STATE OF MICHIGAN

COURT OF APPEALS

DELA JOHNSON,

Plaintiff-Appellee,

v

COUNTY OF WAYNE,

Defendant-Appellant,

and

TOWNSHIP OF REDFORD

Defendant.

UNPUBLISHED
December 29, 1998

No. 201770
Wayne Circuit Court
LC No. 96-619601 NO

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant, County of Wayne, appeals by leave granted from the trial court's denial of its motion for summary disposition. We reverse and remand.

Plaintiff alleged that she was injured when she tripped and fell on a "raised sidewalk slab" concealed by snow and ice. The sidewalk ran beside a street in the County of Wayne. According to plaintiff, defendant's liability was premised on the fact that the sidewalk slab was raised by the root system of a tree that was located in a right-of-way owned and controlled by defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) on the ground that plaintiff's claim was barred under MCL 691.1407; MSA 3.966(107). In response, plaintiff argued that defendant could be held liable under the trespass-nuisance exception to governmental immunity. On February 14, 1997, the trial court entered the order denying defendant's motion for summary disposition from which defendant now appeals.[1]

On appeal, defendant claims that it was entitled to summary disposition because plaintiff failed to plead a claim of trespass-nuisance claim in avoidance of governmental immunity. This Court reviews

a trial court's denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Terry v City of Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). To the extent that defendant's argument is framed in terms of the adequacy of plaintiff's pleadings, we will address the issue as being one of the propriety of summary disposition under MCR 2.116(C)(7) rather than under MCR 2.116(C)(10), which tests the factual basis underlying a claim, *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In deciding a motion for summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7), a court must consider all documentary evidence submitted by the parties. All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party in determining whether the defendant is entitled to judgment as a matter of law. To defeat the motion for summary disposition, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Terry*, *supra* at 428.

To come within the limited trespass-nuisance exception to governmental immunity, a plaintiff must show the existence of a trespass-nuisance, which is defined as a "'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.'" *Continental Paper & Supply Co v City of Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996), quoting *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988) (opinion by Brickley, J) (emphasis added).[2] In this case, plaintiff failed to allege that defendant "set in motion" the physical intrusion of the root. According to plaintiff's third amended complaint, defendant took no "action" with respect to the root other than simply permitting its natural growth.[3] Cf. *Pound v Garden City School Dist*, 372 Mich 499, 501; 127 NW2d 390 (1964), quoting *Ferris v Board of Education of Detroit*, 122 Mich 315, 319; 81 NW 98 (1899). Therefore, plaintiff failed to allege sufficient facts to give rise to an exception to governmental immunity, and defendant was entitled to summary disposition pursuant to MCR 2.116(C)(7). *Terry*, *supra* at 428.

Defendant also contends that it was entitled to summary disposition because plaintiff submitted no documentary evidence to counter defendant's affidavits denying control over the tree. However, because discovery was incomplete at the time of defendant's motion, summary disposition on this factual basis would have been premature. See *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1994).

Reversed and remanded. On remand the trial court is instructed to enter an order of summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] After seeking leave to appeal to this Court, the County of Wayne brought a subsequent motion for summary disposition on similar grounds that was also denied.

[2] The definition of trespass-nuisance we rely on in this case was not the only definition of the phrase contained in Justice Brickley's plurality opinion in *Hadfield*, *supra*. The plurality opinion also defined

trespass-nuisance 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.* at 145. This definition has subsequently appeared in published opinions of this Court. See, e.g., *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486-487; 532 NW2d 183 (1995). Nevertheless, the more precise definition employing the "set in motion" language must be viewed as the controlling definition because it has been relied on by subsequent Supreme Court majorities. See *Continental Paper, supra* at 164; *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205, 521 NW2d 499 (1994); *Li v Feldt (After Remand)*, 434 Mich 584, 594; 456 NW2d 55 (1990).

[3] Although not necessary to our resolution of this case, we note that plaintiff did not allege that defendant *planted* the tree from which the offending root grew.