S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PETER DRONCHEFF, JACQUELINE L. DRONCHEFF, and DENISE L. DUNCAN, Plaintiffs-Appellants,	UNPUBLISHED December 15, 2011
v	No. 298874 Livingston Circuit Court
ELEFTHERIOS J. KERR and HEATHER KERR, Defendants-Appellees.	LC No. 08-023672-CH

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting summary disposition and declaratory relief in defendants' favor in this case involving allegations of trespass and nuisance. We affirm.

Plaintiffs and defendants own real property bordering each other. Defendants' property contains a retention pond that is apparently intended to retain storm drainage. According to plaintiffs, the retention pond is inadequate, as it overflows onto their property during every rainfall resulting in damage to their property. Plaintiffs thus initiated the instant lawsuit against defendants for "trespass-nuisance." The parties thereafter stipulated that plaintiffs' complaint and defendants' answer would be deemed to include a request for declaratory relief on the issues of historic flow of water on the properties and whether defendants had the right to flow water onto plaintiffs' property. The parties each subsequently moved for summary disposition and the trial court granted both summary disposition and declaratory relief in defendants' favor.

We review de novo a trial court's grant or denial of summary disposition. *Mich Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). In reviewing a ruling made pursuant to MCR 2.116(C)(10), we review the evidence in the light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

We review a trial court's decision whether to grant declaratory relief for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993). The trial court's

factual findings are reviewed for clear error, and we review its conclusions of law de novo. *Schumacher v. Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

On appeal, plaintiffs first assert that the trial court erred in concluding that "trespass-nuisance," as was alleged in plaintiffs' complaint, is not a cognizable cause of action. We disagree.

"Trespass-nuisance" was an exception to governmental tort liability recognized in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 154; 422 NW2d 205 (1988), overruled *Pohutski v City of Allen Park*, 465 Mich 675, 689-690, 695; 641 NW2d 219 (2002). In *Pohutski*, 465 Mich at 689-690, 695, the Court explicitly found that trespass-nuisance was not one of the exceptions to governmental tort liability created by the Legislature. We conclude that trespass-nuisance is no longer a viable legal principle, and even if it were, it would not have applied in this case because it was only applicable where the defendant was a state actor. *Hadfield*, 430 Mich at 169. The trial court did not err in reaching its legal conclusion.

The above being true, we also conclude that the trial court did not err in treating plaintiffs' action as sounding in trespass and/or nuisance. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). The next issue for our resolution, then, is whether the trial court erred when it found that plaintiffs failed to allege and to offer any evidence that created a genuine issue of material fact regarding a claim of trespass or nuisance.

Defendants would be subject to liability for private nuisance if:

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995).]

In this case, plaintiffs have not alleged or offered any evidence to show that defendants' conduct is the legal cause of the alleged invasion. Defendants presented evidence showing a historical flow of water from their property onto plaintiffs' property prior to the parties' ownership of their respective properties. And, plaintiffs have provided no evidence establishing that defendants engaged in any conduct causing or increasing the flow of water onto their property. Thus, summary disposition in favor of defendants regarding plaintiffs' nuisance claim was appropriate.

In *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008), this Court explained that recovery for trespass is available upon "proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." Additionally, the intrusion must be intentional. *Id.* "[T]he actor must intend to intrude on the property of another without authorization to do so." *Cloverleaf Car Co*, 213 Mich App at 195. In this case, plaintiffs have not established that defendants intentionally

caused any intrusion because plaintiffs do not allege or offer any evidence that defendants intended that the water flow onto plaintiffs' property or caused the water to flow onto plaintiffs' property. Plaintiffs have not alleged that defendants developed the property, built the retention pond or created the existing drainage easement. Thus, the trial court properly granted summary disposition in favor of defendants in regard to this claim.

In regard to declaratory relief, the trial court found that there was a natural and historic flow of water from defendants' property onto plaintiffs' property. On appeal, plaintiffs argue that this finding was erroneous and that there is no evidence in the record to support the finding. We disagree.

"It has been the settled law of this State for more than a century that the natural flow of surface waters from the upper, dominant estate forms a natural servitude that encumbers the lower, servient estate." *Wiggins v City of Burton*, 291 Mich App 532, 546; __ NW2d __ (2011)(internal quotations omitted). The servient estate is "bound by law to accept the natural flow of surface waters from the upper, dominant estates." *Id.* The owner of the dominant estate may not change conditions on the land that place a "greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water." *Id.* Thus, if defendants materially increase the historical and natural flow of water onto plaintiffs' property, the increase in water flow will constitute an independent trespass. *Wiggins*, 291 Mich App at 548.

Here, defendants provided the affidavit of the lead engineer in charge of the plans for the drainage easement and retention pond. In the affidavit, the engineer swore that there was a historical flow of surface water from defendants' property onto plaintiffs' property forming a drainage course before any development of the land was undertaken. The engineer further indicated that the United States Geological Survey clearly showed that there was a historical flow of water running across defendants' property onto plaintiffs' property. He also stated that the construction of a driveway on plaintiffs' property, built after the development of defendants' property, obstructed the natural drainage course and could have accounted for all of the runoff from onsite and surrounding properties. Defendants also provided the affidavit of the chief deputy drain commissioner for the county, wherein he swore that records showed historical evidence of water flow from defendants' property onto plaintiffs' property.

Plaintiffs did not submit any evidence whatsoever regarding the historical and natural flow of water, including amount of water flow, with respect to the properties. Instead, they simply argued that the fact that a drainage easement and retention pond were created for the development proves that the water flow is not natural and historic. Plaintiffs also rely on the statement of the developer in his affidavit that he created the drainage easement and retention pond to address additional drainage caused by the development. However, plaintiffs did not offer any evidence regarding the water flow levels before and after the development. Plaintiffs were responsible for proving each of their alleged facts before declaratory relief could be granted. *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). Because they did not do so, it was not error for the trial court to declare that the water flow was natural and historic and to grant summary disposition in favor of defendants.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto