STATE OF MICHIGAN

COURT OF APPEALS

FIRE INSURANCE EXCHANGE, ROY GINGRICH and TODD OLSEN,

Plaintiffs-Appellees,

v

COUNTY OF KENT,

Defendant,

and

KENT COUNTY BOARD OF COUNTY ROAD COMMISSIONERS,

Defendant-Appellant.

UNPUBLISHED
September 14, 2004

No. 248777
Kent Circuit Court
LC No. 01-002601-GC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this trespass-nuisance tort action, defendant appeals as of right from the order of the trial court denying defendant's motion for summary disposition under MCR 2.116(C)(7) and holding that governmental immunity does not bar plaintiffs' claims here. We affirm.

On May 18, 2000, as a result of a flood that occurred in Kent County, water entered the property owned by plaintiffs Gingrich and Olsen. Plaintiff insurance company insured the individual plaintiffs and filed this action on October 18, 2001, as subrogee of the individual plaintiffs. On April 1, 2002, plaintiff filed an amended complaint adding the individual plaintiffs, as well as naming the "Kent County Drain/Road Commission" as a party defendant.

On appeal, defendant first argues that 2001 PA 222, which amended the government tort liability act (GTLA), MCL 691.1401 *et seq*., effectively eliminating the trespass-nuisance cause

of action for sewer-related damage while replacing it with a more limited statutory cause of action, precludes plaintiffs' claims here.[1] MCL 691.1417(2). We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Likewise, statutory interpretation presents a question of law which we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

First, it must be determined whether MCL 691.1417(2) has retroactive effect.[2] Our Supreme Court addressed this issue in *Pohutski v Allen Park*, 465 Mich 675, 697-698; 641 NW2d 219 (2002), in the context of deciding whether its ruling (that a trespass-nuisance cause of action was not subject to the governmental immunity statute) should be applied retroactively. In the context of deciding the prudence of making its decision retroactive, the Court looked at whether MCL 691.1417 *et seq*. could be applied retroactively to provide the statutory remedy to plaintiffs with cases pending. *Id.* at 698. The Court concluded that, given the fact that 2001 PA 22 does not contain any language indicating it is meant to apply retroactively, and there is a presumption that statutes operate prospectively,[3] this statute does not apply retroactively. *Id.*

Although this specific holding of the Court is arguably dicta, see *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 95; 610 NW2d 597 (2000) (defining dicta as "a principle of law not essential to the determination of the case"), our Supreme Court has recognized that "'[w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Detroit v Michigan Public Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939), quoting *Chase v American Cartage Co, Inc*, 176 Wis 235, 238; 186 NW 598 (1922) (emphasis in original). Therefore, "a decision . . . is authoritative with regard to any point decided if the Court's opinion demonstrates 'application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case.'" *People v Higuera*, 244 Mich App 429, 437-438; 625 NW2d 444 (2001), quoting *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884 (1982).

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[1] Although MCL 691.1417(3) provides a statutory cause of action for damages due to a "sewage disposal system event," the statute includes certain requirements and limitations not applicable to the common law tort claim pleaded here, including a requirement that the claimant notify the governmental agency of a claim of damage or physical injury in writing within forty-five days after the date the damage was or should have been discovered. It is not clear from the record whether plaintiff would be entitled to bring this alternative claim.

[2] Though the incident occurred and plaintiff insurance company filed this action before the effective date of the statute, defendant road commission was not named as a defendant until after the effective date of the statute.

[3] See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

Our Supreme Court has indicated that "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." *Frank W Lynch & Co, supra* at 583, quoting *Franks v White Pine Copper Div*, 422 Mich 636, 671; 375 NW2d 715 (1985). As the Supreme Court pointed out, there is simply no indication that this statute was meant to apply retroactively. *Pohutski, supra* at 698. Accordingly, we agree that this statute should not be applied retroactively to preclude plaintiffs' claim.

Defendant argues that, regardless of whether this Court applies 2001 PA 222 retroactively, the statute was effective at all pertinent times here, so as to require that it be applied to preclude plaintiffs' claim. Specifically, defendant argues that the original parties to the lawsuit (plaintiff insurance company and the County of Kent) stipulated that the road commission should be added as a party defendant on February 7, 2002, and plaintiffs actually amended their complaint to join defendant road commission on April 1, 2002, all after the effective date of the statute, January 2, 2002. Plaintiffs, on the other hand, argue that what is actually pertinent is when the incident that gave rise to the complaint took place; because the incident occurred over eighteen months before the effective date of the statute, it has no effect on plaintiffs' claims. The question, therefore, is which date should control application of 2001 PA 222.

Once a cause of action accrues, it becomes a vested right. *In re Certified Questions (Karl v Bryant Air Conditioning)*, 416 Mich 558, 573; 331 NW2d 456 (1982). "A cause of action 'arises' when the plaintiff's claim accrues, not when it is filed." *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 451; 487 NW2d 799 (1992). Tort actions accrue at the time when all elements of a cause of action have occurred and can be alleged in a proper complaint. *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473, 479; 586 NW2d 760 (1998).

The elements of the tort of trespass-nuisance are "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." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 145; 422 NW2d 205 (1988). Here, the tort was complete, and the cause of action arose when the water entered plaintiffs' property, which allegedly occurred on May 18, 2000, before the effective date of 2001 PA 222. Accordingly, we hold that 2001 PA 222, which took effect after plaintiffs' cause of action accrued, but before their complaint was amended to name defendant road commission, does not apply to preclude plaintiffs' claim.

Next, defendant argues that the Supreme Court's decision in *Pohutski* precludes plaintiffs' claims here. We disagree.

In *Pohutski, supra*, our Supreme Court overruled *Hadfield, supra*, insofar as it held that there existed an exception to governmental immunity for claims based on common law trespass-nuisance (the claim that plaintiffs have pleaded here). *Id.* at 688. Sensing the adverse effects its decision would have on pending cases, the Court limited the application of the decision:

> 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. [*Pohutski, supra* at 699.]

Defendant insists that, because plaintiffs amended their complaint to add the road commission after April 2, 2002, *Pohutski* applies and precludes plaintiffs' claims. In essence, defendant argues that this case was not "brought" nor was it "pending" as of April 2, 2002. Defendant's position is effectively that when an amended complaint is filed to add a new party it constitutes the bringing of a new action. However, as our court rules explain: "[a] civil action is commenced by filing a complaint with a court." MCR 2.101(B). Defendant's argument is not consistent with the above court rule and ignores the order of our Supreme Court. Quite simply, following the Supreme Court's order by which we are bound, because this case was filed before April 2, 2002, *Pohutski* does not apply.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra