

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS C. BITHELL,

Plaintiff-Appellant/
Cross-Appellee,

UNPUBLISHED
March 7, 1997

and

IRENE BITHELL, SUSAN BITHELL, THOMAS L.
BITHELL, STEVEN BITHELL, LINDSAY BITHELL,
SAMUEL BITHELL, CATHRIN BITHELL,

Plaintiffs-Appellants,

v

No. 185106
Oakland Circuit Court
LC No. 91-412174-NO

OAKLAND HILLS COUNTRY CLUB and
BLOOMFIELD TOWNSHIP,

Defendants-Appellees/
Cross-Appellants,

and

BLOOMFIELD TOWNSHIP SUPERVISOR,

Defendant-Appellee.

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal the circuit court orders dismissing their claims. Defendants Oakland Hills Country Club and Bloomfield Township have filed cross appeals from the circuit court's grant of partial summary disposition relating to the validity of a right-of-way executed by defendant Oakland Hills in 1928. Plaintiffs' underlying claim involves damage caused when raw sewage from a sewer system constructed beneath their home leaked into their basement. We affirm in part and reverse in part.

We first address the claim raised on cross-appeal by defendants/cross-appellants Oakland Hills Country Club and Bloomfield Township, whether the 1928 release of right-of-way constitutes a valid easement. We disagree with the trial court's conclusion that the release was "expunged" by *Myerling Land Co v Spencer*, 273 Mich 703; 263 NW 777 (1935). Even though the Supreme Court, in *Myerling*, determined that the drain commissioner lacked the jurisdiction to build the sewer line at issue, the written release for the drain remained on file with the drain commissioner and was valid pursuant to MCL 280.6; MSA 11.1006. Whether valid or not, the release was still physically on file with the commissioner's office and is considered a valid public easement under the statute. See *Kiesel Drainage Bd v Hooper*, 148 Mich App 381, 387; 384 NW2d 420 (1986). The trial court erred in determining that the right-of-way was invalid in this case.

Plaintiffs argue on appeal that the trial court erred in granting defendant Oakland Hills Country Club summary disposition. Because we conclude that the sewer at issue was a public drain under the statute, we find that summary disposition was properly granted as to plaintiffs' claims of trespass and nuisance against defendant Oakland Hills. Defendant Oakland Hills' lawful discharge into a public sewer system cannot be said to be either a trespass or a nuisance.

Nor did the trial court err in granting summary disposition as to plaintiffs' negligence claim that defendant Oakland Hills' failed to disclose a dangerous condition. Defendant Oakland Hills did not sell the property directly to plaintiffs and, as a matter of law, had no such duty to plaintiffs. *Christy v Glass*, 415 Mich 684, 688, 696; 329 NW2d 748 (1982).

Plaintiffs also argue that summary disposition was improper as to defendant Bloomfield Township. We agree. The trial court erred in dismissing plaintiffs' claim of trespass-nuisance. As the parties acknowledge, there is a trespass-nuisance exception to governmental immunity. *Continental Paper v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996); *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988).

At issue here is whether plaintiffs' allegations sufficiently established the element of causation or control by defendant Bloomfield Township. Control may be established where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, employs another to do work that he knows is likely to create a nuisance, or is under a statutory duty to abate the nuisance. *Continental Paper, supra*, at 165 n 7. Here, plaintiffs alleged that defendant Bloomfield Township periodically maintained the sewer, responded to plaintiffs' request for inspection, examined the sewer, concluded that raw sewage had leaked from the sewer into plaintiffs' basement, and cleaned the sewer. Plaintiffs also alleged that defendant Bloomfield Township had knowingly and intentionally permitted defendant Oakland Hills to continue to use the sewer despite its obvious state of disrepair. Viewed in a

light most favorable to plaintiffs, plaintiffs' allegations were sufficient to justify a finding that defendant Bloomfield Township exercised requisite control over the sewer.

The trial court also improperly dismissed plaintiffs' claim for taking property without just compensation pursuant to MCR 2.116(C)(7) or (8). As defendant Bloomfield Hills notes in its brief, the trial court evidently treated defendant's motion under MCR 2.116(C)(10). We find that summary disposition was improper regardless of what court rule the trial court relied upon. The issue before this Court on appeal is whether plaintiffs stated a viable taking claim, and we conclude that they did. See *In the Matter of Virginia Park v Goldberg*, 121 Mich App 153, 159-160; 328 NW2d 602 (1982). Plaintiffs alleged that defendant Bloomfield Township was responsible for operating and maintaining sewer lines within the township, and that the continued operation of the sewer at issue resulted in the discharge of raw sewage into plaintiffs' home and diminished the value of their property, and that the system was ultimately repaired by rerouting the sewer through another section of plaintiffs' property. Defendant responds by arguing that the Oakland County Drain Commissioner, rather than defendant, is liable for any damages for any taking in this case. Defendant's fact-based defenses are genuinely disputed by plaintiffs, and summary disposition was improper even under (MCR 2.116(C)(10).

We reverse the trial court's ruling that, as a matter of law, the right-of-way in this case was invalid. The trial court's dismissal of plaintiffs' claims against defendant Oakland Hills Country Club is affirmed. The trial court's dismissal of plaintiffs' claims against defendant Bloomfield Township is reversed.

Affirmed in part, reversed in part. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe