STATE OF MICHIGAN

COURT OF APPEALS

RALPH H. ADAMS and VIRGINIA ADAMS,

Plaintiff-Appellants,

v

CHARTER TOWNSHIP OF VAN BUREN,

Defendant-Appellee.

UNPUBLISHED
June 27, 1997

No. 186800
Wayne Circuit Court
LC No. 94-434579-NZ

Before: Hood, P.J., and Saad and T.S. Eveland,* JJ.

PER CURIAM.

The circuit court entered summary disposition in favor of defendant on governmental immunity grounds. Plaintiffs now appeal of right from this disposition, as well as from the denial of plaintiffs' cross-motion for partial summary disposition. We affirm.

On December 3, 1993, plaintiffs experienced a sewer backup through a drain in the basement of their home which caused raw sewage to seep into their basement. Plaintiffs contacted defendant Township Water and Sewer Department, which dispatched a crew to plaintiffs' home. Again, on December 26, 1993, a similar sewage back up occurred, with similar results. Defendant's resulting investigation revealed that the source of the grease which caused both blockages came from an illegal discharge of grease into the sewer line from someone upstream from plaintiffs.

Plaintiffs sued, alleging trespass nuisance, claiming that the sewer backup was due to the actions or omissions of defendant. Plaintiffs argued in relevant part that defendant owned, operated and maintained the sewer system from which the intrusion into plaintiffs' home originated, and therefore defendant was liable in trespass nuisance. Plaintiffs moved for partial summary disposition under MCR 2.116(C)(1) on defendants' affirmative defense that the sewer blockage was caused by the wrongful acts of third parties upstream. The circuit court ruled that there was no showing that the Township controlled whatever caused the backup, and denied plaintiffs' motion. In light of the court's reasoning, defendant moved for summary disposition under MCR 2.116(C)(7), (8) and (10), claiming governmental immunity. The court granted defendant's motion.

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

On appeal, plaintiffs assert first that the trial court erred by denying *their motion* for partial summary disposition; we disagree. Plaintiffs argued below that they were entitled to judgment because defendant has "prima facie liability." However, plaintiffs failed to show that there is a presumption of liability. They have also failed to show any deficiency in McInally's affidavit stating that grease blockages were to blame for the sewage backups, and they have offered no proof to contradict the evidence of grease blockage. The circuit court did not err in denying plaintiffs' motion for partial summary disposition.

Plaintiffs also argue that the circuit court erred in granting *defendant's motion* for summary disposition. Again, we disagree.

Trespass nuisance is an exception to governmental immunity. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988); *Fox v Ogemaw*, 208 Mich App 697, 698; 528 NW2d 210 (1995). It 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." *Hadfield*, 430 Mich at 145 (Emphasis added). There are two key issues here: (1) what constitutes the "nuisance" and (2) whether the Township "controlled" the nuisance. We address both issues.

Although defendant contends that the grease blockage was the nuisance, plaintiffs have alleged that the nuisance was the raw sewage itself. Because we are reviewing the circuit court's grant of defendant's dispositive motion, we view the evidence in the light most favorable to plaintiffs—here the non-moving parties. *Skinner v Square D Co*, 445 Mich 153, 162, 174; 516 NW2d 475 (1994). Therefore, for purposes of our review, we assume that the nuisance is the raw sewage itself, as asserted by plaintiffs.

As stated in *Baker v Waste Management of Michigan*, 208 Mich App 602, 606; 528 NW2d 835 (1995):

> 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. It may also be found where the governmental defendant is under a statutory duty to abate the nuisance.

Plaintiffs contend that there is a dispute of fact over whether defendant "controlled" the nuisance. We disagree. There was no evidence that defendant created the raw sewage, that defendant owned or controlled the property from which the raw sewage arose, that defendant's agent created the raw sewage, or that defendant is under a statutory duty to abate raw sewage. The only colorable argument presented by plaintiffs, is that defendant owned or controlled the property from which the raw sewage arose because defendant did indeed own the sewer pipes. However, we find no merit to this contention. Although defendant owned the pipes from *through which* the sewage backup may have arisen, defendant did not own or control the property "from which the nuisance arose"—that is, the sewage material itself. See *Baker*, 208 Mich App at 606-607. There is no evidence that defendant

contributed to this waste. The circuit court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity).

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Thomas S. Eveland