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STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER SMITH, Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED October 28, 2026 9:42 AM
v	No. 376631 Kalamazoo Circuit Court
CHARLES M. FOSTER and DEBORAH E. FOSTER, also known as DEBRA E. FOSTER, Defendants/Counterplaintiffs-Appellees.	LC No. 2024-000220-CH

Before: SWARTZLE, P.J., and ACKERMAN and TREBILCOCK, JJ.

PER CURIAM.

Plaintiff/counterdefendant, Christopher Smith, alleges that his neighbors—defendants/counterplaintiffs, Charles and Deborah Foster—increased the natural flow of water over his property. That increase, he contends, caused flooding for which the Fosters are liable. Though both parties raised numerous claims below, there is only one issue on appeal: Smith's challenge to the trial court's summary dismissal of his water-based trespass claim. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties own neighboring lakefront properties on Indian Lake. This dispute concerns flooding to Smith's carriage house, which sits at the lowest point of his driveway and near the parties' shared boundary line. Each property slopes toward that boundary line, such that run-off water flows between them and then, ideally, down to the lake.

In 2022, the Fosters replaced a walkway on their property that runs near, and parallel to, Smith's carriage house. The original walkway sat at a higher elevation than Smith's adjacent property, and the new walkway is even higher and wider. Smith believed these changes caused more water to flow onto his property, which in turn flooded his carriage house.

So, that October, he placed sandbags along his property line in an attempt to remediate the issue. While those measures prevented any flow of water onto Smith's property from the Fosters' walkway, it also caused surface runoff from Smith's property to pool near the carriage house. The

Fosters subsequently made their own efforts to prevent any water from traveling onto Smith's property, including by installing an underground drainpipe.

Smith eventually sued the Fosters for trespass, in part alleging that their new walkway increased the natural flow of water onto his property and caused his carriage house to flood.[1] The Fosters moved for summary disposition, which the trial court granted under MCR 2.116(C)(10). Defendant now appeals that decision as on leave granted.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Gueye v State Farm Mut Auto Ins Co*, 343 Mich App 473, 480; 997 NW2d 307 (2022). Summary disposition is appropriate under MCR 2.116(C)(10) "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Albitus v Greektown Casino, LLC*, 339 Mich App 557, 562; 984 NW2d 511 (2021) (quotation marks and citation omitted).

The party seeking summary disposition under MCR 2.116(C)(10) bears the initial burden of either (1) "submitting affirmative evidence negating an essential element of the nonmoving party's claim," or (2) "demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of their claim." *Id*. at 561-562. If met, the nonmoving party "must then establish by evidentiary materials that a genuine issue of disputed fact exists." *Id*. at 562. While circumstantial evidence can suffice to demonstrate a genuine issue of material fact, "mere conjecture or speculation is insufficient." *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1, 7; 972 NW2d 860 (2021) (quotation marks and citation omitted).

III. ANALYSIS

In his sole argument on appeal, Smith contends the trial court erred by dismissing his trespass claim because a genuine issue of material fact exists regarding whether the Fosters' new walkway increased the flow of water onto his property and resulted in flooding. We disagree.

"[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land[.]" *Wolfenbarger v Wright*, 336 Mich App 1, 15; 969 NW2d 518 (2021) (quotation marks and citation omitted; first alteration in original). "Recovery for trespass is available only upon

[1] Though Smith alleged a broader basis for this trespass claim in his operative complaint, he expressly limits his argument on appeal to damage purportedly suffered (1) as a result of the walkway replacement and (2) between Spring 2022 and his October 2022 installation of the sandbags. Smith's operative complaint also alleged a separate trespass claim (related to the Fosters' contractors and guests), as well as claims of private nuisance and nuisance per se. He does not challenge the trial court's dismissal of those claims. The Fosters' counterclaims against Smith, which the trial court dismissed without prejudice, are likewise not at issue in this appeal.

proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Id*. (quotation marks and citation omitted). Though the "unauthorized act of causing excess waters to flow onto another person's property constitutes a trespass," the increase in water must be material. *Wiggins v City of Burton*, 291 Mich App 532, 566; 805 NW2d 517 (2011). The intrusion—i.e., the direction of water onto the plaintiff's property—must also be intentional. *Wolfenbarger*, 336 Mich App at 15, 17. Indeed, "direct or immediate" intrusions for purposes of actionable trespass claims are those "accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 723; 808 NW2d 277 (2010) (quotation marks and citation omitted).

The Fosters met their initial burden of demonstrating that Smith's evidence fell short of establishing an essential element of his claim: that the new walkway materially increased the amount of water flowing onto his property. That shifted the burden to Smith to present evidence establishing a genuine fact issue. *Albitus*, 339 Mich App at 562. We hold that he failed to do so.

In response to the Fosters' motion for summary disposition, Smith directed the trial court to: (1) a report authored by his hired expert, and (2) his own testimony that he never experienced flooding until after the Fosters made various landscaping changes (including the walkway alterations). But such evidence, viewed in a light most favorable to Smith, stops short of demonstrating a fact issue regarding whether the changes to the Fosters' walkway *materially* increased the flow of water onto his property.

To be sure, Smith's expert opined that the changes to the Fosters' walkway "resulted in additional stormwater volume and velocity onto the Smith property." But the expert did not estimate the actual amount of the increase. Smith's own testimony regarding the timing of the flooding at best creates a speculative connection between the walkway improvements and the alleged increase in water runoff, which is insufficient to establish a genuine issue of material fact. *Ahmed*, 337 Mich App at 7. And he has not identified any evidence, circumstantial or otherwise, of the baseline amount of water that ran off the Fosters' property onto his own before the walkway improvements. Absent such evidence, he cannot demonstrate a fact issue as to whether the alleged increase in water runoff was material.

Even if Smith's proffered evidence did suffice to create a genuine issue of material fact as to the increase in water flow, the Fosters are nonetheless entitled to summary disposition for an independent reason: Smith has not presented any evidence they knew or should have known that the changes to their walkway would impact the flow of water onto Smith's property.[2] As Smith concedes, he has no evidence that the Fosters directed the contractor who installed their new walkway to alter the flow of water onto Smith's property or to otherwise direct water onto it. He

[2] The parties each raise scienter-related arguments on appeal, but did not do so below. We nonetheless choose to address this argument because scienter is an essential element of Smith's trespass claim. See *Boylan*, 289 Mich App at 723 (recovery for trespass relevantly requires proof of an "unauthorized direct or immediate intrusion," which is an intrusion "accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land") (quotation marks and citations omitted).

instead relies on his own testimony describing (1) complaints he made to the Fosters regarding unrelated property conditions predating the installation of the new walkway, and (2) his informing the Fosters, after the completion of the walkway, that it increased the water flow onto his property. But this evidence, viewed in a light most favorable to Smith, reveals nothing about whether the Fosters knew or should have known, at the time of their walkway replacement, that the changes would increase the amount of runoff water onto Smith's property. Considering Smith's failure to demonstrate a genuine issue of material fact as to this essential element of his trespass claim, the trial court properly granted summary disposition under MCR 2.116(C)(10).

IV. CONCLUSION

For these reasons, we affirm the trial court's judgment.

/s/ Brock A. Swartzle
/s/ Matthew S. Ackerman
/s/ Christopher M. Trebilcock