STATE OF MICHIGAN

COURT OF APPEALS

LEONARD GUST and SHARON GUST, Plaintiffs-Appellees,	UNPUBLISHED November 8, 2011
v LENAWEE COUNTY ROAD COMMISSION, Defendant-Appellant.	No. 304142 Lenawee Circuit Court LC No. 10-003769-CZ

Before: K.F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant, Lenawee County Road Commission (hereinafter "Commission"), appeals as of right from the trial court's denial of its motion for summary disposition premised on governmental immunity.[1] This case involves claims by plaintiffs, Leonard Gust and Sharon Gust, (hereinafter "Gusts") pertaining to the flooding of their real property as the result of a failure by the Commission to properly maintain a culvert or drain located beneath a roadway under its jurisdiction. We affirm in part, reverse in part and remand for further proceedings.

I. BASIC FACTS

The Gusts are husband and wife and the owners of real property consisting of acreage on both the north and south sides of Sandy Beach Road in Lenawee County. The property has been owned by Gust family members in excess of 100 years. Sandy Beach Road runs in an east-west direction and bisects the Gusts' property. The Gusts maintain a residence and other buildings on the northern section of the property and allege the natural flow of water on the property runs from north to south.

The Gusts sued the Commission for inverse condemnation, trespass and negligence. The Gusts set forth that the portion of Sandy Beach Road that bisects their property "incorporates a drain," which "was constructed and maintained at said location several feet higher than the

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[1] The appeal in this matter is taken pursuant to MCR 7.203(A)(1) as "an order denying governmental immunity" is construed to be a "final judgment" or "final order." MCR 7.202(6)(a)(v).

adjacent lands on each side" of the roadway. The roadway "now acts as a dam preventing water . . . from naturally flowing to the lands on the south side of Sandy Beach Road" and further on "to adjoining lands." Since the construction of the roadway a drain has existed beneath the roadbed that permitted surface water to flow to the south and prevent flooding. Within the last six years the drain has purportedly "ceased to function" and has resulted in turning the roadway into a dam that creates "ponding" on the northern portion of the Gusts' property. The ponding has allegedly resulted in water accumulation at a depth of several feet over 8 to 10 acres of their property. The Gusts claimed that "the construction of said roadway and drain, coupled with said failure to maintain and/or repair said drain, was the sole course of the resultant flooding." The Gusts contended that the flooding rendered their property inhabitable as the flooding has destroyed the septic systems for the residence and seriously damaged other buildings.

The Commission sought summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing that the Gusts failed to plead in avoidance of governmental immunity. While the Commission acknowledged that Sandy Beach Road constituted a public roadway under their jurisdiction, it asserted the Commission had no affirmative duty to maintain the drain. The Commission contended the drain was not part of the roadway, was never maintained by the Commission and was in existence long before the Commission ever had jurisdiction over the roadway. In seeking summary disposition, the Commission primarily contended the insufficiency of the Gusts' pleadings to contain any allegation of a duty to maintain the drain, the failure to state a claim for which relief could be granted or the failure to plead a claim in avoidance of governmental immunity. The trial court denied summary disposition. The Commission now appeals as of right.

II. STANDARD OF REVIEW

We review the grant or denial of a motion for summary disposition de novo. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). The Commission premised its motion for summary disposition on MCR 2.116(C)(7) (claim is barred because of immunity granted by law) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted).

In order to succeed on a summary disposition motion brought pursuant to MCR 2.116(C)(7), the moving party is required to establish through admissible "affidavits, depositions, admissions, or other documentary evidence," that the plaintiffs' claims are barred by "immunity granted by law." We accept the allegations set forth in the plaintiffs' complaint as true "unless contradicted by the evidence." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). In contrast, a motion brought in accordance with MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition should only be granted if the claim is so legally deficient that recovery would be impossible even if all of the well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Maiden,* 461 Mich at 119. Neither the Commission, nor the trial court, specified under which subrule the inverse condemnation claim was being reviewed.

III. INVERSE CONDEMNATION

The Commission first argues that the trial court erred in failing to grant its motion for summary disposition as to the inverse condemnation claim. The Commission maintains that the Gusts pleadings failed to allege that the Commission abused its authority or power by taking an affirmative act directly aimed at their property; merely claiming that the Commission failed to maintain a drain that ceased to function was not sufficient as it did not constitute the requisite affirmative act. Additionally, the Commission asserts that the trial court applied the wrong standard by going beyond the pleadings to consider assertions by the Gusts that the Commission had engaged in the affirmative act of placing gravel or other covering over the drain to repair damage effectuated by the Gusts in attempting to clear out an obstruction. We disagree with each of these contentions.

The Gusts assert that the Commission's development of Sandy Beach Road and its failure to maintain the underlying culvert caused flooding resulting in an inverse condemnation of the property. This Court has previously determined that two elements must be proven to establish a claim for inverse condemnation. Specifically, a plaintiff must demonstrate "'that the government's actions were a *substantial* cause of the decline of his property's value,' and [] 'that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.'" *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549; 688 NW2d 550 (2004), citing *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986) (emphasis in original). The Commission contends the Gusts' inverse condemnation claim is deficient as it fails to allege an "affirmative action[] directly aimed at [their] property." *Id*.

The trial court's denial of summary disposition on this issue was not in error as two bases exist, which would allow this matter to proceed. First, the Commission misconstrues the sufficiency of the Gusts' pleadings on this issue. While mere allegations of a negligent failure to abate a nuisance are insufficient to establish an affirmative governmental action directed at a plaintiff's property, *Hinojosa*, 263 Mich App at 549, the Gusts' pleadings are not so limited in content. In the second amended complaint, the Gusts assert "[t]hat Sandy Beach Road, which incorporates a drain, was constructed and maintained at said location several feet higher than the adjacent lands on each side of Sandy Beach Road." The phrase "at this location" is a reference to the relevant property owned by the Gusts and impacted by flooding. The phrase "constructed and maintained" denotes an affirmative act, implying the modification of the road elevation. In combination, the language of this averment is sufficient to meet the requirement that a plaintiff demonstrate "that the government" was engaged in or committed "affirmative actions directly aimed at the plaintiff's property" and not merely a failure to abate. *Hinojosa*, 263 Mich App at 549.

Second, addressing the Commission's contention that the trial court applied the wrong standard of review, it is noted that the Commission sought summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). While dismissal in accordance with MCR 2.116(C)(8) is reliant on the pleadings alone, in determining the propriety of granting summary disposition under MCR 2.116(C)(7) a trial court may use "affidavits, depositions, admissions, or other documentary evidence." As it is permissible for a trial court to go beyond the pleadings when a motion is brought under MCR 2.116(C)(7), it is notable that the Commission, in its counterclaim, acknowledged:

3. That on or about May 12, 2010, the counter-Defendants undertook excavation activities on and immediately adjacent to the paved portion of Sandy Beach Road, all within the statutory right-of-way of said Sandy Beach Road, thereby causing damage to the road.

4. That pursuant to its statutory duties LCRC undertook and performed repairs to the road, at the expense of $831.72.

At the summary disposition hearings, while disputing having caused further damage or problems regarding drainage, counsel for the Commission acknowledged the performance of work in the area. It is disingenuous for the Commission to challenge the propriety of the trial court's denial of summary disposition based on the pleadings alone, given its acknowledgement of this activity at the site of the drain and roadway involving the Gusts' property. Further, should the Gusts prove successful in pursuing their claim of inverse condemnation, the Commission's assertion of governmental immunity would be unavailing as "the obligation to pay just compensation arises under the constitution and not in tort, [and] the immunity doctrine does not insulate the government from liability." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989).

IV. TRESPASS

The Commission next argues that the trial court erred in failing to grant summary disposition in its favor on the Gusts' trespass claim as there exists no trespass exception for governmental immunity. We agree; however, we disagree with the Commission's assertion that the failure to remove water is not the equivalent of the direction or incursion of water onto property, which is necessary to prove trespass.

"Recovery for trespass to land . . . is available only 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." *Wiggins v City of Burton*, ___ Mich App ___; ___ NW2d ___ (2011) (Docket No. 293023, issued February 8, 2011), slip op at 12 (citation omitted). Claims of trespass have been recognized in cases involving flooding. *Robinson v Wyoming Twp*, 312 Mich 14, 24-25; 19 NW2d 469 (1945). Contrary to the Commission's assertions, the allegations by the Gusts that the Commission constructed the roadway at such a level and/or blocked the drain by placement of gravel would be sufficient to preclude summary disposition as these actions would sufficiently demonstrate the direction of water for intrusion onto the property and not merely a failure to remove or abate the natural accumulation. However, although the elements of trespass may be demonstrated "the Legislature has not provided . . . an exception for trespass-nuisance claims," *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 276; 792 NW2d 798 (2010), the trial court erred in failing to grant summary disposition premised on governmental immunity for this claim.

V. NEGLIGENCE AND GROSS NEGLIGENCE

The Commission next argues that the trial court erred in failing to grant its request for summary disposition based on governmental immunity regarding the Gusts' negligence claim. We agree.

MCL 691.1407(1) provides, "[e]xcept 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. "Governmental function" is defined in MCL 691.1401(f) as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 224.19(1) provides: "[t]he board of county road commissioners may grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, and may extend and enlarge an improvement. The board may construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts." Neither party disputes that the Commission is a "governmental agency" that "is engaged in the exercise or discharge of a governmental function." It has been repeatedly recognized that evidence of ordinary negligence is insufficient to overcome the defense of governmental immunity. *Bain v City of Southfield*, 463 Mich 982; 625 NW2d 781 (2001), citing *Maiden v*, 461 Mich at 122. Thus, as pleaded by the Gusts, any claim of ordinary negligence is precluded by governmental immunity.

The claim as set forth by the Gusts specifically asserts that the Commission engaged in "willful and wanton negligence" implying a claim of gross negligence. The definition of gross negligence in the governmental immunity act suggests a willful disregard of precautions or measures to attend to safety and a "singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). The term gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 691.1407(7)(a). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. Rather, a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Maiden*, 461 Mich at 122-123 (internal citation omitted). While it is questionable that the acts alleged to have been committed by the Commission would, by definition, arise to the level of gross negligence, any such distinction is irrelevant as this Court has previously determined that governmental agencies themselves are not subject to the gross-negligence exception to governmental immunity. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled in part on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50 (1997).

VI. HIGHWAY EXCEPTION

The Gusts raise for the first time on appeal the highway exception to governmental immunity. As this was not raised and addressed in the lower court it is not properly preserved for appellate purposes, *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005), and this Court is not required to address the issue. *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Regardless, we note that the Gusts clearly misconstrue this exception to governmental immunity. In order to demonstrate that a governmental agency failed to "maintain [a] highway in reasonable repair," a plaintiff is required to show that a "defect" exists in the highway. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158, 160-162; 615 NW2d 702 (2000). The ponding or diversion of the natural flow of water does not constitute a "defect" in the roadway. Such limitation is consistent with our Supreme Court's ruling that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Pohutski v Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002), quoting *Nawrocki*, 463 Mich at 158 (emphasis in original).

In addition, the Gusts indicate that any alleged "defect" in the roadway is due to the grade or elevation of its construction. Addressing design defects, our Supreme Court in *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002), held that "the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways." Subsequently, it has been held, "Nowhere in the statutory language is there a duty to install, to construct or to correct what may be perceived as a dangerous or defective 'design.'" *Plunkett v Dep't of Transportation*, 286 Mich App 168, 183-184; 779 NW2d 263 (2009) (citation omitted).

VII. VEXATIOUS APPEAL

The Gusts seek unspecified relief from this Court based on their assertion that the appeal of this matter by the Commission was vexatious in accordance with MCR 7.216(C)(1). As the Gusts have failed to follow proper procedure by submitting their request in a motion pursuant to MCR 7.211(C)(8), we decline to consider this request.

VIII. AMENDMENT OF PLEADINGS

Finally, the Gusts request that this Court permit them further amendment of their complaint, citing MCR 2.118 and MCR 7.216(A)(1). In accordance with MCR 7.216(A)(1), this Court may, in its discretion, "exercise any or all of the powers of amendment of the trial court or tribunal[.]" The Gusts have already been afforded two opportunities to amend their complaint in the lower court. It would not be fair to grant the Gusts the right to amend their complaint again without affording the Commission the opportunity to address concerns pertaining to the futility of an amendment, as well as possible prejudice and the repeated failure of the Gusts to cure any deficiencies by the previously allowed amendments. *Feliciano v Dep't of Natural Resources*, 158 Mich App 497, 501; 405 NW2d 178 (1987) (citations omitted). Moreover, under the circumstances, this request is more properly addressed to the trial court on remand.

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this order. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher