2015 IL App (1st) 142285-U

No. 1-14-2285

Fifth Division
December 18, 2015



IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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| DENNIS TZAKIS, JULIA CABRALES, ZENON GIL, ZAIA GILIANA, CATHY PONCE, and JUAN SOLIS, | ) | |
| Plaintiffs-Appellants, | ) | |
| v. | ) | Appeal from the Circuit Court of Cook County. |
| ADVOCATE HEALTH & HOSPITALS CORPORATION, | ) | No. 09 CH 6159 |
| Defendant-Appellee, | ) | The Honorable Sophia H. Hall, Judge Presiding. |
| (Berger Excavating Contractors, Inc.; Cook County; Gewalt Hamilton Associates, Inc.; Village of Glenview; Maine Township; Metropolitan Water Reclamation District of Greater Chicago; and City of Park Ridge; Defendants). | ) | |

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court's dismissal of plaintiffs' intentional nuisance claim is affirmed, where plaintiffs forfeited argument on that issue by failing to present an argument in their opening appellate brief. Trial court's dismissal of plaintiffs' intentional trespass claim as factually insufficient is reversed, where plaintiffs alleged sufficient facts to support their claim that

defendant acted with knowledge that its actions would cause storm water to invade plaintiffs' homes to a substantial certainty.

¶ 2 This is a class action of homeowners whose homes are located in Maine Township, claiming damage by storm water flooding. Defendant, Advocate Health and Hospitals Corporation, owns and operates a hospital contiguous to plaintiffs' homes. Plaintiffs filed suit against defendant claiming that they wrongfully caused the floodwater damage by draining the storm water from defendant's hospital property onto the land where plaintiffs' homes are located.

¶ 3 Plaintiffs appeal an order granting defendant's motion to dismiss two counts of plaintiffs' complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). The trial court dismissed count X, intentional nuisance, and count XI, intentional trespass, finding that plaintiffs failed to allege specific facts showing that defendant acted intentionally. Plaintiffs seek to reverse the trial court's dismissal, arguing that counts X and XI contained sufficient specific factual allegations to state claims for intentional nuisance and intentional trespass. For the reasons that follow, we affirm Count X, and reverse Count XI.

¶ 4 BACKGROUND

¶ 5 I. Complaint

¶ 6 On February 12, 2009, plaintiffs filed a class action against defendant, seeking damages for floodwater damage to plaintiffs' homes that occurred during a September 13, 2008, rain storm. Plaintiffs allege that defendant caused the damage to plaintiffs' homes by faultily designing the hospital's storm water drainage system in such a way that the water discharged into plaintiffs' properties and caused flooding.

¶ 7 The lawsuit names eight additional defendants that are not parties to this appeal, but are mentioned throughout the complaint: Berger Excavating Contractors, Inc.; Cook County; Gewalt Hamilton Associates, Inc.; Village of Glenview; Maine Township; Metropolitan Water Reclamation District of Greater Chicago; and City of Park Ridge.

¶ 8 On January 20, 2012, plaintiffs filed their "amended fifth amended complaint" (complaint), which is the complaint at issue on appeal. The complaint contains 13 counts against defendant, but only counts X and XI, for intentional nuisance and intentional trespass, are at issue in this appeal.

¶ 9 A. Allegations Common to All Counts

¶ 10 In the statement of facts common to all counts in the complaint, plaintiffs allege that defendant acquired the hospital property some time prior to 1976. Plaintiffs allege that between 1976 and the September 13, 2008, storm that resulted in damage to their property, defendant modified the hospital's "natural drainage patterns" a number of times, with knowledge that the modified drainage routes posed a flood risk to plaintiffs' homes.

¶ 11 First, plaintiffs allege that in 1976, defendant submitted a development plan to the City of Park Ridge that proposed modifications to their property's drainage system. Plaintiffs allege that the City approved defendant's plan, which they subsequently implemented.

¶ 12 Plaintiffs next allege that in October 1976, the Illinois Department of Transportation issued a report stating that "a large portion of the subdivision set out in [defendant's development plan]," including plaintiffs' neighborhood, "was and is subject to flood risks." This report was recorded by the Cook County Recorder of Deeds. Thus, plaintiffs allege that "[d]efendant was on constructive notice" that defendant's modifications to the drainage system "posed substantial flood risks" to plaintiffs' homes and property.

¶ 13 Plaintiffs further allege that in 1987, plaintiffs' neighborhood sustained catastrophic flooding, in response to which the municipalities of Park Ridge, Maine Township, and Glenview, "along with other entities,"[1] hired Harza Engineering Services (Harza) to investigate the flooding. Plaintiffs allege that in 1990 Harza issued a report that identified design and maintenance defects in defendant's drainage system, including the portions adjacent to plaintiffs' properties. The report indicated that these defects impaired the system's drainage capacity to a level "substantially below any reasonably safe standard." Plaintiffs allege that Hanza's report placed defendants Park Ridge, Maine Township, and Glenview and "possibly other [defendants]" on actual or constructive knowledge of the flood risk to plaintiffs' homes.

¶ 14 Plaintiffs allege that some time after 1987 but before 2002, defendant hired Gewalt Hamilton Associates, Inc. (Gewalt), an engineering firm, to draft and implement a development plan for the hospital property that included modifications to their drainage system and topography that altered the property's "natural drainage areas."

¶ 15 Plaintiffs allege that in August of 2002, a rainstorm caused storm water to accumulate within the hospital's drainage system. Plaintiffs allege that an "undersized" discharge component caused water to build up and "catastrophically overflow" the drainage system, again flooding plaintiffs' homes.

¶ 16 Plaintiffs allege that in 2002 or 2003, the Illinois Department of Natural Resources conducted a study in response to the 2002 flooding in conjunction with local municipal authorities, including other defendants in plaintiffs' lawsuit: the City of Park Ridge, Maine Township, and the Village of Glenview. The study found "numerous bottlenecks and

[1] It is not clear from the complaint the "other entities" to which plaintiffs are referring.

obstructions to flow as the causes of the invasive flooding." The study also detailed potential remedies, including specific improvements to defendant's drainage system.

¶ 17 Plaintiffs allege that after 2002 but before the September 13, 2008, invasive flood, defendant and Gewalt developed plans to modify the hospital property's drainage system, including components identified as problematic in the 2002 study. However, plaintiffs allege that based on information and belief, defendant's plan did not include modifications to three undersized components of the drainage system, despite defendant's knowledge of the flood risk these components posed to plaintiffs.

¶ 18 Plaintiffs allege that subsequently, the September 13, 2008, storm water overwhelmed the hospital's drainage system and caused the flooding in plaintiffs' homes and property.

¶ 19 B. Count X – Intentional Nuisance

¶ 20 Count X of plaintiffs' complaint is for intentional nuisance, and alleges that defendant "owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures" on the hospital property, from which "the nuisance of excess accumulated [storm water]" invaded plaintiffs' persons, homes, and property on September 13, 2008.

¶ 21 Plaintiffs allege that defendant "failed to reasonably design, engineer, maintain, repair, and/or operate" components of the drainage system on defendant's property. Accordingly, defendant "intentionally caused excess accumulated [storm water]" from defendant's property to interfere with plaintiffs' persons, homes, and properties. Plaintiffs allege that defendant's conduct caused damage to plaintiffs' "persons, homes, properties, and other legally-protected economic and non-economic interests."

¶ 22 Plaintiffs allege that "[g]iven [defendant's] actual or constructive knowledge of the [earlier flooding and flood-related studies detailed in the allegations common to all counts], by causing [storm water] accumulated and controlled by [defendant] to physically invade [plaintiffs'] persons, homes, and properties ***, [defendant] recklessly, willfully, wantonly and with a conscious disregard to the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated [storm water]" and "substantially and unreasonably interfered" with plaintiffs' "exclusive private use of their homes and properties."

¶ 23 C. Count XI – Intentional Trespass

¶ 24 Count XI is for intentional trespass, and alleges that defendant "knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall" from defendant's drainage system.

¶ 25 Plaintiffs allege that but for defendant's intentional decisions, including (a) failing to pump down the system's primary basin structures before the storm; (b) failing to erect temporary flood protection barriers on its property or property under its control; and (c) failing to redesign the primary basin structures after actual or constructive knowledge of the highly-foreseeable flood risk to plaintiffs, defendant "intentionally decided not to reasonably manage the excess [storm water] on September 13, 2008, proximately causing the catastrophic invasive flooding" sustained by plaintiffs.

¶ 26 Plaintiffs allege that defendant had "exclusive possession and control over the trespassing instrumentality of the excess [storm water]" from defendant's property.

¶ 27 Plaintiffs allege that plaintiffs were entitled to the exclusive enjoyment of their homes and property, "including enjoyment exclusive of any invasive flooding" caused by defendant.

¶ 28 Plaintiffs allege that "[b]ased upon [the earlier flooding and flood-related studies detailed in the allegations common to all counts], Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions," including defendant's failure to properly redevelop its drainage system after the 2002 flooding, would cause invasive flooding to plaintiffs' homes during a rainfall such as the September 13, 2008, storm.

¶ 29 Plaintiffs allege defendant "intentionally omitted to properly plan and/or operate the Basins through its failure to redesign and construct, which intentional acts and omissions proximately caused the [storm water] to damage Plaintiffs."

¶ 30 Plaintiffs allege that "[w]ith a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, Defendant permitted through its designs [storm water] to accumulate in the Basins then escape onto Plaintiffs' land."

¶ 31 Plaintiffs allege that "[b]ased upon the legal certainty of knowledge of invasive flooding as set forth herein, Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties through the instrumentality of Gewalt's excess accumulated [storm water]."

¶ 32 Finally, plaintiffs allege that their damages were caused "as a substantially direct and proximate result of Defendant's intentional conduct by intentional[ly] failing to collect the dangerous and calamitous storm occurrence of *** 9-13-2008."

¶ 33 II. Defendant's Motion to Dismiss

¶ 34 On February 20, 2012, defendant filed a motion to dismiss all counts of plaintiffs' complaint pursuant to section 2-615 of the Code. Regarding count X, defendant argued that plaintiffs' intentional nuisance claim was both legally and factually insufficient, and thus failed to state a claim for which relief could be granted. Defendant argued that count X was legally insufficient because private nuisance is a wrong arising from an unreasonable or

unlawful use of one's own property, but defendant did not own the storm water that allegedly invaded plaintiffs' property. Defendant argued that count X was factually insufficient because plaintiffs failed to allege facts showing that defendant acted intentionally.

¶ 35 Defendant argued that count XI failed to state a claim because plaintiffs' allegations were incomprehensible and unanswerable, and also because plaintiffs failed to allege facts showing that defendant acted intentionally.

¶ 36 On May 11, 2012, plaintiffs filed a response to defendant's motion to dismiss, and on June 1, 2012, filed an amended response. In their amended response, plaintiffs argued that count X for intentional nuisance was legally sufficient because their allegations that defendant manipulated surface water flows causing plaintiffs' damages sufficed to state a cause of action for intentional nuisance. Plaintiffs did not address defendant's argument that plaintiffs' intentional nuisance claim failed to allege facts showing that defendant acted intentionally.

¶ 37 Plaintiffs asserted that their allegations in count XI for intentional trespass were answerable. Plaintiffs also argued that their allegations that defendant was aware of previous flooding, and was aware of specific design and maintenance deficiencies in the drainage system that contributed to earlier flooding and failed to correct the deficiencies, were sufficient to show that defendant acted intentionally.

¶ 38 On September 7, 2012, defendant filed a reply in support of its motion to dismiss. Regarding count X, defendant reiterated its positions that plaintiffs' allegations were generally unclear and unanswerable, and that plaintiffs "failed to allege facts supporting a finding of intent or deliberate indifference so as to maintain a cause of action for intentional nuisance."

¶ 39 Addressing count XI, defendant argued that "plaintiffs have failed to properly allege the requisite intent *** to maintain a cause of action for intentional trespass," and specifically argued that plaintiffs failed to allege facts "demonstrating conduct by [defendant] that constitutes an action posing a high degree of certainty that an intrusion onto [plaintiffs' property] would result." Defendant asserted that "[n]owhere [in] plaintiffs' 300 page complaint do plaintiffs plead conduct attributable to [defendant] that may sufficiently support a claim of intentional trespass."

¶ 40 III. Trial Court Order Granting Dismissal of Counts X and XI

¶ 41 On December 20, 2013, the trial court granted defendant's section 2-615 motion to dismiss in part, and denied it in part. Although defendant's motion sought to dismiss all pending counts of plaintiffs' complaint, including claims for negligent nuisance and negligent trespass, the trial court granted dismissal only for count X, intentional nuisance, and count XI, intentional trespass.

¶ 42 Regarding plaintiffs' intentional nuisance claim, the trial court found that "plaintiffs have alleged facts to support a substantial invasion of their interest in the use and enjoyment of their land by floodwater, which may have been caused by conduct of [defendant]." However, the trial court nonetheless dismissed count X as factually insufficient, finding that "plaintiffs have not alleged facts from which an inference can be drawn that [defendant]'s conduct was intentional."

¶ 43 Similarly, the trial court also dismissed count XI, finding that "plaintiffs have alleged facts to establish invasion of the interest in the exclusive possession of their land by entry of flood waters, which may have been caused by conduct of [defendant]," but failed to allege facts "from which an inference can be drawn that [defendant]'s conduct was intentional."

¶ 44 On June 27, 2014, the trial court found that there was no just reason to delay enforcement or appeal, pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)).

¶ 45 On July 24, 2014, plaintiffs filed their notice of appeal, seeking reversal of the trial court's dismissal of plaintiffs' intentional nuisance and intentional trespass claims.

¶ 46 ANALYSIS

¶ 47 On appeal, plaintiffs argue that the trial court erred by granting defendant's motion to dismiss counts X and XI as factually insufficient because plaintiffs pled sufficient facts to show that defendant acted with the requisite intent for (1) count X, intentional nuisance; and (2) count XI, intentional trespass.

¶ 48 For the following reasons, we affirm the trial court's dismissal of count X, and reverse its dismissal of count XI.

¶ 49 I. Standard of Review

¶ 50 A motion to dismiss under section 2–615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). We review *de novo* an order granting a section 2–615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203 Ill. 2d at 228. *De novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Under the *de novo* standard of review, the reviewing court does not need to defer to the trial court's judgment or reasoning. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 51 The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. In making

this determination, all well-pleaded facts in the complaint, and all reasonable inferences that may be drawn from those facts, are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441.

¶ 52 However, only the well-pleaded facts are taken as true; conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest are not taken as true and are not to be considered by the court in ruling on the motion. *Curtis v. Birch*, 114 Ill. App. 3d 127, 129-30 (1983). No count in a complaint is bad in substance if it sets forth sufficient information to reasonably inform the opposite party of the nature of the claim which said party is called upon to meet.735 ILCS 5/2-612(b) (West 2012). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts could be proven which would entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994); *Ogle v. Fuiten*, 102 Ill. 2d 356, 360 (1984); *Fitzgerald v. Chicago Title & Trust Co.*, 72 Ill. 2d 179, 187 (1978).

¶ 53 II. Count X – Intentional Nuisance

¶ 54 On appeal, plaintiffs first seek to reverse the trial court's dismissal of count X, plaintiffs' intentional nuisance claim. However, as an initial matter, defendant argues that plaintiffs have forfeited their right to argue this issue on appeal pursuant to Illinois Supreme Court Rule 341(h)(7) since plaintiffs failed to raise any arguments or cite to any authority regarding count X in their opening appellate brief. On the facts of the case at bar, we find defendant's argument persuasive.

¶ 55 Rule 341(h)(7) provides the requirements for the argument section of an appellant's opening brief. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). The rule provides that the argument

"shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on," and that "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Under Rule 341(h)(7), an argument not raised in the appellant's opening brief, and not supported by citations to relevant legal authority, is forfeited. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36.

¶ 56 In the case at bar, we find that plaintiffs forfeited their argument regarding the trial court's dismissal of their intentional nuisance claim by failing to include any argument or citations to authority related to that issue in their opening appellate brief. Plaintiffs' opening brief contains no substantive argument regarding their intentional nuisance claim. Plaintiffs cite to a total of six cases in their opening brief, but they all serve to address plaintiffs' trespass claim. They cite to no cases or statutory authority pertaining to a nuisance argument. Accordingly, we affirm the trial court's dismissal of count X, intentional nuisance.

¶ 57 III. Count XI – Intentional Trespass

¶ 58 Next, the trial court dismissed count XI, plaintiffs' intentional trespass claim, as factually insufficient because plaintiffs failed to allege specific facts showing that defendant acted intentionally. Plaintiffs argue that the trial court improperly dismissed count XI as factually insufficient, because plaintiffs alleged sufficient facts to show that defendant acted with the requisite intent. Defendant argues that the trial court decided correctly because plaintiffs' allegations regarding defendant's intent constitute mere factual and legal conclusions, unsupported by specific facts. For the following reasons, we find plaintiffs' argument persuasive, and reverse the trial court's dismissal of count XI.

¶ 59 To survive dismissal under section 2-615 of the Code, a pleading must be both legally and factually sufficient. *RBC Mortgage Co. v. National Union Fire Insurance Co. of Pittsburgh*, 349 Ill. App. 3d 706, 711 (2004). As we have noted, a complaint is factually insufficient if it contains only conclusions of fact without specific underlying facts that support the cause of action. See *Dietz v. Illinois Bell Tel. Co.*, 154 Ill. App. 3d 554, 557 (1987) ("a court does not accept as true conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest"); *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 167 (2003) ("under Illinois fact pleading, the pleader is required to set out ultimate facts that support his or her cause of action").

¶ 60 To survive dismissal under section 2-615, plaintiffs' intentional trespass claim must allege facts showing that defendant: (1) "cause[d] an intrusion on the plaintiff's premises"; and (2) did so with knowledge that its actions would, "to a substantial certainty," result in the intrusion. *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 553-54 (1980).

¶ 61 In the case at bar, the trial court found that plaintiffs alleged sufficient facts to establish that flood water intruded on their property, and that the intrusion was possibly caused by defendant, but failed to allege facts "from which an inference can be drawn that [defendant]'s conduct was intentional." Thus, the trial court found plaintiffs' allegations sufficient as to the first element, and the only question on appeal is whether plaintiffs alleged sufficient facts to support the inference that defendant knew to a substantial certainty that its actions would cause flooding to plaintiffs' homes.

¶ 62 In *Dial v. City of O'Fallon*, the Illinois Supreme Court analyzed the "substantial certainty" intent requirement using examples from the Restatement (Second) of Torts. *Dial*,

81 Ill. 2d at 552-55. Under the Restatement, the actions of a person "who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands," would suffice to show that he was substantially certain his actions would cause the unwanted intrusion. *Dial*, 81 Ill. 2d at 555. Similarly, a person acts with substantial certainty if he "erects a dam across a stream, thereby intentionally causing the water to back up and flood" another's land. *Dial*, 81 Ill. 2d at 555. These examples satisfy the substantial certainty test because in each case, the trespasser acts with "knowledge of a high degree of certainty that the intrusion on another's land will follow the act." *Dial*, 81 Ill. 2d at 555.

¶ 63 Thus, in the case at bar, we must decide whether plaintiffs' intentional trespass allegations were sufficient to show that defendant acted with the requisite high degree of certainty. Although we note defendant's argument that plaintiffs' complaint relied heavily on conclusory allegations, we find that plaintiffs' complaint also included sufficient specific factual allegations to support the inference that defendant acted with substantial certainty that its actions would cause flooding to plaintiffs' homes at this early stage of the proceedings.

¶ 64 Plaintiffs' allegations, taken as a whole, illustrate a pattern of flooding starting in 1976, before defendant acquired its property adjacent to plaintiffs' homes. The September 2008 flooding is at the center of this litigation. Further, plaintiffs' allegations include sufficient specific facts to support the inference that defendant was aware of the recurring flood pattern that caused damage to plaintiffs' homes. Plaintiffs alleged facts that indicated that the responsive action that defendant took would not fully correct the storm water runoff problems that caused the flooding to plaintiffs' homes.

¶ 65 In their allegations common to all counts, plaintiffs allege that in 1976, defendant developed and implemented a plan to modify its existing drainage system. Plaintiffs further allege that later in 1976, an Illinois Department of Transportation report identified potential flood risks to plaintiffs' homes caused by defendant's modifications.

¶ 66 Plaintiffs allege that in 1987, plaintiffs suffered flooding, as predicted by the 1976 report.

¶ 67 Plaintiffs allege that in 1990, local municipal authorities, "along with other entities," commissioned another study to address the flooding. Plaintiffs allege that this report identified design and maintenance defects in the drainage system, including the portions adjacent to plaintiffs' homes. The report indicated that these defects impaired the system's drainage capacity to a level "substantially below any reasonably safe standard." Plaintiffs allege that the report placed defendants the City of Park Ridge, Maine Township, the Village of Glenview and "possibly other [defendants]" on actual or constructive knowledge of the flood risk to plaintiffs' homes.

¶ 68 Plaintiffs allege that some time after 1987 but before 2002, defendant hired Gewalt, an engineering firm, to draft and implement a development plan for the hospital property that included modifications to the drainage system and topography that altered the property's "natural drainage areas."

¶ 69 Plaintiffs allege that in August of 2002, a rainstorm caused storm water to accumulate within the hospital's drainage system. Plaintiffs allege that an "undersized" discharge component caused water to build up and "catastrophically overflow" the drainage system, again flooding the property and homes in plaintiffs' neighborhood.

¶ 70 Plaintiffs allege that in 2002 or 2003, the Illinois Department of Natural Resources conducted a study in response to the 2002 flooding in conjunction with local municipal

authorities, including other defendants in plaintiffs' lawsuit: the City of Park Ridge, Maine Township, and the Village of Glenview. The study found "numerous bottlenecks and obstructions to flow as the causes of the invasive flooding." The study also detailed potential remedies, including specific improvements to defendant's drainage system.

¶ 71 Plaintiffs allege that after 2002 but before the September 13, 2008, invasive flood, defendant and Gewalt developed plans to modify the hospital property's drainage system, including components identified as problematic in the 2002 study. However, plaintiffs allege that defendant's plan did not include modifications to three undersized components of the drainage system, despite defendant's knowledge of the flood risk these components posed to plaintiffs.

¶ 72 Plaintiffs allege that subsequently, the September 13, 2008, storm water overwhelmed the hospital's drainage system and caused the invasive flooding in plaintiffs' homes and property.

¶ 73 In count XI of plaintiffs' complaint, Plaintiffs allege that "[b]ased upon [the earlier flooding and flood-related studies detailed in the allegations common to all counts], Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and [*sic*] would result in [storm water] invasive flooding [*sic*] Plaintiffs' homes from the [water storage basins] as these Basins were gravity [fed] and had known inadequate storage for a storm of the magnitude as the September 13, 2008 storm."

¶ 74 Taken as a whole, these allegations are far from mere conclusory allegations. Plaintiffs identify numerous examples that suggest defendant was aware of the flooding problem, and knowingly took inadequate measures to correct it. Plaintiffs' allegations identify specific components of defendant's drainage system as deficient, and demonstrate multiple instances

where defendant had occasion to address the problems and failed to do so adequately. As with the examples of piling sand adjacent to another's property, or erecting a dam to alter the flow of a stream, plaintiffs' allegations regarding defendant's conduct are sufficient to show that defendant acted with a high degree of certainty that its modifications to the drainage system would cause or fail to prevent flooding to plaintiffs' homes.

¶ 75 Defendant relies on *Dietz v. Illinois Bell Telephone Co*., 154 Ill. App. 3d 554 (1987), for its argument that "a pleading containing conclusory allegations that a defendant's actions posed a high degree of certainty that an intrusion onto another's property would occur, unsupported by facts from which that conclusion may be drawn, fails to state a cause of action under the theory of intentional trespass." In *Dietz*, plaintiff Dietz appealed a section 2-615 motion to dismiss his intentional trespass claim against Illinois Bell Telephone Company (Illinois Bell) as factually insufficient. *Dietz*, 154 Ill. App. 3d at 556. Dietz alleged that Illinois Bell had previously installed a telephone pole and telephone cable on his property, with his permission. He argued that Illinois Bell had committed a trespass by entering into licensing agreements with cable television companies that allowed them to use Illinois Bell's existing cable infrastructure, including the pole on Dietz's land, without Dietz's permission. *Dietz*, 154 Ill. App. 3d at 556. The licensing agreements provided that the cable companies "shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain its communications facilities" using Illinois Bell's existing infrastructure. *Dietz*, 154 Ill. App. 3d at 556.

¶ 76 In its motion to dismiss, Illinois Bell argued that Dietz's trespass claim consisted almost exclusively of conclusory allegations, and that "the only facts alleged relating to [Illinios Bell's] conduct is that [Illinois Bell] entered into licensing agreements which permitted [the

cable companies] to use its telephone poles and conduits in order to install and maintain their *** systems." *Dietz*, 154 Ill. App. 3d at 558-59.

¶ 77 The appellate court affirmed the trial court's dismissal, finding that "defendant correctly observes that the only factual allegation regarding [Illinois Bell's] conduct is that it entered into licensing agreements with [cable] companies and permitted, under certain circumstances, the use of [Illinois Bell's] poles and conduits." *Dietz*, 154 Ill. App. 3d at 560. The appellate court found that Dietz "merely concludes in his complaint that [Illinios Bell] knew that [the cable] companies would trespass," but that his complaint included "no factual allegations that would indicate that trespass would naturally follow from [Illinois Bell's] actions." *Dietz*, 154 Ill. App. 3d at 559. Since Dietz's conclusory allegations were "not supported by specific factual allegations," the court did not find sufficient facts to establish that Illinois Bell acted with substantial certainty that the trespass would occur, and thus affirmed the trial court's dismissal. *Dietz*, 154 Ill. App. 3d at 559.

¶ 78 Defendant is correct that *Dietz* supports the proposition that a complaint consisting largely of conclusory allegations will fail as factually insufficient. However, *Dietz* is distinguishable from the instant case because unlike the plaintiff in *Dietz*, plaintiffs here have alleged specific facts in their allegations common to all counts that support the allegations found in count XI. In *Dietz*, the complaint included only the fact that Illinois Bell had signed licensing agreements with the cable companies. In the case at bar, plaintiffs have alleged specific facts claiming deficient components in defendant's system and modifications, and defendant's knowledge of previous flooding and studies that identified specific deficiencies in defendant's drainage system that likely contributed to the flooding. Although count XI contains several arguably conclusory allegations, plaintiffs support those allegations with

more detailed and specific factual allegations in their allegations common to all counts. Plaintiffs' specific allegations regarding defendant's knowledge of a pattern of flooding, and measures it could have taken to prevent future flooding, support the inference that defendant acted with a high degree of certainty that its actions would cause the flooding to plaintiffs' homes.

¶ 79 Thus, construing the allegations in plaintiffs' favor, as we are required to do on a 2-615 motion to dismiss (*e.g.*, *Young*, 213 Ill. 2d at 441), we find that the trial court erred in dismissing plaintiffs' count XI as factually insufficient.

¶ 80 IV. Conclusion

¶ 81 For the foregoing reasons, we affirm the trial court's dismissal of count X of plaintiffs' complaint where plaintiffs failed to argue otherwise on appeal. We find that count XI was improperly dismissed for factual insufficiency where plaintiffs made numerous general factual allegations that support the inference that defendant acted with the requisite high degree of certainty that flooding would occur on plaintiffs' property.

¶ 82 Affirmed in part, and reversed in part.