency "of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered." MCL 691.1419(1). Additionally, a governmental agency is required by the statute to "make available public information about the provision of notice under this section" in order to facilitate compliance with this section. MCL 691.1419(1). As the *Pohutski* Court noted,

MCL 691.1416 *et seq.* would bar a plaintiff's claim that accrued before the statute was enacted because a plaintiff would not be able to comply with the statutory timetables. *Id.* at 698.[5] Plaintiff would, in the words of the *Pohutski* Court, become one of the "distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Id*. at 699. Accordingly, we find that the trial court properly denied defendant's motion for partial summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray

[5] We recognize that the Legislature is fully empowered to eliminate a tort claim, and nothing in this opinion speaks to that subject. The question in this case is *when* the Legislature's commands become effective.