

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH STEVENS, TONY DECK,
VIRGINIA HERNANDEZ, BARRY KELLEY,
RUSSELL SOLES, DENISE SOLES, DORIS
WALKER and ELIZABETH CLINE,

Plaintiffs-Appellees,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
July 19, 2005

No. 252399
Genesee Circuit Court
LC No. 00-069124-NZ

GLEND A DRISKILL, MICHAEL DRISKILL,
MARK AMONT, SHERMAN AUSTIN, IRAD
AUSTIN, MATTHEW BABIERACKI, CHARLA
BABIERACKI, GAVIN BABIERACKI, KELCI
BABIERACKI, CARSON BABIERACKI,
DENNIS BACON, DEBRA BACON, RYAN
BACON, BETTY BENNETTS, LEONA
BERRYMAN, JANICE BERRYMAN, LUKE
BIRMINGHAM, LOUISE BIRMINGHAM,
GARY BOEDECKER, NANCY BOGARD,
JAMES BOLEN, PATRICIA BOLEN, MARK
BOTUMASI, IONA BRADLEY, PHIL
BRADLEY, LORI BROWN, JEFF BROWN,
JOSE CAPUCHINA, VIOLET CAPUCHINA,
JEANNIE CHURCH, DOROTHY CLANTON
WEEKS, WALKER WEEKS, DUANE
CLEMENTZ, JR., JEFFREY COLLINS, JANEEN
COLLINS, JERRY COTIE, VICKIE COTIE,
ERWIN CURTIS, PAUL DARNTON, JEANE
DARNTON, JOSEPH DICKEY, AUDREY
DICKEY, DONNA DODDS-HAMM, ELLA
DURBIN, DON DURBIN, ALBERT EITEL,
HELEN EITEL, CARRIE GALE, MARK
FRUTCHEY, STEVEN GARTY, WILLIAM
GARTY, PAMELA GARTY, MARY GILES,
VALERIE GLEASON, BILLY GORDON,

MARION GORDON, LEE GOULET, WAYNE
GOULET, AARON GRAY, LINDA GRAY, TIM
GREENLICK, MICHELLE GREENLICK,
LINDA GROSSI, EDWIN GULLEY, OLA
GULLEY, GLORIA GUYER, BETTY HALL,
KAREN HENSE, KARL HENSE, EDYTHE
HEWITT, BRADLEY HOLT, WANECE HOLT,
CURTIS HOLT, JORDAN HOLT, STEPHEN
HORVATH, TRACY HORVATH,
CHRISTOPHER HUBBARD, TERESA
HUBBARD, FRED JACKSON, CHERYL
JONES, LARRY JORDAN, EVA KIDDER,
FRANK KUDLA, FLORRIE KUDLA, JOHN
LANDRY, CLYDE LAPISH, SANDRA LAPISH,
DAVID LENGYL, ROGER LUNA, NICOLE
LUNA, JULIE MAGNUSON, JASON
MAGNUSON, LINDA MILLER, WILLIE
MILLER, DIANNA MILLER, LOUAY
NAAMAN, MARK NEWTON, DALE
NORRINGTON, LORI NORRINGTON,
PATRICK O'DONNELL, KAREN O'DONNELL,
AL OTTERMAN, AMY OTTERMAN, KEITH
PARKER, CINDY PEREZ-AIRGOOD, MARTY
AIRGOOD, FLOYD PECKMAN, IDA
PECKMAN, ALPHA PETTUS, JAMES
PHILLIPS, BRENDA PHILLIPS, FRANK
PREKETES, KAY ROGERS, DANIEL
SCHNEIDER, JONATHAN SCHNEIDER,
HAROLD SCHNEIDER, SANDRA
SCHNEIDER, PATRICIA SILLMAN,
VLADIMIR SKRIPNIK, REINA SKRIPNIK,
JAMES SEYMOUR, DELIA SEYMOUR,
GERALD SHARPE, DOROTHY SHARPE,
STUART SHOUP, RACHEL SNIDER, PHYLLIS
SPRAGUE, MARY STANLEY, JASON
STURGEON, KRISTA WILHELM, HARRY
SWIFT, HAZEL GRANT, WANDA TAYLOR,
CAROLYN TERRIAN, DEBBIE TOBIAS,
ADRIAN TUSHIM, DIANE WALKER,
MICHELLE WALKER, ROBERT WARD,
SABRINA STADLER, CARMEN
WASHINGTON, TERRANCE WAY, ANDY
WELLS, LIZ WELLS, DORIS WILLIAMS,
JENNIFER WILLIAMS, JERRY WILLIAMS,
JEREMY WILLIAMS, PAUL WILLIAMS,
PAMELA WILLIAMS, DEAN YEOTIS, LYNDIA
YEOTIS, HATTIE YOUNG, KEITH YOUNG,

RICHARD ZIZKA, HELENE ZIZKA, DAVID
ALEXANDER, BRANDY GARZA,
ALEJANDRO GARZA, EDWARD LONEY,
MICHELLE LONEY, RICK PIFER, KERI PIFER,
REBECCA BANACKI, PAUL HARRIS, MILLIE
HARRIS, RICK MCELWAIN, NICHOLE
MCELWAIN, KERRY SNIDER, MANDY
SNIDER, RENEE WOOLHISER, RICK
MICHAEL, SANDRA MICHAEL, HOLLY
AULT, TIMOTHY BRUCE, ROWENA SCOTT,
KEN BEARUP, COLLEEN BEARUP, LISA
SEELEY, JERRY LEE REESE, MARK T.
EVANS, LINDA EVANS, FRANK
DUBERVILLE, MARK DUBERVILLE,
MARTHA DUBERVILLE, CHARLOTTE
STURTZ, AMBER STURTZ, JILL MORSE,
PATRICK MORSE, GAIL SEWELL, ANNETTE
WILSON, BOB LEWIS, SHARON LEWIS,
RACHEL SILK, THOMAS HICKS, SALLIE
HICKS, PAUL SHULER, PAM SHULER,
MARTY MUELLER, MARY MUELLER,
MILDRED PENROD and IOANNIS
MAVRIKOS,

Plaintiffs-Appellees,

v

CITY OF FLINT,

Defendant-Appellant.

No. 252400
Genesee Circuit Court
LC No. 00-069344-NZ

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from the trial court's order denying in part defendant's motion for summary disposition and granting partial summary disposition in favor of plaintiffs, Stevens, *et al.*, and Driskill, *et al.* We affirm.

I. Facts and Procedure

On July 29, 2000, September 23, 2000, and February 2001, raw sewage from the city of Flint's sewer system backed up through plaintiffs' floor drains and into their basements. Plaintiffs filed suit against defendant, alleging trespass-nuisance and unconstitutional taking.

Defendant's affirmative defenses included an assertion that plaintiffs' claims were barred by governmental immunity.

Defendant filed a motion for summary disposition, arguing that the cause of the flooding was the excessive rainfall and not defendant's failure to maintain its sewer system. Defendant argued that the heavy rainfalls, combined with the failure of residents to comply with Flint City Code § 46-43(p) and (q), requiring residents to disconnect their downspouts and foundation drains from the public sewer system, caused a surcharge of water into the sewer system that in turn caused the sewage backups. Defendant argued that the nuisance arose from property that was tapped into Flint's sewer system and was owned and controlled by plaintiffs. Defendant further argued that plaintiffs failed to state a claim for unconstitutional taking of their property because they had not been deprived of permanent use of their residences.

In response, plaintiffs filed a counter-motion for summary disposition, arguing that defendant retained control of the sewer system and its contents and was liable as a matter of law because its failure to maintain and repair the sewer system proximately caused the sewage backups. Plaintiffs argued that the rainfalls that preceded the sewage backups were neither extraordinary nor so substantial that they constituted an "unexpected manifestation of nature." Plaintiffs argued that even if defendant could proactively apply Flint City Code § 46-43(p) and (q), it had failed to show that plaintiffs had violated this ordinance. Plaintiffs contended that an unconstitutional taking had occurred because plaintiffs' property could not be salvaged and the backups significantly interfered with plaintiffs' possession of their property.

The trial court granted partial summary disposition for plaintiffs under MCR 2.116(C)(10) in regard to defendant's liability under the trespass-nuisance claims. The trial court, recognizing that *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), was inapplicable because of the date the complaint was filed, applied *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). The court ruled that defendants owned and controlled the sewers and their contents, rejected defendant's assertion that the rainfall was an intervening cause of the backups, and held that a proximate cause of the backups was defendant's inadequate sewer system. The court granted partial summary disposition for defendant in regard to plaintiffs' unconstitutional taking claims, holding that plaintiffs had not demonstrated a permanent invasion amounting to a total appropriation of their property.

At a subsequent hearing regarding defendant's motions for reconsideration and for a stay pending appeal, plaintiffs argued that defendant did not have a right to appeal, because the trial court's order did not deny governmental immunity and, thus, was not a final order. The trial court declined to rule on this issue, but amended its order granting partial summary disposition for defendant and granting partial summary disposition for plaintiff by stating that it had decided the motions for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10).

II. Analysis

A. Jurisdiction

As a preliminary matter, the Driskill plaintiffs contest this Court's jurisdiction over defendant's appeal as of right, asserting that the trial court's order is not a final order within the meaning of MCR 7.203(A) and MCR 7.202(6)(a)(v). Driskill argues that the trial court's order

granting partial summary disposition for plaintiffs is not a final order because it was not based upon a determination that defendant was not entitled to governmental immunity. Rather, Driskill argues that the trial court's ruling was based on a finding that plaintiffs had sufficiently demonstrated and proved the elements of a trespass-nuisance claim. Driskill contends that because defendant's claim of immunity is based on the facts of the case and not its legal entitlement of immunity from suit, the trial court's order is not a final order and is not appealable as of right. "This issue concerns the interpretation of statutes and court rules, legal issues that are reviewed de novo." *Newton v Michigan State Police*, 263 Mich App 251, 256; 688 NW2d 94 (2004).

This Court has jurisdiction of an appeal of right from a final order as defined in MCR 7.202(6). MCR 7.203(A)(1). A "final order" includes an order denying governmental immunity to a governmental party. MCR 7.202(6)(a)(v). An appeal as of right from a final order "is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). In *Newton, supra* at 257, this Court held that MCR 7.202(6)(a)(v)

applies only to situations in which the denial of summary disposition is directly based on a finding that the moving party is not entitled to government immunity and not to a situation where, although a claim of governmental immunity has been asserted, the trial court denies a summary disposition motion because the party opposing summary disposition has stated a sufficient factual case to avoid summary disposition—in other words, . . . in which the motion is actually disposed of as a MCR 2.116(C)(10) motion rather than a (C)(7) motion.

This Court distinguished a trial court's legal determination that a party was entitled to a claim of governmental immunity from a determination regarding the existence of genuine issues of material fact, ruling that the latter situation did not result in a final order for purposes of MCR 7.202(6)(a)(v). *Newton, supra* at 259.¹

Here, the trial court granted partial summary disposition for plaintiffs based upon its determination that plaintiffs had sufficiently proven the elements of trespass-nuisance. Although the trial court did not specifically indicate that its was rejecting defendant's claim of governmental immunity in granting partial summary disposition for plaintiffs, such a determination was inherent because of the trial court's application of *Hadfield*.² Because plaintiffs filed their complaints before April 2, 2002, *Hadfield* remains the controlling case. See

¹ Two other panels have disagreed with *Newton*, but this Court has declined to convene a special conflict panel to resolve the issue. See *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572, 581-585; 689 NW2d 712 (2004), lv pending (Supreme Court Docket No. 127334); *Walsh v Taylor*, 263 Mich App 618, 621-626; 689 NW2d 506 (2004), request for special panel denied 263 Mich App 801; 689 NW2d 778 (2004).

² In fact, the court stated on the record that it viewed the issues of governmental immunity and liability for trespass-nuisance under *Hadfield* as "intrinsically intertwined." The court amended its original order to show that it was granting partial summary disposition under MCR 2.116(C)(7), as well as (C)(10).

Pohutski, supra at 699. In *Hadfield, supra* at 145, 169, our Supreme Court recognized the existence of a limited trespass-nuisance exception to governmental immunity. Because trespass-nuisance is an exception to governmental immunity under *Hadfield*, it follows that a successful claim of trespass-nuisance necessarily means that governmental immunity does not apply to that claim; i.e., when a plaintiff alleges and proves a cause of action for trespass-nuisance, that claim falls under the *Hadfield* trespass-nuisance exception and may not be barred by governmental immunity. See *Hadfield, supra* at 169. By ruling that plaintiffs were entitled to a judgment as a matter of law on their trespass-nuisance claims because they had satisfied the elements of trespass-nuisance under *Hadfield*, the trial court by necessity and logic also ruled that plaintiff's claims were not barred by governmental immunity. Therefore, the trial court's ruling was "[a]n order denying governmental immunity to a governmental party" in accordance with MCR 7.202(6)(a)(v). Thus, the trial court's order was a final order, and this Court has jurisdiction over defendant's appeal as of right.

B. Summary Disposition

1. Standard of Review

Defendant argues that the trial court erred in denying in part its motion for summary disposition and granting partial summary disposition for plaintiffs in regard to plaintiffs' trespass-nuisance claims. The trial court indicated that it based its ruling on MCR 2.116(C)(7), (C)(8), and (C)(10). However, because only the pleadings may be considered in a motion under subrule (C)(8), MCR 2.116(G)(5), and the trial court considered documentary evidence beyond the pleadings, we must construe the trial court's ruling as having been made under subrules (C)(7) and (C)(10). *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A motion under MCR 2.116(C)(7) " "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." ' ' ' *McDowell v Detroit*, 264 Mich App 337, 345; 690 NW2d 513 (2004), quoting *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). The court must accept the contents of the complaint as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *McDowell, supra* at 346.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Maiden, supra* at 120.]

2. Discussion

In *Hadfield, supra* at 169, our Supreme Court defined trespass-nuisance as: “[T]respass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage.” The trespass must result “from a physical intrusion caused by, or under the control of, a governmental entity.” *Id.* at 145. The elements of trespass-nuisance are: “condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).” *Id.* at 169. Negligence is not a necessary element of a cause of action for trespass-nuisance. *Peterman v Dep’t of Natural Resources*, 446 Mich 177, 205 n 42; 521 NW2d 499 (1994), citing *Robinson v Wyoming Twp*, 312 Mich 14, 24; 19 NW2d 469 (1945). “This is true even if the instrumentality causing the trespass-nuisance was ‘built with all due care, and in strict conformity to the plan adopted by’ a governmental agency or department.” *Peterman, supra* at 205 n 42, quoting *Seaman v City of Marshall*, 116 Mich 327, 329-330; 74 NW 484 (1898). Under the trespass-nuisance exception, “[w]hile a governmental entity must have been a proximate cause of the injury, ‘the source of the intrusion’ need not originate from ‘government-owned land.’ ” *Peterman, supra* at 205 n 42, quoting *Li v Feldt (After Remand)*, 434 Mich 584, 594 n 10; 456 NW2d 55 (1990).³ “Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003).

There may be more than one proximate cause of an injury. Two causes frequently operate concurrently so that both constitute a direct proximate cause of the resulting harm. . . . When a number of factors contribute to produce an injury, one actor’s negligence will be considered a proximate cause of the harm if it was a substantial factor in producing the injury. [*Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401-402; 571 NW2d 530 (1997).]

Defendant argues that the trial court erred in determining that plaintiffs satisfied the “causation or control” element of trespass-nuisance.⁴ Control may be established “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.” *Continental*

³ Plaintiffs argue that they were not required to show causation, because *Hadfield, supra* at 169, defined the third element of trespass-nuisance as “causation or control” (emphasis added). However, our Supreme Court later clarified that “a governmental entity must have been a proximate cause of the injury” *Peterman, supra* at 205 n 42. Additionally, our Supreme Court in *Pohutski, supra* at 700, remanded the cases in which the trial courts “may not have addressed all the elements required under *Hadfield* for a claim of trespass-nuisance, including causation” As stated in *Hadfield, supra* at 169, the trespass must be “caused by a physical intrusion that is set in motion by the government or its agents” (Emphasis added.) Accordingly, a plaintiff cannot rely solely upon a governmental entity’s control of the sewer system to support his trespass-nuisance claim.

⁴ Defendant does not dispute that plaintiffs established the first two elements of a trespass-nuisance (condition and cause).

Paper & Supply Co, Inc v Detroit, 451 Mich 162, 165 n 7; 545 NW2d 657 (1996), citing *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995).

Plaintiffs presented evidence establishing that the sewer system was owned and controlled by defendant. Defendant owns the water main pipes, storm pipes and sanitary pipes. Every homeowner is mandated by defendant to be connected to its sanitary system, which carries wastewater from each resident's home to defendant's wastewater treatment plant. Defendant approves the "hook-up," controls the sanitary system process, and is solely responsible for maintaining the integrity of the sewer system. Thus, defendant controlled the property from which the nuisance arose.

We also conclude that defendant caused the sewage backups. The city of Flint has a history of sewage backup problems. According to Hans Kuhlman, the former city engineer and Director of Public Works, defendant's sewer system is considered to be a "combined" system that does not comply with state and federal regulations that now require the separation of municipal storm and sanitary systems. Because of defendant's failure to comply with state and federal regulations regarding the operation of its sanitary system, the state has told defendant that it will impose fines for noncompliance. Additionally, the Michigan Department of Environmental Quality sanitary survey rated defendant's sanitary sewer as "not acceptable."

In September 1985, following two days of heavy and prolonged rainfall, significant areas of Flint were flooded and experienced sewage backups. As a result, an ombudsman, James D. Ananich, conducted an investigation and issued a report which stated, in pertinent part:

It is the position of the Ombudsman's Office that city officials have been negligent in attempting to lessen or prevent[] the potential for flood[-]related damages in the city. This has been true in the past and it was true with respect to the September, 1985[,] flooding.

City of Flint officials, past and present, have performed poorly in cleaning and maintaining the storm and sanitary sewer systems. If the storm sewers and catch basins are not regularly cleaned they become clogged and rainwater cannot properly drain away. The water has to go somewhere[,] and it generally drains into the sanitary system. The sanitary system likewise is poorly cleaned and maintained and as rain water enters the sanitary sewer, sewage is forced to back up into basements.

Additionally, city officials, past and present, have witnessed the spread and growth of city boundaries without making the necessary improvements to the storm and sanitary sewer systems. Quite succinctly, Flint has outgrown its current sewer systems. Such news is not earth[-]shattering or unknown to city officials. Engineering reports (1956 and 1979) have predicted Flint's sewer needs and the Ombudsman's Office has previously reported certain problems and problem areas with respect to continual flooding due to poor sewer conditions. . . . One of the many problems is that some existing sewer lines are simply too small to meet the needs of the many residents serviced by the sewer line.

Later, Kuhlman disagreed with Ananich's conclusion that defendant had outgrown its sewer system, but he acknowledged that there had "been very little additions to the City of Flint" sanitary sewer system and that the focus had primarily been on the initiation of repairs.

Kuhlman stated that although defendant had funds designated specifically for preventative maintenance and for the replacement and repair of the pipes in the sewer system, no sewer replacements were made between 1994 and the time of the backups at issue in this case. Before 2000, defendant's sewer maintenance program was primarily reactive to problems as they arose rather than focused on preventative care. Kuhlman described it as a "hodgepodge" or "Band-Aid" program.⁵ Kuhlman stated that the sewer system had a capacity problem in some areas and that the repairs done were not acceptable to cure the problem. Kuhlman further agreed that houses in certain areas of Flint had a history of repeatedly being flooded even during moderate rainfalls, and that Flint officials were aware of this problem.

In regard to the backups that occurred in July 2000, September 2000, and February 2001, plaintiffs produced a letter from Bruce A. Fenske, who was the principal engineer for the firm plaintiffs hired to "evaluate[] the available information relating to the back-up of untreated sewage at locations throughout the city of Flint." Fenske found that the backups were not related to the rainfall, but "resulted from circumstances under the city's control." Fenske determined that "a properly maintained and separate sanitary sewer system would not have backed up." Fenske reached the following findings and conclusions:

- The sanitary sewer system in the city of Flint is an old system with most of it dating from the 1950s and constructed of VCP.⁶ Parts of the system are from the early 1900s.
- Even though separate storm sewers were built in the early 1980s, the sanitary system is still most accurately classified as a combined sewer system.
- Between 1990 and 2001, the annual average number of back-ups reported to the city was 1,234. This number is roughly equivalent to one sewer back-up along the length of every four city blocks.
- Some blockages of the sewer system are due to the conditions of an old sewer system with bricks and boulder being the cause.

⁵ In 2000, defendant instituted a routine sewer maintenance program, which included cleanings, repair, and relining of pipes.

⁶ According to Fenske, plumbers began to use vitrified clay pipe (VCP) in the 1930s, but switched to polyvinyl chloride (PVC) pipes in the mid-1970s. According to Fenske, VCP pipes are relatively brittle and easily cracked.

- Sewer back-ups are more than merely rainwater. Every sewer back-up has some domestic and, potentially, industrial components to it.
- The weather during July 2000, September 2000 and February 2001 was wet, but not abnormally so. A total of 3.09 inches of rain that fell during the wettest 24-hour period on July 27 through 30 and the people of Flint can expect a similar rainfall to occur once every 11 years on average. The 2-hour period with the heaviest rainfall produced a 2-hour event which the people can expect to occur once every four years on average. The wettest 3-hour period produced a rainfall that would occur once every 18 years on average. During a 24-hour period on September 22 and 23, a total of 3.13 inches of rain fell with 1.45 inches of that amount falling within a 2-hour period. One can expect a rainfall of 3.13 inches over 24 hours and 1.45 inches over two hours to occur every 11 years and 4 years on average, respectively. During a 24-hour period on February 8 and 9, a total of 1.80 inches of rain fell with 0.56 inches of that amount falling within a 2-hour period. One can expect rainfalls of 1.80 inches over 24 hours and 0.56 inches over two hours to occur more frequently than once every two years on average. None of these rainfall events can be considered extreme.
- At the time of the 2000 and 2001 back-ups, between 100 and 200 buildings with roof and foundation drains connected to the sanitary sewers could have caused the sewers to back-up. The city of Flint has about two-thirds, or 40,000 buildings, connected to its sanitary sewers.
- The city has been under various stages of enforcement action by the MDEQ during the 1990s and 2000s. The causes for enforcement action were for things under the city's direct control, and some of these issues contributed to the blockage of sewers. (e.g. An industrial pre-treatment program.)
- The city's sewer system, like many systems that old, needs extensive proactive maintenance to function properly.

We conclude from the information available to us that the most likely cause of the back-up of raw sewage throughout the city during July 2000, September 2000 and February 2001 was a combination of 1) the condition of the city of Flint's sanitary sewer, 2) the use of the sanitary sewers as a combined sewer system with two-thirds (about 40,000) of its buildings having roof and foundation drains, 3) a hydraulic capacity incapable of handling rainfalls in excess of about 1 inch, 4) an inadequate preventative maintenance program, including routine sewer replacement, given the age and general state of repair of the system, and 5) an unwillingness to spend money documented as available on necessary maintenance.

Defendant failed to present any evidence that the backups were not caused by the factors listed by Fenske. Although defendant submitted evidence that the sewers were cleaned and

maintained on a regular basis, the evidence submitted by defendant does not contradict evidence showing that the backups were caused by the condition of the sewer system and the lack of preventative maintenance.

We reject defendant's argument that the sewer backups were the result of an intervening cause in that the rainfall set in motion the backups. "An intervening cause, one which actively operates to produce harm to another after the negligence of the defendant, may relieve a defendant from liability. . . . An intervening cause is not a superseding cause if it was reasonably foreseeable." *Meek v Dep't of Transportation*, 240 Mich App 105, 120; 610 NW2d 250 (2000). "[A]n intervening event . . . will not preclude liability where the intervening event is part of the very nature of the nuisance involved." *Peters v Dep't of Corrections*, 215 Mich App 485, 489; 546 NW2d 668 (1996), quoting *Continental Paper & Supply Co, Inc, supra* at 411. Here, there is no dispute that the rainfalls contributed to the sewer backups. Kuhlman stated that the sewer system works functionally well for the majority of the time and only has problems during heavy rainfalls. However, "[i]t cannot be successfully maintained that the duty of the city to care for its sewage disposal continues only during the time of normal weather and ends when there is an excessive rainfall." *Dohany v Birmingham*, 301 Mich 30, 42; 2 NW2d 907 (1942). The rainfalls did not preclude defendant's liability because the evidence shows that they were not extraordinary to the point that they were not reasonably foreseeable. The rainfalls did not alter the fact that the sewage backups were set in motion by defendant's unmaintained sewer system. While the rainwater may have been a proximate cause of the sewer backups, plaintiffs presented evidence that the condition of defendant's aging sewer system was also a substantial factor contributing to the basement flooding and thus constituted a proximate cause.

Defendant also contends that the backups arose from plaintiffs' noncompliance with Flint City Code § 46-43 which provides, in pertinent part:

(p) *Prohibited surface runoff connections.* Unless specifically authorized and controlled by the Director of the Department of Public Works and Utilities, pursuant to written departmental guidelines promulgated by the Department, no person or owner shall make connection of roof[f] downspouts, areaway drains, or other sources of surface runoff, to a building sewer or building drain which in turn is connected directly or indirectly to a public sanitary sewer. . . .

(q) *Prohibited groundwater connections.* Unless specifically allowed and controlled by the Director, exterior foundation drains or other sources of groundwater shall not be connected to a building sewer or building drain which in turn is connected directly or indirectly to a public sanitary sewer. One- and two-family dwellings shall be exempt from this requirement[] unless a storm sewer is available within the adjacent street.

The Stevens plaintiffs admitted that they had not disconnected their drain holes from the service lines that lead to the public sewer.

We reject defendant's argument for several reasons. First, the ordinance does not apply retroactively to buildings that had surface runoff and groundwater connections to the public sewer before the enactment of § 46-43(p) and (q) in 1976. Whether an ordinance applies retroactively is a question of statutory construction that we review *de novo*. *Frank W Lynch &*

Co v Flex Technologies, Inc, 463 Mich 578, 583; 624 NW2d 180 (2001). Ordinances, like statutes, “ ‘are presumed to operate prospectively unless contrary intent is clearly manifested.’ ” *Id.*, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 671; 375 NW2d 715 (1985). There is nothing in the ordinance indicating that § 46-43 should be given retrospective application. In fact, in regard to private property, § 46-43(m) states that “[a]ll excavation, backfilling, connections and installations shall be made *in accordance with the provisions of this code in force at the time of installation.*” (Emphasis added.) Additionally, there is evidence that defendant had informed plumbers that any home in Flint that was given authorization to connect their plumbing in accordance with the code that was in place before 1976 (which did not contain § 46-43(p) or (q)) would not be in violation of the new amended city code.⁷ An ordinance is especially presumed to operate prospectively if retroactive application of the ordinance would create a new obligation and impose a new duty. *Lynch, supra* at 583. Here, in order to disconnect a foundation drain from the sewer, a building owner would have to excavate around the building and find the connection or demolish the basement floor and install a new piping system. Thus, we conclude that § 46-43(p) and (q) are prospective in their application. Defendant does not claim that any of the buildings in question were not given permits for surface runoff or groundwater connections to the public sewer when the buildings were constructed. Defendant does not allege that the any of the surface runoff or groundwater connections to the public sewer were made without authorization after the enactment of § 46-43(p) and (q) in 1976.

Second, even if these section of the city code were to apply retroactively, defendant did not present any evidence that plaintiffs or any other Flint residents were noncompliant with § 46-43(p) or (q). In regard to § 46-43(p), defendant presents no evidence that any person or owner made connections of roof downspouts, areaway drains, or other sources of surface runoff to the public sewer system without the authorization to do so. In regard to § 46-43(q), defendant failed to demonstrate (1) that any building that connects an exterior foundation drain or other source of groundwater to the public sewer is not a one or two-family dwelling without a storm sewer available within the adjacent street, and (2) that authorization was not given for any such groundwater connection.

Third, although there is evidence that the residents’ drain connections to the sewer system, along with the heavy rainfall, contributed to the overflow of the system and the sewage backups, the condition of the sewer system and defendant’s failure to properly repair and maintain the sewer system remain factors that set in motion the backups.⁸ In *Hadfield, supra* at 184, the Court determined that the plaintiffs had established a claim of actionable trespass- nuisance because “the interference was a physical intrusion onto private property that was caused

⁷ Although § 46-41(d) requires the owner of a house or building to install plumbing and to connect this plumbing to the public sewer “in accordance with the provisions of this article,” this provision does not require an owner who has already installed plumbing to reinstall the plumbing to comply with the most recent ordinance; it only requires an owner who is installing plumbing for the first time to do so in compliance with the ordinance requirements.

⁸ Kuhlman stated that, regardless of whether there were downspout or roof tile connections to the sewer system, certain areas of Flint would still have experienced flooding.

by the county drain commissioner's actions or failure to act." Here, defendant failed to rebut the evidence demonstrating that defendant's failure to properly maintain and repair its sewer system was a substantial factor in the sewage backups. Based on the evidence presented, defendant's inadequate sewer system constituted a proximate cause of the sewage backup into plaintiffs' basements. Therefore, the trial court did not err in denying in part defendant's motion for summary disposition and granting partial summary disposition for plaintiffs.

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Pat M. Donofrio