STATE OF MICHIGAN

COURT OF APPEALS

NATIONWIDE INSURANCE COMPANY OF AMERICA, f/k/a TIG COUNTRYWIDE INSURANCE COMPANY, f/k/a TIG INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 247580 Oakland Circuit Court
TOWNSHIP OF WEST BLOOMFIELD, Defendant-Appellant,	LC No. 1999-013440-NZ
and OAKLAND COUNTY DRAIN COMMISSION, Defendant.	

Before: Hoekstra, P.J., and Owens and Hood, JJ.

PER CURIAM.

Plaintiff Nationwide Insurance Company of America (Nationwide) commenced this trespass-nuisance action as a subrogee of Henry and Wendy Abrams, who endured a sewage backup into their home located within defendant township of West Bloomfield. Defendant appeals as of right from a circuit court order that denied its motion for summary disposition of Nationwide's trespass-nuisance claim on the basis of governmental immunity. We reverse and remand.

I

In March 1999, Nationwide filed a complaint against defendant stating counts of trespass-nuisance, gross negligence, and an unconstitutional taking.[1] In December 2000, the

[1] In July 1999, Nationwide filed a first amended complaint that added the Oakland County Drain Commission as a defendant, which Nationwide alleged had also engaged in acts that constituted (continued…)

parties filed cross-motions for summary disposition of the trespass-nuisance claim. In February 2001, the circuit court granted Nationwide's motion with regard to defendant's liability for trespass-nuisance pursuant to MCR 2.116(C)(10), and denied defendant's motion. With respect to the disputed element of defendant's causation or control over the trespass or nuisance, the court explained that because defendant undisputedly owned and controlled its municipal sewer system, defendant had strict liability for the Abrams' damages arising from the sewer backup.[2]

Defendant filed an interlocutory application for leave to appeal the circuit court's order. In April 2001, this Court entered an order in Docket No. 232717 holding defendant's application in abeyance "pending the decision in the [trespass-nuisance] cases of *Jones v City of Farmington Hills*, Docket No. 227657 or *Pohutski v City of Allen Park*, Court of Appeals Docket No. 222238." On April 2, 2002, the Supreme Court decided *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), together with the companion case of *Jones v City of Farmington Hills*.

In *Pohutski*, the Supreme Court held that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity," overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), and its progeny. *Pohutski*, *supra* at 684-690, 695, 699. But in light of the fact that the *Pohutski* decision was "akin to the announcement of a new rule of law," the Supreme Court concluded that its ruling would apply only prospectively. *Id*. at 695-699. The Supreme Court explained that "[i]n all cases currently pending, the interpretation set forth in *Hadfield* will apply." *Id*. at 699.[3] In June 2002, this Court entered an order denying defendant's interlocutory application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review."

In January 2003, defendant filed a brief in support of its renewed motion for summary disposition of Nationwide's trespass-nuisance claim pursuant to MCR 2.116(C)(7) and (10). In March 2003, the circuit court denied defendant's motion premised "on the defense of governmental immunity." The court explained at a hearing that defendant's "argument . . . should have and could have been presented in prior proceedings," that this Court had already denied an application for leave to appeal involving defendant's causation argument, and that defendant's motion "for summary disposition regarding governmental immunity and causation" qualified as "untimely." Defendant subsequently filed the instant claim of appeal.

II

We initially address Nationwide's suggestion that this Court lacks jurisdiction to consider defendant's appeal. Nationwide observes that in February 2001, the circuit court denied with prejudice defendant's motion for summary disposition of Nationwide's trespass-nuisance claim,

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(…continued)

a trespass and/or nuisance, gross negligence, and an unconstitutional taking. On January 16, 2001, the parties stipulated to dismiss the drain commission from the lawsuit.

[2] The court granted defendant's motion for summary disposition concerning the gross negligence and unconstitutional taking counts, neither of which is at issue in the instant appeal.

[3] The Supreme Court denied a motion for rehearing of *Jones* on May 21, 2002. 466 Mich 1208.

and that this Court subsequently denied defendant's application for leave to appeal the summary disposition ruling. In March 2003, the circuit court denied as untimely the renewed motion for summary disposition of the trespass-nuisance claim that defendant brought on the same grounds previously asserted. According to Nationwide, because the court denied defendant's renewed motion as untimely, the "court's March 6, 2003 order is not one 'denying governmental immunity to a governmental party' consistent with MCR 7.202(7)(a)(v)." Nationwide further asserts that the instant appeal qualifies as moot because it involves only the March 2003, order, and even if this Court reverses the March 2003, order, the circuit court's "February 1, 2001 order, issued 'with prejudice' would still remain in effect." Nationwide argues that defendant "has not included the [February 2001] order in this appeal, and, in fact, could not have included it."

Nationwide incorrectly suggests that this Court may not consider the merits of the circuit court's ruling regarding the applicability of the trespass-nuisance exception to the facts of this case. First, this Court has jurisdiction over defendant's claim of appeal from the circuit court's March 2003 order denying its motion for summary disposition. Plaintiff ignores that defendant premised its January 2003 countermotion for summary disposition in part on governmental immunity, and that the circuit court's March 2003 order expressly determined that "[d]efendant's Counter Motion for Summary Disposition *on the defense of governmental immunity* is hereby denied." (Emphasis added). Accordingly, the circuit court's order qualifies as a "final order" appealable by right to this Court. MCR 7.202(7)(a)(v) and MCR 7.203(A)(1). Furthermore, defendant timely filed its claim of appeal on March 25, 2003, nineteen days after the circuit court entered its order. MCR 7.204(A)(1)(a).

Second, irrespective of the "with prejudice" language within the circuit court's February 2001 order denying defendant's initial motion for summary disposition, this Court may consider the merits of the circuit court's prior ruling in this appeal from a subsequent final order.[4] "Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Nationwide offers no authority in support of the proposition that the "with prejudice" language within the circuit court's 2001 order restricts the scope of this Court's review. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002) (explaining that a party may not leave it to this Court to search for authority to sustain or reject its position).

III

Defendant contends that the circuit court erred in denying its motion for summary disposition of Nationwide's trespass-nuisance claim because the undisputed facts illustrate that no action taken by defendant caused the sewage backup. This Court reviews de novo a circuit court's summary disposition ruling. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). The motion defendant brought pursuant to MCR 2.116(C)(10) tests

[4] This Court's June 2002 order denying defendant's interlocutory application for leave to appeal did not address the merits of defendant's arguments.

the factual support of Nationwide's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(10), this Court considers de novo, and in the light most favorable to the nonmoving party, all pleadings, admissions, affidavits, and other relevant documentary evidence of record to determine whether any genuine issue of material fact exists to warrant a trial. *Spiek*, *supra* at 337.

Because this case arose before the Supreme Court's April 2, 2002, decision in *Pohutski, supra*, we must apply the limited trespass-nuisance exception to governmental immunity delineated by the Supreme Court in *Hadfield*, *supra* at 139. The Supreme Court in *Pohutski*, *supra* at 700, cited the trespass-nuisance description found in *Hadfield*, *supra* at 169, which provides, in relevant part, as follows:

> Therefore, we find that plaintiffs will successfully avoid a governmental immunity defense whenever they allege and prove a cause of action in trespass or intruding nuisance. Trespass-nuisance shall be 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. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and *causation or control* (by government). [Emphasis added.]

In addition to the above-quoted passage from *Hadfield*, the Supreme Court in *Pohutski*, *supra* at 700, also cited as relevant to the elements of a trespass-nuisance claim *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205 n 42; 521 NW2d 499 (1994), wherein the Supreme Court quoted the trespass-nuisance definition from *Hadfield*, *supra* at 169, which the Court then further clarified in a footnote as follows:

> While a governmental entity *must have been a proximate cause of the injury*, "the source of the intrusion" need not originate from "government-owned land." Moreover, "[n]egligence is not a necessary element of this cause of action." This is true even if an instrumentality causing the trespass-nuisance was "built with due care, and in strict conformity to the plan adopted by" a governmental agency or department. [*Peterman*, *supra* at 205 n 42 (emphasis added; citations omitted).]

The above-quoted discussions of trespass-nuisance reflect that for a governmental defendant to face liability for a physical intrusion onto a plaintiff's property, the plaintiff must present evidence that the governmental entity engaged in some act or omission that proximately caused the physical intrusion. *Pohutski*, *supra* at 700. This requirement is embodied within the description in *Hadfield*, *supra* at 169, that the governmental defendant must have "set in motion" the physical intrusion.

In granting Nationwide's initial motion for summary disposition with respect to defendant's liability for trespass-nuisance, the circuit court appeared to conclude that defendant's mere ownership of its sanitary sewer system rendered it strictly liable for the May 19, 1997, sewer surcharge. In support of the notion that trespass-nuisance is a strict liability tort for which a plaintiff need not show causation or negligence, the circuit court cited decisions including *CS&P, Inc v City of Midland*, 229 Mich App 141; 580 NW2d 468 (1998).

The circuit court confused the question of negligence or standard of care with the issue of proximate causation. In light of the "set in motion" and "proximate cause" language of *Hadfield* and *Peterman*, a plaintiff alleging trespass-nuisance plainly must demonstrate that the government took some action or made some omission that qualified as a legal cause of a physical invasion. The fact that a plaintiff need not show negligence by the government does not relieve the plaintiff of proving causation, but simply signifies that the plaintiff need not demonstrate that the act of proximate cause by the government occurred with a specific standard of care.[5]

After reviewing the circuit court record, we conclude that defendant is entitled to summary disposition of Nationwide's trespass-nuisance claim pursuant to MCR 2.116(C)(10) because no genuine issue of fact exists that defendant caused or set in motion the May 19, 1997, sewer surcharge. The evidence of causation appears within the deposition testimony of Gerald Sweetland, an assistant chief engineer with the Oakland County Drain Commission, and Daniel

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[5] This distinction appears recognized within *CS&P*, *supra* at 142-143, which this Court decided on the basis of the following facts:

> *According to the undisputed testimony*, water and sewage emanating from the toilets and floor drains invaded the premises of a commercial building located in Midland and owned by LBL Investments. Both CS&P and 3-S Construction occupied suites in the lower level of the building. The flooding caused extensive damage to the building and its contents. The tenants could not occupy the lower portion of the building for several weeks. . . . *Broken risers in the sewer on a street adjacent to the building caused a blockage, and diverted the water and sewage into the building*. Midland admitted that it owned the sewer system, that it was responsible for maintaining, installing, and repairing sanitary sewers, and that the section of the sewer that failed had been cleaned and inspected, no problems having been found. [Emphasis added.]

This Court affirmed the trial court's conclusion that in light of these facts, the plaintiffs did not have to additionally prove any negligence by the defendant to establish a trespass-nuisance. *Id*. at 144, 146. Contrary to the circuit court's insinuation, this Court did not disregard the requirement of proximate causation. This Court quoted *Hadfield*, *supra* at 169, for the proposition that a trespass-nuisance constitutes a "'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.'" *CS&P*, *supra* at 145 (emphasis added). This Court also quoted the Supreme Court's discussion in *Peterman* that distinguished between the necessary element of proximate causation and the lack of a negligence requirement. *Id*. at 145-146, quoting *Peterman*, *supra* at 205 n 42. In light of the apparently undisputed fact that some action by the defendant city had set in motion the sewer backups, this Court followed the *Peterman* distinction and concluded that the plaintiffs need not additionally show that the defendant city breached a negligence standard of care. *CS&P*, *supra* at 146. Accordingly, in this case, the circuit court incorrectly reasoned that defendant's mere ownership of the sewer system constituted a basis for imposing strict liability on it, without any examination whether defendant's sewer system caused or set in motion the flooding.

Gebrowsky, the superintendent of defendant's water and sewer department. The surcharge[6] at issue involved both defendant, which owns and operates a sanitary sewer system, and the county, which operates and maintains separate storm and sanitary sewer systems.

The deposition testimony establishes the following facts. The Abrams' house where the invasion occurred, on Rose Boulevard, is located in section twenty-seven of West Bloomfield Township. A privately owned sanitary sewer lead connected the Rose address to a lateral sewer pipe of eight inches in diameter owned and maintained by defendant;[7] defendant's lateral sewer pipe in turn directly connected to a twelve-inch sewer arm or main owned and maintained by the county, known as the Fourteen Mile-Maple Road arm. Once township sewage entered the county's arm of the sanitary system, it flowed south into the county's Farmington interceptor, which guided the sewage south and then east, where it eventually reached the sewage system of Detroit.

Sweetland investigated the May 19, 1997, surcharge into the Abrams' house by reviewing data recorded by "sewage meters on the [county] interceptor that serve[s] that particular area." Sweetland recalled that "the flow [from defendant's lateral] was higher than had been identified as the [anticipated or expected] amount of flow that should be from that particular area," a situation that created the likelihood of a surcharge. According to Sweetland, the meter results signified that "there was more flow being generated . . . both from private and I/I sources within [defendant's] system."

Sweetland explained that "I/I" signified infiltration, which occurred when water surrounding a pipe entered through cracks or leaks in the pipe or bad pipe joints, and inflow, which happened when, for example, surface water traveled through an improperly sealed manhole, or when private parties connected their sump pumps to a township's sanitary sewer system. Sweetland summarized that two possible sources of excess flow from infiltration and inflow existed: nonprivate or public infiltration of water through the sewer system itself, and inflow from private residences, including from improper sump pump connections that can transfer their storm water runoff into a sanitary sewer system. Although sanitary sewer systems like the township's were constructed to accommodate particular quantities of infiltration through the systems themselves,[8] they were not designed to incorporate and discharge flow from the sump pumps of private residences. Because of the presence of flows in excess of the sanitary sewage flows generated by township residences alone, Sweetland suspected "that part of the

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[6] According to Sweetland's deposition, a surcharge occurs "when the level of water exceeds the area of the pipe."

[7] Township homeowners were required to pay a fee and acquire a permit to connect their sewer leads to defendant's sanitary sewer system.

[8] Sweetland testified that defendant's sanitary sewer system was designed to handle the impact of excess flow of "1.8 inches of rain in one hour," which "is the definition of a ten-year/one-hour" storm.

problem is that homeowners are" illegally connecting their sump pumps to defendant's sanitary sewer system.[9]

Sweetland concluded that the May 19, 1997, surcharge into the Abrams' basement happened because of (1) excess flow, together with (2) the effect of grease accumulated in inverted siphons located within the county's Fourteen Mile-Maple Road arm.[10] Sweetland denied that he could "assign a percentage or weight" to either cause. When questioned whether the source of the excess flow consisted of sewage or infiltration and inflow, Sweetland responded, "I have no way of telling. We presume it's I/I." Sweetland clarified that a May 19, 1997 "wet weather event" or "major rain" would constitute a substantial part of the I/I, which presumably comprised the excess flow.[11] Gebrowsky believed that defendant's water and sewer department personnel had determined that the surcharge on May 19, 1997, happened because of a backup in the county arm or main.

Gebrowsky described that on an ongoing basis, defendant routinely jet-cleaned its sanitary sewer system. Gebrowsky explained that the cleaning schedule for each area of the township varied, in the discretion of the water and sewer department director, depending on the area's location. For example, areas with many restaurants and "high grease contents" demanded cleaning more frequently than other areas. Defendant's sanitary sewer laterals within section 27, the location of the Abrams' house, were not cleaned more often than other township laterals.[12] Before the surcharge into the Abrams' house on May 19, 1997, defendant last cleaned and inspected the laterals within section twenty-seven on May 19, 1992.

Nationwide presented no evidence that defendant's sanitary sewer system was constructed in a defective manner, or that on May 19, 1997, defendant's system experienced a blockage of some kind. Although Sweetland testified that on May 19, 1997, the township's lateral transported excess flow, which Sweetland opined presumably consisted of infiltration and inflow, Sweetland did not pinpoint from where or what the infiltration or inflow had arisen;

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[9] Gebrowsky acknowledged the possibility that illegal sump pump hookups to the sanitary system existed within the township, but did not know for certain whether there were illegal sump pump connections during 1997. Gebrowsky testified that defendant conducted ongoing visual inspections for illegal sump pump connections to the township's sanitary sewer system.

[10] The hydraulic properties of the county's inverted siphons caused grease buildup there. Although defendant had an ordinance against the dumping of grease into its sanitary sewer system, Sweetland and Gebrowsky opined that the grease came from restaurants located within the township.

[11] Gebrowsky testified that "a heavy rain" fell around the time of the May 19, 1997, surcharge.

[12] Gebrowsky clarified that defendant conducted additional maintenance efforts in the area of Dunmore within section 27's northeast portion, which was "a low spot in the main" where several past backups had occurred. But defendant never instituted a special maintenance program for the Rose Boulevard area. Gebrowsky explained that it could not more frequently clean the area of Rose Boulevard because the lateral sewer pipe there "runs directly into the County main," and "if the County mains are full, then we can't flow into it."

Sweetland gave no specific indication that infiltration of water through defendant's sanitary sewer system, instead of inflow by storm water runoff from illegally connected sump pumps, caused the excess flow. Both Gebrowsky and Sweetland recognized that defective manholes, pipes or joints could lead to infiltration, but Nationwide presented no specific evidence that defendant's sanitary sewer system contained malfunctioning pipes or manholes on May 19, 1997, or that any such defects would have contributed to the surcharge into the Abrams' house. The deposition testimony of Gebrowsky and Sweetland suggested as causes of the infiltration or inflow only the illegal grease accumulations, the heavy rain, and illegal sump pump hookups to the sanitary sewer system, none of which causes are attributable to defendant. Because Nationwide produced no evidence that the construction or operation of defendant's sanitary sewer system proximately caused or set in motion the May 19, 1997, surcharge, the circuit court should have granted defendant's motion for summary disposition of Nationwide's trespass-nuisance count pursuant to MCR 2.116(C)(10).

Notwithstanding the Supreme Court's and this Court's explicit recognitions of a proximate causation requirement in a trespass-nuisance action, Nationwide seeks to avoid the causation element by insisting that it need establish only government causation *or control*. In *Hadfield, supra* at 169, the Supreme Court did summarize the elements of a trespass-nuisance claim as "condition (nuisance or trespass); cause (physical intrusion); and *causation or control* (by government)." [Emphasis added.] But the option of showing government control does not entirely relieve a trespass-nuisance plaintiff from the obligation of establishing that an instrumentality controlled by the government proximately caused a physical invasion of the plaintiff's property. In applying the causation or control element to one of the four consolidated appeals in *Hadfield*, the Supreme Court described the control element as examining the "defendant's control *over the creation of the nuisance*." *Id*. at 203 (emphasis added). Other courts have recognized that in the context of a trespass-nuisance action, "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." *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 165 n 7; 545 NW2d 657 (1996) (emphasis added), quoting *Baker v Waste Mgmt of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995) (citation omitted). While Nationwide suggests that the italicized language merely reflects its obligation to show defendant's ownership and control of its sewer system, the element of "control" requires further that a plaintiff must establish that the nuisance *arose from the property controlled by the defendant*.

The obligation to establish "control" by showing that the trespass or nuisance arose from the property owned or controlled by a defendant appears akin to the differently phrased requirement that the trespass-nuisance plaintiff must prove that the governmental defendant *set in motion* the physical intrusion. Both phrasings contemplate that the plaintiff must establish the link of proximate causation between government property, or an act or omission of the governmental defendant, and the physical invasion of the plaintiff's property. A contrary conclusion that mere control alone would suffice to impose liability on a governmental defendant would ignore the "set in motion" portion of the trespass-nuisance definition.

In this case, the parties do not appear to dispute that defendant owns and controls a municipal sanitary sewer system. But as discussed above, Nationwide has presented no facts to support the notion that the sewage backup *arose from* defendant's sanitary sewer system. *Baker*,

supra at 606. Therefore, we reverse the circuit court's order granting Nationwide's motion for summary disposition with respect to defendant's liability for trespass-nuisance, and the court's orders denying defendant's motions for summary disposition of the trespass-nuisance count.

Reversed and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Donald S. Owens
/s/ Karen Fort Hood