

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.

Case No. 13-03873-NZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER SCHEDULING EVIDENTIARY
HEARING ON GOVERNMENTAL-IMMUNITY ISSUES

On May 11, 2011, two housing units at Calvin College were flooded with sewage. Plaintiff Travelers Property Casualty Company of America (“Travelers”) paid in excess of \$400,000 for the loss, then filed this case on April 29, 2013. In response, Defendant City of Grand Rapids (“Grand Rapids”) moved for summary disposition pursuant to MCR 2.116(C)(7), requesting a determination as to immunity under the Governmental Tort Liability Act (“GTLA”), MCL 691.1401, *et seq.* The Court denied the motion, so Grand Rapids appealed on an interlocutory basis. Our Court of Appeals affirmed the Court’s decision in an unpublished opinion and remanded for further proceedings. See Travelers Property Casualty Company of America v City of Grand Rapids, No 327787 (Mich App Sept 13, 2016). Now, on remand, Grand Rapids has asked for an evidentiary hearing on the factual issues underlying the immunity dispute. If the Court rules against Grand Rapids, the city may once again seek interlocutory review prior to trial. Although this process surely constitutes the antithesis of judicial economy, the Court must indulge the city in this time-consuming spin cycle.

In a written opinion issued on June 1, 2015, the Court explained why Plaintiff Travelers may well be entitled to recover its losses from Defendant Grand Rapids by demonstrating that the losses resulted from a “[s]ewage disposal system event,” as defined by the GTLA. See MCL 691.1416(k). The Court acknowledged, however, that genuine issues of material fact precluded a final ruling on the city’s immunity request under the GTLA. Our Court of Appeals affirmed, noting that “questions of fact remain regarding (1) whether the City knew, or with reasonable diligence should have known, about the defect in the sewer line and (2) whether the defect was a substantial proximate cause of the sewer event and resulting property damage[.]” See Travelers, No 327787, slip op at 1. But when the case returned on remand from our Court of Appeals and the Court expressed its intention to set the matter for a bench trial that would include the factual issues underlying the request for immunity under the GTLA, Grand Rapids demanded a separate evidentiary hearing on the remaining immunity issues prior to trial.

In a bit of Orwellian sophistry, Defendant Grand Rapids begins its argument for a pretrial evidentiary hearing by citing the principle that “a ‘central purpose’ of governmental immunity is ‘to prevent a drain on the state’s financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.’” See Costa v Community Emergency Medical Services, Inc, 475 Mich 403, 410 (2006). In the context of this case, where Grand Rapids has already taken one interlocutory appeal and is threatening a second one despite the Court’s stated willingness to address and resolve every remaining issue at a combined hearing and bench trial prior to the next round of appeals, the city’s position calls to mind war correspondent Peter Arnett’s quote: “It became necessary to destroy the town [of B n Tre] to save it.” Surely the more logical path for Grand Rapids would have involved a request for an evidentiary hearing before its first interlocutory

appeal, but neither logic nor expense nor judicial economy seems to be the city's motivating concern. Consequently, the Court must take at face value the city's demand for a pretrial evidentiary hearing on the remaining factual issues concerning immunity.

Our Court of Appeals has ruled that, "where there are questions of fact necessary to resolve the ultimate issue whether governmental immunity applies[.]" the Court must "hold an evidentiary hearing for the purpose of obtaining such factual development as is necessary to determine whether" summary disposition should be granted under MCR 2.116(C)(7). Dextrom v Wexford County, 287 Mich App 406, 431-432 (2010). Our Court of Appeals has employed that very reasoning (albeit only in unpublished opinions thus far) to mandate evidentiary hearings in cases where local governments have demanded immunity under the GTLA and plaintiffs have invoked the "sewage disposal system event" exception in an effort to avoid GTLA immunity. E.g., Kelley v City of Manistee, No 314994, slip op at 6 (Mich App May 27, 2014) (unpublished decision); Gallagher v City of East Lansing, No 311086, slip op at 2 (Mich App Feb 25, 2014) (unpublished decision). Indeed, our Court of Appeals has based that approach upon language in Dextrom that, "to the extent the trial court envisioned that such further inquiry and clarification would be arrived at during a *trial*, with either the court sitting as a finder of fact or a jury serving the same function, we disagree." See, e.g., Kelley, No 314994, slip op at 5, quoting Dextrom, 287 Mich App at 430. Therefore, the Court must follow the lead of Dextrom in acknowledging that "[a] *trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity." See Dextrom, 287 Mich App at 430. Instead, the factual issues underlying application of the "sewage disposal system event" exception defined and prescribed in the GTLA must be the subject of an evidentiary hearing prior to a bench trial in this case.

Plaintiff Travelers makes an enticing argument that Defendant Grand Rapids effectively gave up its right to an evidentiary hearing on the factual issues underlying its summary-disposition motion by pursuing interlocutory appellate review before asking for such a hearing to fill out the record on the subject of GTLA immunity. The argument advanced by Travelers, however, depends upon the finding of forfeiture, as opposed to waiver, see People v Carter, 462 Mich 206, 215 (2000), which ordinarily is the province of the appellate courts, rather than the trial courts. Moreover, Travelers did not make the forfeiture argument on the city's interlocutory appeal, and Grand Rapids has since formally and emphatically asserted its right to a pretrial evidentiary hearing, so the Court would be hard-pressed to find that forfeiture has occurred at this stage of the proceedings. Consequently, the Court shall schedule an evidentiary hearing to take up the factual issues underlying the city's motion for summary disposition pursuant to MCR 2.116(C)(7).

IT IS SO ORDERED.

Dated: November 14, 2016



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