

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-015486

03/03/2006

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
D. Glab
Deputy

FILED: 03/10/2006

MARTHA B PONCE, et al.

BARRY G REED

v.

PIMA COUNTY, et al.

STEVEN B WEATHERSPOON

BARRY L BELLOVIN
RICHARD A BROWN
MARK A FULLER
KEVIN E O'MALLEY

MINUTE ENTRY

The Court took these matters under advisement after oral argument on February 13, 2006. The Court has considered the pleadings and the argument of counsel.

This case arose as a result of a sewer breach and the resulting repairs.

Motion for Partial Summary Judgment No. 1 (Economic Loss Rule)

Defendants propose to limit class member claims to those who can prove physical damage to their property. Those persons who claim personal injury are pursuing a separate lawsuit.

Defendants assert that because there was no physical harm to the property of many plaintiffs, those plaintiffs have suffered only economic loss and are not entitled to any recovery in tort as a matter of law.

Judge Schwartz certified four classes in this lawsuit: the remediation class, the evacuation class, the property damage class and the economic damage class.

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The economic loss rule “bars recovery of economic damages in tort because such damages are not cognizable in tort absent actual injury.” *Carstens v. City of Phoenix*, 206 Ariz. 123, 127, 75 P.3d 1081, 1085.

The usual remedy in the case of a temporary nuisance is diminished rental value for the time the nuisance was in existence. Personal discomfort, illness or mental anguish are also recoverable in nuisance. *Dobbs, Law of Remedies (Second Edition)*, §5.6(2). In an Arizona cases in which sewage backed up into homes, the court awarded the lesser of repair costs or diminution of value to property. *Graber v. City of Peoria*, 156 Ariz. 553, 753 P.2d 1209 (App. 1998).

The economic loss rule does not operate to take away traditional tort recovery and traditional tort damages if the plaintiff can prove the tort and resultant damages. Rather, it serves to preclude recovery in tort for damages that arise out of contract.

It is ordered denying Motion for Partial Summary Judgment No. 1 (Economic Loss Rule)

Motion for Partial Summary Judgment No. 2 (Nuisance)

Defendants seek summary judgment on plaintiffs’ nuisance claim. Plaintiffs have asserted claims for both private and public nuisance for the odors and raw sewage emanating from the sinkhole and from the noise, vibration, light, traffic and access problems and inconvenience resulting from the repair and rehabilitation of the sewer pipe.

A public nuisance affects rights of citizens as part of the public. For a person to recover damages for a public nuisance, he must have suffered damages distinct from those suffered by all members of the public affected by the public nuisance.

Defendants cite *Amory Park v. Episcopal Community Services*, 148 Ariz. 1, 712 P.2d 914 for the proposition that intent is required for both a public and private nuisance in Arizona. However, the opinion in that case is about public nuisance. “[P]laintiff’s claim must stand or fall on the public nuisance theory alone.” 148 Ariz.1, 5, 712 P.2d 914, 918.

Intent is a necessary element of a public nuisance. It is not a necessary element of a private nuisance.

An actor may be liable for private nuisance if his conduct is “unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.” *Restatement (Second) of Torts* § 822.

It is clear that neither the city nor county intended the sinkholes occur, that they did not intend that the discharge of raw sewage would occur, and that they did not intend to subject

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plaintiffs to exposure to sewer roaches, flies and mosquitoes. There is no evidence in the record from which a reasonable jury could conclude that the sinkhole was a substantial certainty and that defendants should be charged with this knowledge. Because there was no intent, there is no cause of action for public nuisance for the occurrence of the sinkhole and its resultant raw sewage and odors or for private recovery for a public nuisance.

However, there is evidence in the record from which a reasonable jury could find negligence. There is a cause of action for private nuisance.

The repair and rehabilitation of the sewer and road was clearly an intentional act on the part of the city and county. The repairs and rehabilitation were reasonable under the circumstances. They were completed as promptly as possible and were fully complete within two months of the occurrences of the sinkholes.

To constitute a public nuisance, "the complained-of interference must be substantial, intentional and unreasonable under the circumstances." 148 Ariz.1, 7, 712 P.2d 914,

To recover for a private nuisance for intentional conduct, that conduct must be unreasonable. *Restatement (Second) Torts*, §822 (a).

No reasonable jury could conclude that the repairs were unreasonable under the circumstances.

In order for plaintiffs to recover for private nuisance the harm must be significant. "In the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action." *Restatement (Second) of Torts* § 821F. comment c.

A reasonable jury could find that the sewer break caused such an interference with plaintiffs' use and enjoyment of their land.

The Court grants summary judgment in favor of defendants on plaintiffs' public nuisance claims and plaintiffs' claims in nuisance resulting from repair and remediation efforts. The Court denies summary judgment on plaintiffs' private nuisance claims arising from the sewer break and resultant discharge of raw sewage.

Motion for Summary Judgment No. 3 (Trespass)

Defendants Pima County and City of Tucson moved for summary judgment because there was no physical entry on plaintiffs' properties and no intrusion causing actual and substantial damage.

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Plaintiffs have provided affidavits that document the intrusion of raw sewage onto the property of several affected persons and resultant damage.

To the extent that raw sewage entered into the property of class members, they have a valid claim for trespass.

Plaintiffs also claim trespass for intrusion of odors from raw sewage and for intrusion of light, diesel fumes, noise and vibration from efforts to remedy and repair the sewer break. With regard to nontangible intrusions on the property of plaintiffs, it is ordered granting summary judgment in favor of defendants Pima County and City of Tucson on plaintiffs trespass claims.

Defendant Pima County's Motion for Summary Judgment (Immunity)

Defendant Pima County moved for summary judgment on the grounds that it is immune from liability under A.R.S. §12-820.01 for the sewer breach and resulting damages because it engaged in a thoughtful deliberative process in its determination to rehabilitate the sewer pipe.

Defendants contend that to the extent they did so they are entitled to immunity except to the extent that they did not perform ordinary repair or upkeep as defined in A.R.S. §12-820 (3).

The Court finds that as a matter of law, defendant Pima County is immune from liability for actions taken over a several year period to determine the best way to rehabilitate the NOW and to secure funding to do so.

The Court finds that there is a jury question as to whether Pima County properly performed ordinary repair and upkeep to prevent a breach of the sewer pipe and resultant damages in the interim until the planned rehabilitation could take place.

IT IS ORDERED denying Pima County's Motion for Summary Judgment (Immunity).

Conclusion

IT IS ORDERED denying Motion for Summary Judgment No. 1 of Pima County and City of Tucson.

IT IS ORDERED granting in part and denying in part Motion for Summary Judgment No. 2 of Pima County and City of Tucson.

IT IS ORDERED granting Motion for Summary Judgment No. 3 of Pima County and City of Tucson as to vibration, noise, light, diesel fumes and other nontangible intrusions on the property of plaintiffs.

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IT IS ORDERED granting Motion for Summary Judgment (Immunity) in favor of Pima County for actions taken over a several year period to determine the best way to rehabilitate the NWO and to secure the funding to do so.

IT IS ORDERED denying Motion for Summary Judgment (Immunity) as to issues of whether Pima County breached a duty to perform ordinary repair and maintenance to prevent a breach of the sewer pipe and resultant damages until the planned rehabilitation could take place.