

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, as subrogee  
of Calvin College,

Plaintiff,

vs.

CITY OF GRAND RAPIDS,

Defendant.

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Case No. 13-03873-NZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING CROSS-MOTIONS FOR  
SUMMARY DISPOSITION UNDER MCR 2.116(C)(7) & (10)

Everyone instinctively knows that water finds its lowest point. Unfortunately, on May 11, 2011, two housing units owned by Calvin College became the collection basin for a torrent of water that caused extensive damage to both units. In the wake of that flood, Plaintiff Travelers Property Casualty Company of America (“Travelers”) paid \$375,426.82 to Calvin College and others to cover the loss. Then, on April 29, 2013, Travelers stepped into the shoes – or, more likely, the rain boots – of Calvin College and commenced this lawsuit against the City of Grand Rapids (“Grand Rapids”). In simple terms, Travelers asserts that the flood resulted from the collapse of a sanitary sewer pipe adjacent to Calvin College’s housing units. Travelers acknowledges that Michigan’s Governmental Tort Liability Act (“GTLA”), MCL 691.1401, *et seq*, presents a substantial obstacle to recovery, but Travelers contends that its claim falls within the “sewage disposal system event” exception set forth in the GTLA. Both sides have moved for summary disposition, but the Court concludes that genuine issues of material fact prevent the Court from declaring a winner at this stage of the case.

## I. Factual Background

Plaintiff Travelers has requested summary disposition pursuant to MCR 2.116(C)(10), and Defendant Grand Rapids has responded with its own motion for summary disposition under MCR 2.116(C)(7), citing the GTLA as the sole basis for relief. “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered.” Maiden v Rozwood, 461 Mich 109, 119 (1999). Similarly, in addressing a motion for relief under MCR 2.116(C)(10), “a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” Id. at 120. Here, the parties have provided the Court with a mountain of evidence, so the Court must distill all of that evidence into a workable explanation of the factual background of this dispute.

By all accounts, Calvin College owns and operates two apartment buildings on the north side of Burton Street just east of the East Beltline in the City of Grand Rapids. Near the two apartment buildings sits a “drop manhole” fed by two sewer pipes: a 12-inch pipe coming from the west and an 8-inch pipe coming from the east.<sup>1</sup> On May 11, 2011, a mixture of water and sewage collected on the bottom floor of the two apartment buildings, filling the first floor in each building with several inches of sewage-infused water. Plaintiff Travelers insists that the flood resulted from a rupture and collapse of a sewer pipe leading into the “drop manhole,” so Travelers asserts that Defendant Grand Rapids must bear the costs of the flood-related damage to the Calvin College apartment buildings. In contrast, Grand Rapids contends that the flood was not caused by a sewer-system defect, and in any event Grand Rapids had no knowledge of a defect in the sewer system, so it cannot be assigned financial responsibility under the “sewage disposal system event” exception to the GTLA.

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<sup>1</sup> The “drop manhole” is directly underneath Burton Street.

On April 29, 2013, Plaintiff Travelers filed a complaint against Defendant Grand Rapids for the purpose of obtaining recovery for its expenditures on behalf of its insured, *i.e.*, Calvin College.<sup>2</sup> On June 11, 2013, Travelers filed an amended complaint identifying its total loss as \$375,426.82 and seeking recovery of that entire amount from Grand Rapids. In the fullness of time, both sides moved for summary disposition, so the Court must decide whether either party is entitled to that relief. The Court's analysis depends largely upon the GTLA, which Grand Rapids has expressly invoked to fend off Travelers's claim.

## II. Legal Analysis

Both sides have requested summary disposition on the issue of causation. And, as a threshold matter, Defendant Grand Rapids has moved for summary disposition under MCR 2.116(C)(7) based upon the GTLA, MCL 691.1401, *et seq.*, which generally insulates governmental entities from civil liability. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effects of the facts, the question whether the claim is barred by governmental immunity is an issue of law." Pierce v City of Lansing, 265 Mich App 174, 177 (2005). This standard applicable to motions under MCR 2.116(C)(7) that rely upon the GTLA seems similar to the standard applicable to motions for summary disposition under MCR 2.116(C)(10), which provides for relief when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id.

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<sup>2</sup> Plaintiff Travelers has based its claim upon the "sewage disposal system event" provision set forth in MCL 691.1417. See Bosanic v Motz Dev, Inc, 277 Mich App 277, 283-284 (2007).

Because both sides have devoted most of their submissions to the applicability of the GTLA, the Court shall begin by considering Defendant Grand Rapids's request for governmental immunity. Indeed, sovereign immunity in Michigan is as old as our state itself. "Since Michigan became a state in 1837, Michigan jurisprudence has recognized the preexisting common-law concept of sovereign immunity, which immunizes the 'sovereign' state from all suits to which the state has not consented, including suits for tortious acts by the state." *In re Bradley Estate*, 494 Mich 367, 377 (2013) "This common-law concept of sovereign immunity has since been replaced in Michigan by the GTLA and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability." *Id.* at 377-378. The statute provides "that 'a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.'" *See id.* at 378, quoting MCL 691.1407(1). Grand Rapids contends that it was a "governmental agency" engaged in the exercise or discharge of a "governmental function" at all times relevant to this case, *see State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483 (2006) (discussing "governmental agency" and "governmental function"), so it claims entitlement to GTLA protection for the "sewage disposal system event" even if that event flooded the apartment buildings at Calvin College.<sup>3</sup>

Michigan law deprives a governmental agency such as Defendant Grand Rapids of immunity from tort liability for an "overflow or backup" that constitutes "a sewage disposal system event" if "the governmental agency is an appropriate governmental agency," *see* MCL 600.1417(2), and a host of requirements are met. As our Court of Appeals put it, our Legislature "intended to provide limited

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<sup>3</sup> Under the GTLA, MCL 691.1416(k), a "sewage disposal system event" is defined as "the overflow or backup of a sewage disposal system onto real property." *See also Fingerle v City of Ann Arbor*, 308 Mich App 318, \_\_\_ n9 (2014).

relief to persons who suffer damages as a result of a ‘sewage disposal system event[,]’”<sup>4</sup> Willett v Waterford Charter Twp, 271 Mich App 38, 46 (2006), but the exception allowing a claimant to “seek compensation for the property damage” under MCL 691.1417(3) “imposes *several* requirements for a claimant to avoid governmental immunity for a sewage disposal system event.”<sup>5</sup> Id. at 49. That is, MCL 691.1417(3) comprises five separate elements that the claimant must establish:

- (a) The governmental agency was an appropriate governmental agency.
- (b) The sewage disposal system had a defect.
- (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
- (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
- (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

MCL 691.1417(3). Grand Rapids asserts that Plaintiff Travelers’s claim arising from the flood at the Calvin College housing units founders upon two of these five statutory requirements: (1) Grand Rapids neither knew, nor in the exercise of reasonable diligence should have known, about the defect in the sewer pipe that fed the manhole; and (2) the defect in the pipe was not a substantial proximate cause of the flooding at the Calvin College apartment units. The Court shall address these two issues in turn.

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<sup>4</sup> Our Court of Appeals recently identified the subchapter of the GTLA permitting this type of relief as the Sewage Act, MCL 691.1416-691.1419. See Fingerle v City of Ann Arbor, 308 Mich App 318 (2014). As our Court of Appeals noted, our “Legislature enacted these provisions in 2001 to abrogate the common-law trespass-nuisance doctrine” and replace it with “a ‘more limited legal liability standard’ that would make it more difficult for plaintiffs to prevail against governmental defendants in suits that involved sewage backups.” Fingerle, 308 Mich App at \_\_\_ n9.

<sup>5</sup> The requirements are set forth in two separate subsections of MCL 691.1417. The first five requirements can be found in MCL 691.1417(3); the last two are prescribed by MCL 691.1417(4). Because Defendant Grand Rapids has chosen to base its request for summary disposition exclusively upon the requirements in MCL 691.1417(3), the Court need not discuss MCL 691.1417(4).

A. Prior Knowledge of a “Defect”

Although Defendant Grand Rapids appears to concede the existence of a defect in the sewer pipe that fed the “drop manhole” and eventually collapsed in May 2011,<sup>6</sup> it nonetheless insists that it neither “knew, [n]or in the exercise of reasonable diligence should have known, about the defect” prior to May 11, 2011, when the flood occurred at the Calvin College apartment buildings. See MCL 691.1417(3)(c). Plaintiff Travelers, however, has provided evidence supported by expert testimony indicating that Grand Rapids knew or should have known about the damaged condition of the sewer line long before its collapse. Thus, Travelers insists that the Court cannot grant summary disposition to Grand Rapids based upon the city’s lack of knowledge of the defect in the sewer pipe.

On September 28, 2010, Defendant Grand Rapids conducted a video inspection of the “drop manhole” and the sewer pipes leading into it where the rupture and collapse took place in May 2011. Plaintiff Travelers had an expert, Stephan Bichler, review the videotape of that inspection and offer opinions about the condition of the pipes eight months before the collapse. See Daubert Hearing Tr at 28. According to Bichler, “that pipe was clearly a failed pipe on the verge of catastrophic failure” in September of 2010. Id. at 29. Bichler explained that, “[j]ust inside the pipe, past the drop, there was a radial crack . . . [t]hat was obviously a very wide crack.” Id. Bichler also noted other cracks and “aggregate from outside of the pipe, maybe even possibly a piece of the pipe itself hanging down inside the pipe.” Id. at 29-30. In sum, “the whole basic top of that pipe was cracked, shifted, and ready to drop . . . on the 28th of September, 2010.” Id. at 30.

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<sup>6</sup> A “[d]efect’ means a construction, design, maintenance, operation, or repair defect[,]” see MCL 691.1416(e), which our Court of Appeals has called “a fault or shortcoming; imperfection.” See Willett, 271 Mich App at 51. Although Grand Rapids seeks to narrowly define the “defect” as the state of collapse on May 11, 2011, the Court concludes that the “defect” resulting from a lack of maintenance refers to the failing state of the 8-inch sewer pipe that fed into the “drop manhole.”

On April 27, 2011, just two weeks before the collapse and the flooding at the Calvin College apartment buildings, a sewage discharge occurred, “caused by intense rainfall and introduction of stormwater/groundwater into the sanitary sewer system.” See Brief in Support of Plaintiff’s Motion for Summary Disposition, Exhibit 24 (report of Kathie Kuzawa for Grand Rapids to the Michigan Department of Environmental Quality at 2). Then, when flooding took place at the Calvin College apartments on May 11, 2011, Defendant Grand Rapids filed a report with the Michigan Department of Environmental Quality stating that that “[s]anitary sewer break” was “a contributing and/or root cause of [the] April 27, 2011 SSO,” id., Exhibit 9 (report of Kathie Kuzawa at 1-2), referring to the sanitary sewer overflow that had occurred just two weeks earlier. Indeed, Grand Rapids explained that “[w]e were in the process of televised [sic] all lines through other side of storm pond to the East Beltline[,]” and that work was “now completed[.]” Id. In other words, Grand Rapids saw fit to let state regulators know that it finally had taken steps to address the recurring problems on the line that led to two discharges in the span of two weeks.

As Defendant Grand Rapids has conceded, “[t]he sewer back-up onto the property of [Calvin College] was caused by a collapse in the 8-inch main on May 11, 2011 . . . .” See Defendant’s Brief in Response to Plaintiff’s Supplemental Brief in Opposition to Defendant’s Motion for Summary Disposition Under MCR 2.116(C)(7) at 2. Because Plaintiff Travelers has presented evidence that Grand Rapids knew or should have known about substantial flaws in that pipe as early as September 2010 and that Grand Rapids had to conduct another inspection because of another sewage incident two weeks before the flood on May 11, 2011, the record gives rise to genuine issues of material fact concerning Grand Rapids’s knowledge of the defect, so the Court must deny Grand Rapids’s request for summary disposition predicated upon its lack of knowledge of the defect.

## B. Proximate Cause

The GTLA not only requires proof that the “defect was a substantial proximate cause of the event and the property damage or physical injury[,]” see MCL 691.1417(3), but also defines the term “substantial proximate cause” as “a proximate cause that was 50% or more of the cause of the event and the property damage . . . .” See MCL 691.1416(l). In this case, Plaintiff Travelers argues that the flooding on May 11, 2011, resulted from the rupture and collapse of the sewer line. Defendant Grand Rapids counters that the flooding was simply the byproduct of heavy rain, for which it cannot be held legally responsible.<sup>7</sup> Each side has presented a wealth of evidence to support its theory, so the Court concludes that a genuine issue of material fact prevents the resolution of this case through an award of summary disposition. See Pierce, 265 Mich App at 176-177.

Eyewitness descriptions of the flooding at the Calvin College apartments furnish substantial support for Plaintiff Travelers’s theory of causation. Phil Beezhold – the physical plant director for Calvin College – arrived at the apartment buildings “at around 8:00 pm” on May 11, 2011, and “was confronted with an overwhelming stench of sewage” as well as “sewage measuring five or six inches deep” that “was readily observed throughout the entirety of each of the first floors of the buildings.” See Brief in Support of Plaintiff’s Motion for Summary Disposition, Exhibit 2 (Affidavit of Phil Beezhold, ¶4). Significantly, Beezhold saw “sewage being discharged from shower drains and floor drains” in the apartment buildings.<sup>8</sup> Id. (Affidavit of Phil Beezhold, ¶ 5). When Dennis Anderson

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<sup>7</sup> As our Court of Appeals recently explained, “the Sewage Act literally does not address or apply to the consequences of severe weather such as rain-storms. Historically, this has been an issue for private property owners and their insurers, not an area of liability for cities and their taxpaying residents.” Fingerle v City of Ann Arbor, 308 Mich App 318, \_\_\_ (2014).

<sup>8</sup> According to Phil Beezhold, “it was not raining and there was no evidence of any rainwater coming into the building in any manner. See Affidavit of Phil Beezhold, ¶ 5.

of Anderson Brothers Steamatic arrived at the Calvin College apartment buildings on May 11, 2011, he also observed sewage “flowing out lower level sliding glass doors in both units” and noticed that “more sewage was coming up through the drains.” See Plaintiff’s Supplemental Brief in Support of Its Motion for Summary Disposition, Exhibit A. Significantly, as Anderson put it: “The City of Grand Rapids finally found the sewer line had collapsed & every time the pump came on the move [sic] sewer water came into the units.” Id. This observation provides direct evidence that the defect at issue in this action, *i.e.*, the deteriorating 8-inch sewer pipe, caused the sewage flood in the Calvin College apartment buildings.

On the other hand, Defendant Grand Rapids has presented significant evidence to support its assertion that the sewer-line defect did not cause the flood at the Calvin College apartments. For example, photographs taken at the scene of the flood show that the water was clear, bolstering Grand Rapids’s claim that the apartment buildings were flooded with rainwater, as opposed to sewage. See Defendant’s Brief in Support of its Motion for Summary Disposition, Exhibit 1 (pictures appended to deposition transcript). Indeed, testimony and weather reports established that the area received almost half an inch of rain on May 11, 2011. See id., Exhibit 8 (Kathie Kuzawa Deposition at 62).<sup>9</sup> In addition, Michael Kooistra – a utility field operations supervisor for Grand Rapids who went to the scene of the sewer collapse on May 11, 2011 – “observed sanitary sewage coming out of several manholes in the area” and on the roadway along Burton Street, but he could not “say for a fact” that the sanitary sewage entered any of the Calvin College apartments. See Brief in Support of Plaintiff’s Motion for Summary Disposition, Exhibit 14 (Michael Kooistra Deposition at 12, 19-20). In sum,

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<sup>9</sup> Defendant Grand Rapids has attached only portions of the deposition of Kathie Kuzawa to its submissions, but Plaintiff Travelers has provided the full transcript of that deposition as Exhibit 10 to the brief supporting its motion for summary disposition.

the record thus far does not definitively establish whether the flood at the Calvin College apartments constituted rainwater, which would not subject Grand Rapids to potential liability, see Fingerle v City of Ann Arbor, 308 Mich App 318, \_\_\_ (2014), or sewage, which could very well subject Grand Rapids to liability, notwithstanding the broad protection of the GTLA. Instead, a genuine issue of material fact remains for the Court to decide at trial. Thus, the Court must deny both sides' motions for summary disposition on the issue of "substantial proximate cause." See MCL 691.1417(3)(e).

### III. Conclusion

For the reasons set forth in this opinion, the Court concludes that neither side is entitled to summary disposition on Plaintiff Travelers's claim pursuant to the "sewage disposal system event" exception to the broad immunity afforded by the GTLA. There remain genuine issues of material fact with respect to Defendant Grand Rapids's knowledge of the defect and causation, so the Court must leave the dispute for resolution at trial.

IT IS SO ORDERED.

Dated: June 1, 2015



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge