

STATE OF MICHIGAN
COURT OF APPEALS

KEITH FRANKLIN, SUSAN FRANKLIN,
HAZEL BEAUDRY, BOBBIE MOORE, DAVID
LEWIS, STEVEN WINN, SANDRA WINN,
LAURA WINN, EFTERPI KOSMANOPOULOS,
KONSTANTINOS KOSMANOPOULOS, and
CHRISTOS KOSMANOPOULOS,

Plaintiffs-Appellants,

v

FLINT TOWNSHIP SEWER AND WATER
DEPARTMENT and GENESEE COUNTY
DRAIN COMMISSIONER,

Defendants-Appellees,

and

LINDA I. WALTMAN and MR. WALTMAN,

Defendants.

UNPUBLISHED

June 9, 2005

No. 253784

Genesee Circuit Court

LC No. 01-069855-NZ

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting defendants Genesee County Drain Commissioner and Charter Township of Flint summary disposition under MCR 2.116(C)(10). We affirm.

On March 8, 2001, plaintiffs Keith Franklin, Susan Franklin, Hazel Beaudry, Bobbie Moore, and David Lewis (the Brookgate plaintiffs) filed this action alleging claims for trespass-

nuisance and an unconstitutional taking of property, arising from damages allegedly caused by sewer backups into the basements of their homes on July 28-29, 2000.¹

On July 17, 2002, plaintiffs filed a first amended complaint, adding as additional plaintiffs Steven Winn, Sandra Winn, and Laura Winn (the Winn plaintiffs), and Efterpi Kosmanopoulos, Konstantinos Kosmanopoulos, and Christos Kosmanopoulos (the Kosmanopoulos plaintiffs).²

Both defendants moved for summary disposition, relying on evidence that the sewer backup occurred during an unusually heavy rainstorm and that a property owner had propped open a manhole cover to drain his own yard, causing excess water to overwhelm the system. Defendants presented evidence that the pump system itself was working correctly; and that, as soon as the manhole cover was replaced, the system was able to “keep up with the flow.” The trial court considered each defendant’s motion separately and granted both motions.

On appeal, plaintiffs first argue that the trial court erred in dismissing their trespass- nuisance claim.

This Court reviews a trial court’s grant or denial of summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). Only evidence that is admissible to a jury can be used to create an issue of fact. MCR 2.116(G)(6).

As a general rule, “the state, as sovereign, is immune from suit unless it consents, and . . . any relinquishment of sovereign immunity must be strictly interpreted.” *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). Before April 2, 2002, trespass-nuisance was an exception to governmental immunity. *Id.* at 699; *Hadfield v Oakland Co Drain Comm’r*, 430 Mich 139, 147; 422 NW2d 205 (1988). In *Pohutski*, however, the Supreme Court overruled its decision in *Hadfield* and held that § 7 of the governmental tort liability act, MCL 691.1407, does not permit a trespass-nuisance exception to governmental immunity. *Pohutski, supra* at 678-679. The decision in *Pohutski* was given prospective application, limited to cases filed on or after

¹ Plaintiffs initially filed suit against the Flint Township Sewer and Water Department, which was dismissed by the trial court as an improper party. Plaintiffs thereafter substituted defendant Charter Township of Flint as a party defendant.

² In their first amended complaint, plaintiffs also added a negligence claim against defendants “Linda Waltman and Mr. Waltman” for allegedly removing a manhole cover that contributed to the sewer backup, but that count was omitted when plaintiffs filed their second amended complaint on December 15, 2003.

April 2, 2002. *Id.* at 699. Because the Brookgate plaintiffs brought their action before April 2, 2002, they properly may raise a claim of trespass-nuisance.

Trespass-nuisance involves “trespass 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.” *Hadfield, supra* at 145. “The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).” *Id.* at 169. But unless an intrusion is not the “natural and likely necessary result” of the defendant’s conduct, and instead is the result of an intervening cause, it is not “set in motion” by the defendant and is not actionable under the trespass-nuisance exception to governmental immunity. *Peters v Dep’t of Corrections*, 215 Mich App 485, 488; 546 NW2d 668 (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 Mgt of Mich*, 208 Mich App 602, 606; 528 NW2d 835 (1995). A finding that the defendant had control over a nuisance requires more than mere regulation of “activity on the property which gives rise to the nuisance.” *McSwain v Redford Twp*, 173 Mich App 492, 498; 434 NW2d 171 (1988).

The nuisance in this case was raw sewage. According to the only admissible evidence presented,³ however, the sewer backup was caused by an excessive rainfall and a property owner who opened a manhole cover to drain his own yard, overwhelming the sanitary system. Assuming *arguendo* a question of fact with respect to which defendant controlled the sanitary sewer system, plaintiffs presented no evidence that either defendant created the nuisance or owned or controlled the property where the nuisance arose. *Baker, supra* at 606-607. In light of the strict interpretation due to any exception to immunity, *Pohutski, supra* at 681, summary disposition of plaintiffs’ trespass-nuisance claim was properly granted.

We reject plaintiffs’ arguments that the trial court improperly made findings of fact when deciding defendants’ motions. The trial court merely determined that plaintiffs failed to establish a genuine issue of material fact regarding causation.

Plaintiffs also argue that the trial court erred in dismissing their claim alleging an unconstitutional taking against both defendants under US Const, Am V and Const 1963, art 10, § 2. We disagree.

When property has been damaged rather than completely taken by governmental actions, the owner may be able to recover by way of inverse condemnation. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). “Inverse condemnation is “a cause of

³ Opinion evidence, hearsay evidence, and unsworn letters do not operate to create a genuine issue of material fact. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *SSC Associates Ltd v Detroit Retirement System*, 192 Mich App 360, 364-366-367; 480 NW2d 275 (1991).

action against a governmental defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.”” *Id.* (citations omitted).

A plaintiff alleging an inverse condemnation or de facto taking “must prove a causal connection between the government’s action and the alleged damages.” *Hinojosa v DNR*, 263 Mich App 537, 548; 688 NW2d 550 (2004). The plaintiff has the “burden of proving that the government’s actions were a *substantial* cause of the decline of his property’s value.” *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979) (emphasis in original). “It also appears that the plaintiff must establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff’s property.” *Id.* Takings, as distinguished from torts, result from “authorized acts of governmental officials,” while “challenges to the propriety or lawfulness of government officials sound in tort.” *Thune v United States*, 41 Fed Cl 49, 52 (1998). As the United States Supreme Court observed in *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 427; 102 S Ct 3164; 73 L Ed 2d 868 (1982), courts have “consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within, on the other. A taking has always been found only in the former situation.”

In this case, plaintiffs failed to establish that defendants directed any action against their property that caused the alleged damage, or that the damage was of a permanent nature or caused a substantial decline in value. The trial court did not err in granting defendants summary disposition of plaintiffs’ taking claim.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood