STATE OF MICHIGAN

COURT OF APPEALS

JOHN DEISLER and MARY DEISLER,

Plaintiffs-Appellants,

v

CITY OF DEARBORN,
EDWARD D. OPALEWSKI,
JOSEPH LOUSH, a/k/a
JOSEPH GHAMALOUCHE, and
HANNA LOUSH, a/k/a
HANNA GHAMALOUCHE,

Defendants-Appellees.

UNPUBLISHED
April 8, 1997

No. 192534
Wayne Circuit Court
LC No. 94-420219

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order dismissing their suit against defendants, Joseph Loush and Hanna Loush ("the Loushs"), the City of Dearborn ("the City"), and Edward D. Opalewski in this nuisance and taking case. We affirm in part, reverse in part, and remand.

Plaintiffs' residential property runs contiguous to the Loushs' property in the City. In 1989, the City issued a permit to the Loushs to build an addition to the rear of their home. In 1990, as part of the addition, a carport and drive were built onto the side of the Loushs' home. In 1994, plaintiffs filed suit against defendants seeking damages for the flooding of their property allegedly caused by the diversion of surface water from the carport. In Count I of their complaint, plaintiffs claimed that the Loushs were strictly liable for the diversion of surface water onto their property. In Count II, plaintiffs alleged that the City and Opalewski intentionally caused the creation of a nuisance in allowing the construction of the carport. In Count III and Count IV, plaintiffs alleged negligence and gross negligence against the City and Opalewski for allowing the carport to remain in violation of City code. In Count V, plaintiffs alleged a taking without just compensation against the City.

The City and Opalewski subsequently brought a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing that plaintiffs' intentional nuisance claim was barred as no longer being recognized as an exception to governmental immunity, that plaintiffs' negligence claims were barred by governmental immunity, and that plaintiffs' taking claim was barred as not being a recognized claim under these facts.

Plaintiffs filed a motion to amend their complaint to include a count of trespass-nuisance and nuisance per se against the City. Plaintiffs also filed a motion for summary disposition as to liability in regard to the Loushs, and for equitable injuctive relief.

The trial court granted the City and Opalewski summary disposition pursuant to MCR 2.116(C)(7), governmental immunity, and MCR 2.116(C)(8), failure to state a claim upon which relief could be granted. The trial court also denied plaintiffs' motion to amend their complaint to include a claim for trespass-nuisance and nuisance per se, and denied plaintiffs' motion for equitable injunctive relief. The court then sua sponte dismissed plaintiffs' claim of strict liability against the Loushs as frivolous, and awarded corresponding sanctions to the Loushs.

I. Plaintiffs' strict liability claim against the Loushs

Plaintiffs first argue that the trial court erred in sua sponte dismissing their strict liability claim against the Loushs as frivolous. We agree.

A trial court's finding that a claim is frivolous will not be reversed on appeal unless under clearly erroneous. *Cvengros v Farm Bureau Insurance*, 216 Mich App 261, 266; 548 NW2d 698 (1996). A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which the underlying facts were true, or (3) the party's position was devoid of arguable legal merit. *Id.* at 266-267.

In this case, in sua sponte dismissing plaintiffs' claim as frivolous, the trial court reviewed a portion of plaintiffs' expert witness' deposition that stated that he was unaware that the Loushs' carport violated any City ordinance. However, whether plaintiffs' expert witness believed that the carport violated City code was not attendant to plaintiffs' common law strict liability claim against the Loushs. See *Allen v Morris Building Co*, 360 Mich 214, 217; 103 NW2d 491 (1960). Furthermore, a review of plaintiffs' expert witness' deposition supports plaintiffs' argument that the expert did not testify that the carport was not in violation of City code, only that he had not reviewed the City's relevant ordinances in order to render an opinion.

In any event, the fact that plaintiffs' expert witness stated that he believed the Loushs' carport construction was responsible for the diversion of water and flooding onto plaintiffs' property was a sufficient basis for plaintiffs to plead their strict liability claim against the Loushs. *Id*. Plaintiffs therefore had legal authority on which to base their claim, and had a reasonable belief that the underlying facts were true. Accordingly, the trial court clearly erred in dismissing plaintiffs' complaint as frivolous. *Cvengros, supra*.

II. Plaintiffs' gross negligence claim against Opalewski

Plaintiffs also argue that the trial court erred in granting Opalewski's motion for summary disposition because a question of fact existed as to whether Opalewski was grossly negligent under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), and because the court based its decision on an unpublished decision from this Court. We disagree.

When reviewing a grant of summary disposition on the ground that the claim is barred by governmental immunity, this Court considers all documentary evidence submitted by the parties. *Codd v Wayne County*, 210 Mich App 133, 134; 537 NW2d 453 (1995). All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.* To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* at 134-135.

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Eason v Coggins Memorial Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). This Court reviews the trial court's decision on a motion brought under this rule de novo to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Id.* Summary disposition under this rule is appropriate in a negligence action f it is determined that, as a matter of law, the defendant did not owe a duty to the plaintiff according to the alleged facts. *Id.*

An essential element of a negligence claim is the existence of a duty owed by the defendant to the plaintiff. *Koenig v City of South Haven*, ___ Mich App ___; ___ NW2d ___ (Docket No. 180870, issued 2/21/97), slip op p 9; *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). Whether a duty exists is a question of law for the court. *Koenig*, *supra*. A public official is regarded as owing his duty to the public in general and not to a specific individual. *Id.*; *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 456-460; 487 NW2d 799 (1992); *Jones v Wilcox*, 190 Mich App 564, 568; 476 NW2d 473 (1991). This rule applies unless a special relationship exists between the official and the individual such that performance by the official would affect the individual in a manner different in kind from the way performance would affect the public. *Id.* Here, it is undisputed that Opalewski is a building inspector for the City. Plaintiffs have failed to demonstrate that Opalewski had a "special relationship" which would create a duty. Accordingly, under the public duty doctrine, Opalewski was properly granted summary disposition as to plaintiffs' gross negligence claim.

We also note that plaintiffs' argument that the trial court erroneously relied on an unpublished decision in rendering its decision is without merit. Review of the record reveals that the trial court based its decision on all the cases that were discussed in arguing the motion, including *Jones*, *supra*. Moreover, even if the lower court improperly relied on an unpublished case, reversal is not warranted because the court reached the right result. See *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

III. Plaintiffs' unlawful taking claim against the City

Plaintiffs next argue that the trial court erred in granting the City's motion for summary disposition as to plaintiffs' unlawful taking claim. Specifically, plaintiffs claim that they were deprived of the use and enjoyment of their property because the City failed to enforce its zoning ordinance and abate the alleged nuisance (the carport). We disagree. We review the trial court's summary dismissal of plaintiffs' taking claim de novo. *Eason, supra*.

Because plaintiffs claimed that the City's action (or inaction) unlawfully deprived them of the use and enjoyment of their property, plaintiffs claim was for inverse condemnation. *Murphy v City of Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993); *Jack Loeks Theatres, Inc v City of Kentwood*, 189 Mich App 603, 608; 474 NW2d 140 (1991), modified in part, 439 Mich 968 (1992). A "taking" for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994); *Murphy, supra*. When such a taking has occurred, the Michigan Constitution entitles the property owner to compensation for the value of property taken. Const 1963, art 10, § 2. *Jack Loeks Theatres, Inc, supra*.

In this case, we find that there was insufficient governmental action (or inaction) to support plaintiffs' claim of inverse condemnation. The City in no way initiated the construction of the carport, nor did it own the property on which the carport was constructed, nor can it be said that plaintiffs' alleged property damage was a direct consequence of the City's action (or inaction). The City's failure to abate the alleged nuisance under these facts was simply too far removed to support this claim, particularly where the evidence indicated that the alleged nuisance qualified as a prior nonconforming use. [1] Compare, *Peterman, supra*. We therefore conclude that the trial court properly granted the City summary disposition on this claim.

IV. Plaintiffs' motion to amend their complaint

Plaintiffs further argue that the trial court abused its discretion in denying their motion to amend their complaint to include a claim of trespass-nuisance against the City and Opalewski. Plaintiffs argue that, because the City and Opalewski set the physical intrusion into motion (surface water) by failing to abate the alleged nuisance (carport), they pleaded a viable claim for trespass-nuisance. Again, we disagree.

We review a trial court's decision to grant or deny a motion for leave to amend pleadings for an abuse of discretion. *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996). A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2); *Jenks v Brown*, 219 Mich App 415, 419-420; 557 NW2d 114 (1996). Leave to amend should be denied only for particularized reasons, such as undue delay bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where the amendment would be futile. *Id.* An amendment is futile where, ignoring

the substantive merits of the claim, it is legally insufficient on its face. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

The Supreme Court has recognized a limited trespass-nuisance exception to governmental immunity. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). Trespass-nuisance is defined as "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." *Id.* To establish a claim for trespass-nuisance, the plaintiff must show "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Id.*; *Continental Paper & Supply Co, Inc v City if Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996).

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. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995); *Kuriakuz v West Bloomfield* Twp, 196 Mich App 175, 177; 492 NW2d 757 (1992). Control may also be found where the governmental defendant is under a statutory duty to abate the nuisance. *Baker, supra*; *McSwain v Redford Twp*, 173 Mich App 492, 498-499; 434 NW2d 171 (1988). Issuing permits that enable another to create the nuisance is not sufficient to impose liability. *Kuriakuz, supra*.

In this case, plaintiffs have failed to demonstrate that the City and Opalewski retained sufficient control over the Loushs' property to maintain a claim for trespass-nuisance. The fact that the City and Opalewski allowed the construction of the carport in accordance with the City ordinance effective at the time does not rise to the level of sufficient control for a viable claim of trespass-nuisance. See *Id*. Furthermore, we are not persuaded by plaintiffs' argument that the City and Opalewski were under a statutory duty to abate the nuisance, where the documentary evidence does not support this contention. In fact, the evidence indicates that the carport was a prior nonconforming use. We therefore conclude that the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to include a claim for trespass-nuisance where such a claim was futile under these facts.

V. Plaintiffs' motion for equitable injunctive relief

Plaintiffs next argue that the trial court abused its discretion in denying their motion for equitable injunctive relief, where the Loushs' carport was a nuisance per se under MCL 125.587; MSA 5.2937. We disagree.

We review the grant or denial of an injunction for an abuse of discretion. *Township of Addison v Dep't of State Police*, ___ Mich App ___; ___ NW2d ___ , (Docket Nos. 196587, 196588, issued 12/20/96), slip op, p 3. Injunctive relief is an extraordinary remedy that is granted only when justice requires it, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Wilkins v Gagliardi*, 219 Mich App 260, 276; 556 NW2d 171 (1996). The use of land in violation of a local ordinance is a nuisance per se. *Addison*, *supra*, slip op, p 5.

We agree with plaintiffs' assertion that the carport would constitute a nuisance per se under MCL 125.587; MSA 5.2937 if it was, in fact, in violation of a City ordinance. In this case, however, the evidence indicated that, in 1989, when the City issued a permit to the Loushs to build an addition to the rear of their home and when the carport was constructed, it did not violate any City code. The carport, therefore, qualifies as a prior nonconforming use, and a prior nonconforming use is an exception to zoning's general principle that certain uses should be confined to certain localities. *Heath v Sall,* 442 Mich 434, 439; 502 NW2d 627 (1993). Accordingly, the Loushs' carport is protected because it lawfully existed before the regulation took effect. *Id.* We therefore conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for equitable injunctive relief.

VI. Award of costs, sanctions and attorney fees to the Loushs

Plaintiffs finally argue that the trial court abused its discretion in awarding the Loushs sanctions in the form of attorney fees and costs, as a result of the court's finding that plaintiffs' claim was frivolous. Because we concluded, *supra,* that the trial court erred in dismissing plaintiffs' strict liability claim against the Loushs as frivolous, we hold that the court abused its discretion in awarding the Loushs sanctions. See *Thomas Industries, Inc v C & L Electric, Inc,* 216 Mich App 603, 610-611; 550 NW2d 558 (1996).

Plaintiffs also argue that sanctions should be imposed against defendants for making factual misrepresentations. We need not address this issue because plaintiffs failed to support this claim with any authority. *American Transmissions, Inc v Attorney General,* 216 Mich App 119, 120-121; 548 NW2d 665 (1996).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Defendants, the City of Dearborn and Edward D. Opalewski, being the prevailing parties, may tax costs pursuant to MCR 7.219. No taxable costs pursuant to MCR 7.219 as to plaintiffs' claim against the Loushs, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/Kathleen Jansen

[1] A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date. *Heath v Sall,* 442 Mich 434, 439; 502 NW2d 627 (1993).