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STATE OF MICHIGAN
IN THE SUPREME COURT

SUNRISE RESORT, INC., a Michigan corporation, GREGORY P. SOMERS, MELISSA L. SOMERS, and KARL BERAKOVICH,

Plaintiffs-Respondents,

v.

CHEBOYGAN COUNTY ROAD COMMISSION,

Defendant-Applicant.

Supreme Court No.: 163949

Court of Appeals Case No.: 354540
Circuit Court Case No.: 20-8790-ND

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APPENDIX TO RESPONSE OF SUNRISE RESORT ASSOCIATION, *ET AL.*, TO CHEBOYGAN COUNTY ROAD COMMISSION'S SUPPLEMENTAL BRIEF

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INDEX

Exhibit	Description	Pages
Exhibit A	*Township of Fraser v Haney*, Mich Supr Ct Op No 160991 (Feb 28, 2022)	001-005
Exhibit B	MCL 691.1416 – 691.1419 Sewage Disposal System Event Act	006-009
Exhibit C	*Morley v Twp of Bangor*, *unpublished*, Mich Ct App Op No 340636 (Apr 25, 2019)	010-018
Exhibit D	*Miner v Ogemaw County Road Commission*, -- F Supp 3d – (ED Mich, March 29, 2022)	019-028

EXHIBIT A

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2022 WL 388013
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

TOWNSHIP OF FRASER, Plaintiff-Appellant,
v.
Harvey HANEY and Ruth Ann Haney, Defendants-Appellees.

Docket No. 160991
|
Calendar No. 3
|
Argued October 6, 2021
|
Decided February 8, 2022

Synopsis

Background: Township brought nuisance-abatement action against landowners, alleging violation of zoning ordinances stemming from landowners' keeping of hogs on property. The Circuit Court, Bay County, No. 16-003272-CH, Harry P. Gill, J., denied landowners' motion for summary disposition on limitations grounds. Landowners appealed. The Court of Appeals, 327 Mich.App. 1, 932 N.W.2d 239, reversed and remanded. Township sought leave to appeal, and, in lieu of granting leave, Supreme Court vacated and remanded. On remand, the Court of Appeals, 331 Mich.App. 96, 951 N.W.2d 97, again reversed and remanded. Township sought leave to appeal, which was granted.

The Supreme Court held that action accrued from each date that landowners kept hogs on property, rather than solely from first date on which landowners had hogs on property.

Reversed and remanded.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Motion for Summary Disposition.

BEFORE THE ENTIRE BENCH

OPINION

Per Curiam.

Defendants, Harvey and Ruth Ann Haney, owned property in Fraser Township that is zoned for commercial use. Defendants brought a hog onto their property as early as 2006. At some point, additional hogs were brought onto the property. Plaintiff, Fraser Township, filed its complaint in May 2016, alleging that defendants' property is not zoned for agricultural use and that defendants' actions violate its zoning ordinance and constitute a nuisance. Plaintiff seeks a permanent injunction to enforce its ordinance and to prevent defendants from raising on their property hogs or other animals that would violate the zoning ordinance, to remove an allegedly nonconforming fence, and to plow and coat the ground with nontoxic material. We must decide whether plaintiff's action is barred by the pertinent six-year statute of limitations.[1] We hold that it is not. Plaintiff has alleged a harm that has occurred every day on which defendants maintain hogs on their property. Plaintiff's action is timely under MCL 600.5813 because its complaint was initiated within six years of defendants' most recent offenses. The Court of Appeals erred by analyzing this case as a "continuing wrongs" case because plaintiff does not seek to reach back and remedy or impose monetary fines for violations that occurred outside the period of limitations. Rather, plaintiff's injunctive action seeks to remedy only present violations, which occurred within the six-year period of limitations. We therefore reverse the judgment of the Court of Appeals, reinstate the trial court's order denying summary disposition, and remand this case to the trial court for further proceedings that are consistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

Defendants began raising at least one hog on their commercially zoned property in 2006.[2] Plaintiff alleges that defendants were raising approximately 20 hogs when the complaint was filed and that the property was saturated with animal waste, "creating a horrible stench and attraction for flies." The complaint alleges that defendants had a history of illegal animal operations on the property, including a deer farm that had been ordered closed by a circuit court and Russian boar production that had been banned by the Michigan Department of Natural Resources.

Defendants moved for summary disposition, arguing that plaintiff's claim was time-barred by the six-year statutory period of limitations set forth in MCL 600.5813. The trial court denied the motion, reasoning that this was an action in rem, as opposed to a "personal action," so the statute of

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limitations did not apply. Defendants sought leave to appeal in the Court of Appeals, and the Court of Appeals granted leave to appeal and reversed. It held that because defendants had kept hogs on the property since 2006 and plaintiff did not bring suit until 2016, plaintiff's case was time-barred. [3]

***3** Plaintiff sought leave to appeal in this Court, and in lieu of granting leave, we vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for it to address whether defendants waived an affirmative defense under *Baker v. Marshall*. [4] On remand, the Court of Appeals distinguished *Baker* and explained that defendants did not waive the statute-of-limitations defense. [5]

Plaintiff again sought leave to appeal in this Court, and we granted leave to consider whether MCL 600.5813 bars plaintiff from enforcing its zoning ordinance. [6]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. [7] We also review de novo questions of law and statutory interpretation. [8]

III. ANALYSIS

The statute of limitations at issue, MCL 600.5813, states, "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5827 defines when a claim accrues for purposes of interpreting MCL 600.5813, and it provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues ... at the time the wrong upon which the claim is based was done regardless of the time when damage results.

" '[T]he wrong is done when the plaintiff is harmed rather than when the defendant acted' under § 5827 ...." [9] "The relevant 'harms' ... are the actionable harms alleged in a plaintiff's cause of action." [10] We thus look to plaintiff's complaint to determine when the wrong upon which the claim is based was done.

Plaintiff seeks to enforce its zoning ordinance through a nuisance-abatement action. The Michigan Zoning Enabling Act [11] permits such actions, providing, in relevant part:

> Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se. [12]

Plaintiff alleges that defendants have used their land in violation of the local zoning ordinances. Specifically, because defendants' land is zoned for commercial use, rather than agricultural use, defendants cannot raise hogs or other animals on the land.

Defendants do not argue that they have used their land in conformity with the zoning ordinance. They have indeed maintained at least one hog on their property since 2006. Defendants argue that because plaintiff did not bring the present suit until 2016, this action is time-barred by the six-year period of limitations in MCL 600.5813. We conclude that MCL 600.5813 does not bar plaintiff's suit, which is an action for injunctive relief to address violations of the zoning ordinance that occurred within the six-year limitations period.

***4** The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates. [13] For example, the fact that

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defendants had hogs on their property *yesterday* is not a wrong that occurred until yesterday, and any claims arising from harms due to the hogs' presence yesterday could not have accrued until then either. Therefore, because defendants had hogs on their property within the limitations period, claims accrued during that period and plaintiff's action is timely. [14]

Our conclusion is further supported by the plain language of the Zoning Enabling Act. MCL 125.3407 states that a "use" of land in violation of a zoning ordinance is a nuisance per se. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional ...." [15] A "use" is thus inherently ongoing. And the nature of zoning violations typically makes a limitations period of little relevance to nuisance-abatement actions concerning present or ongoing nonconforming uses.

***5** A single property can be subject to many "uses." The Zoning Enabling Act refers to "residential use" as one such use. [16] Operation of a state-licensed residential facility, for example, is a residential use. [17] Land that is employed as a state-licensed residential facility is continuously being used for a residential purpose as long as the land is so employed. The use is not finished on the first day construction of the facility is completed or the first day someone moves in. The same is true of the use at issue here. Defendants' use of the property to raise hogs was not a one-time occurrence that happened in 2006. The use continues as long as the property is employed as a piggery. Under MCL 600.5813, "the claim accrues at the time the wrong upon which the claim is based was done ...." [18] Whether the "wrong" here, a zoning violation, accrued continuously or each day, it certainly accrued within the limitations period.

In its initial opinion, the Court of Appeals erroneously concluded that plaintiff's action would be timely only under the continuing-wrongs doctrine, which has been abrogated in Michigan. [19] The continuing-wrongs doctrine (or its abrogation) is not relevant to plaintiff's claim for relief. The doctrine allowed a plaintiff to reach back to recover for wrongs that occurred outside the statutory period of limitations. If a plaintiff could establish that a wrong or injury experienced within the permitted time period was part of a series of sufficiently related "continuing wrongs," the plaintiff might have been able to recover damages for each wrong that was part of the series—including those that otherwise would have been time-barred. [20] But even under the continuing-wrongs doctrine, a plaintiff had to establish that one of the wrongs or injuries occurred within the statutory period of limitations. [21] The doctrine has never operated to toll the statutory period of limitations for such claims, which were timely because the claim accrued during the limitations period. [22]

When we abrogated the continuing-wrongs doctrine in *Garg*, we explained that the relevant statute of limitations there, MCL 600.5805, "requires a plaintiff to commence an action within three years of *each adverse employment act* by a defendant." [23] After *Garg*, a plaintiff in Michigan may not revive stale claims even if the claims are part of a series of "continuing violations." But *Garg*, of course, did not operate to immunize future wrongful conduct. In other words, a plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. [24] A plaintiff is free to bring a new action each time a defendant commits a new violation. [25] *Garg* simply held that a plaintiff may not recover for injuries that fall outside the statutory period of limitations —regardless of how related those injuries are to timely claims —when the Legislature has not permitted such recovery by statute. [26] But, importantly, *Garg* allowed the claim that accrued within the limitations period to go forward. [27]

***6** Defendants here are not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation. Whether Michigan recognizes the continuing-wrongs doctrine has no bearing on a plaintiff's ability to bring an action for claims that accrued within the statutory period of limitations. Thus, Michigan's abrogation of the doctrine is irrelevant to this case because plaintiff does not seek a remedy for violations outside the limitations period. Defendants violate the law as long as they keep hogs on their property, and plaintiff seeks to remedy only violations that occurred within the statutory period of limitations in the form of an injunction.

IV. CONCLUSION

We hold that plaintiff's action to enforce its zoning ordinance is not barred by MCL 600.5813. The wrong alleged is defendants' retention of hogs on their commercially zoned property. Plaintiff's action is timely because it

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was commenced while defendants' unlawful conduct was ongoing. We reverse the judgment of the Court of Appeals, reinstate the trial court's order denying summary disposition, and remand this case to the trial court for further proceedings that are consistent with this opinion.

Bridget M. McCormack, C.J., Brian K. Zahra, David F. Viviano, Richard H. Bernstein, Elizabeth T. Clement, Megan K. Cavanagh, Elizabeth M. Welch, JJ., concur.

All Citations

--- N.W.2d ----, 2022 WL 388013

Footnotes

1 MCL 600.5813.

2 Defendants' property was not (and is not) zoned for agriculture.

3 *Fraser Twp. v. Haney*, 327 Mich.App. 1, 11, 932 N.W.2d 239 (2018), vacated 504 Mich. 968, 933 N.W.2d 42 (2019). This opinion was originally released as an unpublished opinion, but the panel agreed to publish its opinion per defendants' request. See MCR 7.215(D).

4 *Baker v. Marshall*, 323 Mich.App. 590, 919 N.W.2d 407 (2018); *Fraser Twp. v. Haney*, 504 Mich. 968, 933 N.W.2d 42 (2019).

5 *Fraser Twp. v. Haney*, 331 Mich.App. 96, 98-99, 951 N.W.2d 97 (2020).

6 *Fraser Twp. v. Haney*, 506 Mich. 964, 950 N.W.2d 748 (2020).

7 *McQueer v. Perfect Fence Co.*, 502 Mich. 276, 286, 917 N.W.2d 584 (2018).

8 *Id.* at 285-286, 917 N.W.2d 584.

9 *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 479 Mich. 378, 387 n 8, 738 N.W.2d 664 (2007) (citation omitted).

10 *Frank v. Linkner*, 500 Mich. 133, 150, 894 N.W.2d 574 (2017).

11 MCL 125.3101 *et seq.*

12 MCL 125.3407.

13 Cf. *Woldson v. Woodhead*, 159 Wash.2d 215, 219, 149 P.3d 361 (2006) (en banc) ("With most torts, a single isolated event begins the running of the statute of limitations.... A continuing trespass tort is different; the 'event' happens every day the trespass continues. Every moment, arguably, is a new tort. Thus, the statute of limitations does not prevent recovery for a continuing trespass that 'began' before the statutory period; instead the statute of limitations excludes recovery for any trespass occurring more than three years before the date of filing."); *Russo Farms, Inc. v. Vineland Bd. of Ed.*, 144 N.J. 84, 102, 675 A.2d 1077 (1996) (" '[I]f the nuisance or trespass is "temporary" or "continuous," a new cause of action arises day by day or injury by injury, with the result that the plaintiff in such a case can always recover for such damages as have accrued within the statutory period immediately prior to suit.' "), quoting Dobbs, Law of Remedies (1973), § 5.4, p. 343.

14 Although not necessary to our analysis, Fraser Township's zoning ordinance is consistent with our conclusion, in that it describes when a violation of the zoning ordinance occurs: "A separate offense shall be deemed

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committed upon each day during or when a violation occurs or continues." Fraser Township Zoning Ordinance, § 2503. Thus, per the plain language of this ordinance, defendants committed a separate offense each day they had hogs on their property in violation of the zoning ordinance. Plaintiff does not seek to impose monetary penalties or to obtain a remedy for actions that occurred more than six years prior to the filing of this case. Rather, plaintiff seeks only an injunction—a remedy to enforce its ordinance against current and future violations. Defendants maintained hogs on their property through the time this lawsuit was filed in 2016, thus violating the ordinance during this period. These violations gave rise to the harms alleged in plaintiff's complaint, and thus fresh harms occurred during the limitations period. Fraser Township Zoning Ordinance, § 2503.

15 *Black's Law Dictionary* (8th ed.); see also *Random House Webster's College Dictionary* (2007) (defining "use" as "the enjoyment of property, as by occupation or employment of it"). It is unnecessary to determine whether "use" is a legal term of art. because the legal and lay dictionary definitions are substantially the same. See *Sanford v. Michigan*, 506 Mich. 10, 21, 954 N.W.2d 82 (2020).

16 MCL 125.3206.

17 MCL 125.3206(1).

18 MCL 600.5827.

19 *Fraser Twp.*, 327 Mich.App. at 11-12, 932 N.W.2d 239.

20 See *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 510, 398 N.W.2d 368 (1986), overruled by *Garg v. Macomb Co. Community Mental Health Servs.*, 472 Mich. 263, 696 N.W.2d 646 (2005).

21 See *Garg v. Macomb Co. Community Mental Health Servs.*, 472 Mich. 263, 280, 696 N.W.2d 646 (2005), as amended on denial of reh July 18, 2005 ("[M]erely demonstrating a 'present effect to a past act of discrimination' is insufficient to create a continuing violation."), quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977).

22 *Accrual of Claims for Continuing Trespass or Continuing Nuisance for Purposes of Statutory Limitations*, 14 A.L.R.7th Art. 8 (2016) ("[C]ontinuing torts do not avoid the statute of limitations; rather, such torts remain timely not because the limitation period is tolled but because the cause of action continues to accrue.").

23 *Garg*, 472 Mich. at 282, 696 N.W.2d 646 (emphasis added).

24 Even our opinion *adopting* the continuing-wrongs doctrine recognized that it would be incorrect to bar a suit based on misconduct occurring within the limitations period simply because the defendants had committed the same acts before. See *Sumner*, 427 Mich. at 537 & n 11, 398 N.W.2d 368, overruled by *Garg*, 472 Mich. 263, 696 N.W.2d 646.

25 See 1A American Law of Torts (December 2021 update), § 5:33 ("The continuing tort theory does not apply when tortuous instances, though similar, constitute distinctly separate transactions.").

26 *Garg*, 472 Mich. at 282, 696 N.W.2d 646.

27 *Id.* at 286, 696 N.W.2d 646.

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EXHIBIT B

GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

691.1416 Definitions.

Sec. 16. As used in this section and sections 17 to 19:

(a) "Affected property" means real property affected by a sewage disposal system event.

(b) "Appropriate governmental agency" means a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury.

(c) "Claimant" means a property owner that believes that a sewage disposal system event caused damage to the owner's property, a physically injured individual who believes that a sewage disposal system event caused the physical injury, or a person making a claim on behalf of a property owner or physically injured individual. Claimant includes a person that is subrogated to a claim of a property owner or physically injured individual described in this subdivision.

(d) "Contacting agency" means any of the following within a governmental agency:

(*i*) The clerk of the governmental agency.

(*ii*) If the governmental agency has no clerk, an individual who may lawfully be served with civil process directed against the governmental agency.

(*iii*) Any other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice under section 19, including, but not limited to, an agency, authority, department, district, or office responsible for the operation of the sewage disposal system, such as a sewer department, water department, or department of public works.

(e) "Defect" means a construction, design, maintenance, operation, or repair defect.

(f) "Noneconomic damages" includes, but is not limited to, pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damages.

(g) "Person" means an individual, partnership, association, corporation, other legal entity, or a political subdivision.

(h) "Serious impairment of body function" means that term as defined in section 3135 of the insurance code of 1956, 1956 PA 218, MCL 500.3135.

(i) "Service lead" means an instrumentality that connects an affected property, including a structure, fixture, or improvement on the property, to the sewage disposal system and that is neither owned nor maintained by a governmental agency.

(j) "Sewage disposal system" means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency.

(k) "Sewage disposal system event" or "event" means the overflow or backup of a sewage disposal system onto real property. An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:

(*i*) An obstruction in a service lead that was not caused by a governmental agency.

(*ii*) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.

(*iii*) An act of war, whether the war is declared or undeclared, or an act of terrorism.

(*l*) "Substantial proximate cause" means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury.

History: Add. 2001, Act 222, Imd. Eff. Jan. 2, 2002.

Popular name: Governmental Immunity Act

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GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

691.1417 Damages or physical injuries caused by sewage disposal system event; compliance of claimant and governmental agency with relief provisions.

Sec. 17. (1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event, a claimant and a governmental agency subject to a claim shall comply with this section and the procedures in sections 18 and 19.

(2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

(3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(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.

(4) In addition to the requirements of subsection (3), to obtain compensation for property damage or physical injury from a governmental agency, a claimant must show both of the following:

(a) If any of the damaged property is personal property, reasonable proof of ownership and the value of the damaged personal property. Reasonable proof may include testimony or records documenting the ownership, purchase price, or value of the property, or photographic or similar evidence showing the value of the property.

(b) The claimant complied with section 19.

History: Add. 2001, Act 222, Imd. Eff. Jan. 2, 2002.

Popular name: Governmental Immunity Act

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GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

691.1418 Economic damages; grounds for noneconomic damages; available defenses.

Sec. 18. (1) Except as provided in subsection (2), economic damages are the only compensation for a claim under section 17. Except as provided in subsection (2), a court shall not award and a governmental agency shall not pay noneconomic damages as compensation for an event.

(2) A governmental agency remains subject to tort liability for noneconomic damages caused by an event only if the claimant or the individual on whose behalf the claimant is making the claim has suffered death, serious impairment of body function, or permanent serious disfigurement.

(3) In an action for noneconomic damages under section 17, the issues of whether a claimant or the individual on whose behalf the claimant is making the claim has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(a) There is no factual dispute concerning the nature and extent of the claimant's or the individual's injuries.

(b) There is a factual dispute concerning the nature and extent of the claimant's or the individual's injuries, but the dispute is not material to determining whether the claimant or the individual has suffered a serious impairment of body function or permanent serious disfigurement.

(4) Unless this act provides otherwise, a party to a civil action brought under section 17 has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules.

History: Add. 2001, Act 222, Imd. Eff. Jan. 2, 2002.

Popular name: Governmental Immunity Act

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GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

***** 691.1419 THIS SECTION DOES NOT APPLY TO NONECONOMIC DAMAGES MADE UNDER SECTION 17: See subsection (7) *****

691.1419 Notice of claim; requirements.

Sec. 19. (1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.

(2) If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:

(a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.

(b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).

(c) The required content of the written notice under subsection (1), which is limited to the claimant's name, address, and telephone number, the address of the affected property, the date of discovery of any property damages or physical injuries, and a brief description of the claim.

(3) A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against a governmental agency notified under subsection (2) if the claimant can show both of the following:

(a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).

(b) The claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

(4) If a governmental agency that is notified of a claim under subsection (1) believes that a different or additional governmental agency may be responsible for the claimed property damages or physical injuries, the governmental agency shall notify the contacting agency of each additional or different governmental agency of that fact, in writing, within 15 business days after the date the governmental agency receives the claimant's notice under subsection (1). This subsection is intended to allow a different or additional governmental agency to inspect a claimant's property or investigate a claimant's physical injury before litigation. Failure by a governmental agency to provide notice under this subsection to a different or additional governmental agency does not bar a civil action by the governmental agency against the different or additional governmental agency.

(5) If a governmental agency receives a notice from a claimant or a different or additional governmental agency that complies with this section, the governmental agency receiving notice may inspect the damaged property or investigate the physical injury. A claimant or the owner or occupant of affected property shall not unreasonably refuse to allow a governmental agency subject to a claim to inspect damaged property or investigate a physical injury. This subsection does not prohibit a governmental agency from subsequently inspecting damaged property or investigating a physical injury during a civil action brought under section 17.

(6) If a governmental agency notified of a claim under subsection (1) and a claimant do not reach an agreement on the amount of compensation for the property damage or physical injury within 45 days after the receipt of notice under this section, the claimant may institute a civil action. A civil action shall not be commenced under section 17 until after that 45 days.

(7) This section does not apply to claims for noneconomic damages made under section 17.

History: Add. 2001, Act 222, Imd. Eff. Jan. 2, 2002.

Popular name: Governmental Immunity Act

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EXHIBIT C

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2019 WL 1867640
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jack MORLEY, Plaintiff-Appellant,
v.
TOWNSHIP OF BANGOR, Defendant-Appellee.

No. 340636
|
April 25, 2019

Synopsis

Background: Landowner brought action against township for a taking of his land, indemnification, and abatement of trespass nuisance, based on flooding on his land allegedly caused by township's activities in neighboring park. The trial court granted township's motion for summary disposition as to trespass-nuisance and indemnification claims, but ordered landowner to file amended complaint with clearer statement of his takings claim. In amended complaint, landowner alleged a taking of a prescriptive flowage easement. The Circuit Court, Bay County, No. 14-003743-CZ, granted township's motion for summary disposition on takings claim. Landowner appealed dismissal of trespass-nuisance and takings claims.

Holdings: The Court of Appeals held that:

[1] governmental immunity did not apply to landowner's claim to abate trespass nuisance;

[2] statute providing that actions by municipal corporations for recovery of land were not subject to statute of limitations did not apply to landowner's prescriptive easement claim; but

[3] statute of limitations began to run on landowner's claim that township's activities constituted a taking of his prescriptive easement no later than last date on which fill material was deposited on park land.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Disposition; Motion for Summary Disposition.

West Headnotes (4)

[1] **Municipal Corporations** Obstruction or diversion of flow of surface water

Governmental immunity did not apply to landowner's trespass-nuisance claim against township, wherein landowner alleged township caused flooding on landowner's land by raising elevation of neighboring park, even if township was engaged in a governmental function in storing sediment removed from river to prevent flooding, where landowner only sought abatement and not monetary damages. Mich. Comp. Laws Ann. §§ 600.2940(5), 691.1407(1).

[2] **Eminent Domain** Petition or complaint

Landowner who alleged township's activities on neighboring park land caused landowner's property to flood failed to state a claim for a taking based on the physical invasion of his land by water; landowner did not allege any reduction of property value, describe size of flooded area, or explain how he previously used that portion of his land.

[3] **Limitation of Actions** Municipality or officers thereof

Statute providing that actions brought by municipal corporations for the recovery of the possession of public ground were not subject to periods of limitations did not apply to landowner's claim for prescriptive easement for flow of water over neighboring park owned by

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township; statute applied to actions brought by, not against, municipalities. Mich. Comp. Laws Ann. § 600.5821 (2014).

[4] Limitation of Actions Injuries to property in general

Landowner's claim that township's elevation of neighboring park land constituted a taking of his prescriptive easement over park for the flow of water accrued, and applicable statute of limitations began to run, no later than the last date on which fill material that could have obstructed the flow of water was deposited on park land, regardless of whether six-year statute of limitations for inverse condemnation claim or 15-year statute of limitations for recovery of possession of land applied. Mich. Comp. Laws Ann. § 600.5801(4).

Bay Circuit Court, LC No. 14-003743-CZ

Before: Stephens, P.J., and Gleicher and Boonstra, JJ.

Opinion

Per Curiam.

***1** Jack Morley filed suit against Bangor Township, complaining that the township's activities on a parcel dedicated to park uses altered the natural flow of surface water toward the Kawkawlin River and caused flooding on his neighboring land. The circuit court dismissed Morley's trespass-nuisance claim on governmental immunity grounds and his takings claim for failure to state a claim upon which relief could be granted. The circuit court failed to recognize that at the time Morley filed his action, MCL 600.5821(2) only applied to "[a]ctions brought by any municipal corporations," and not to actions brought by private citizens against municipalities. The court thereby erroneously determined that Morley could not state a viable takings claim. However, the circuit court properly dismissed Morley's takings claim on an alternate ground—that it was not filed within the statute of limitations. The court also failed to recognize that a governmental agency may be sued for equitable relief from a trespass nuisance. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

In 1993, Morley purchased a 106.5-acre irregularly shaped parcel of vacant land in Bangor Township for $ 1. To the north of Morley's property is "Bay Side Park," a 26-acre irregularly shaped parcel dedicated to Bangor Township for use as a park. Both parcels are within the Kawkawlin River watershed, but are separated from the river by a swath of riverfront homes and a roadway.

Morley began to farm his land but quickly discovered that much of his property was low lying and waterlogged; 92.3 acres have been designated as wetland. He started filling it in, but the United States Army Corp. of Engineers (USACOE) advised him that the area was protected and ordered Morley to stop this activity. In 1994, Morley sought "After-The-Fact" permission for his work. The USACOE ordered Morley to return the land to its previous condition within 30 days and to pay a fine, both of which Morley did. A 1997 inspection revealed that the wetlands were recovering according to plan and the USACOE notified Morley that it would stop monitoring the site.

Different activities took place in the park to the north. In 1978, the township began allowing the USACOE to use the park as a dump site for sand and silt, also known as "spoils," periodically dredged from the Kawkawlin River. In approximately 1996, the township went further, digging a pit for the spoils and erecting berms to distinguish the area. In 1999, a newly elected township supervisor expressed concern about the legality of using the park as a spoils dump site and asked the city attorney to investigate. On September 17, 1999, the city attorney responded that the spoils dump site was not permitted under the language of the land dedication. The township board of trustees voted to level the site on November 9, 1999. The next day, the city hired a contractor "[t]o provide a dozer and operator for leveling the berms around the Kawkawlin River Dredge Disposal Site and finish grading to achieve positive drainage to the Frank Jean County Drain." The former town supervisor, who had negotiated the 1996 project, wrote a letter

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"express[ing] [his] extreme disappointment" with the turn of events. The township's December 13, 1999 response indicated that the park had already been "return[ed] to a 'level playing field' both physically and philosophically."

***2** Morley contends, however, that the township continued to bring in material and grade the land. He accuses the township of crossing the properties' boundary line with the spoils it spread. In an affidavit, Morley attested that township maintenance man, Joe Zielinski, approached him on August 3, 2016, and reported that he had slowly moved soil and yard waste across the property line over the past 10 years.[1] At the township supervisor's direction, Zielinski stated that he had also exacerbated Morley's drainage problems by "level[ing] the hill and reduc[ing] the slope on the Park property." Morley presented the affidavit of a professional surveyor, Kevin Pomaville, who prepared a topographical survey of the park and north end of Morley's property. Pomaville noted 12 acres of "raised elevations" in the park. This was a larger elevated area than anticipated in Michigan Department of Environmental Quality (MDEQ) and USACOE permits and the elevations were greater than permitted.

Professional engineer Timothy Lapham reviewed the survey and aerial photographs of the area in the public record. Lapham attested that he visited the area and observed "indications ... that fill was added in Park Property ... and also moved to the south to cross" onto Morley's land. Lapham also reviewed an undated, hand-drawn Bay County Drain Commission map recording the natural flow of water. The map showed that water historically flowed from Morley's property across the park. Lapham noted his observations that the natural flow of water "ha[d] been altered by the placement of spoils or alteration of land" on the park and actually had been "reverse[d] ... such that water in the Park would be diverted towards" Morley's land.

The MDEQ, on the other hand, observed that Morley was again engaging in illegal terraforming in the regulated wetlands in 2007. Morley apparently ignored the MDEQ's notice and was cited by the USACOE as well in October 2008. On November 19, 2009, the MDEQ notified Morley that it inspected his property and found that he had engaged in illegal fill activity on 4.1 acres of protected wetland. The MDEQ ultimately filed suit against Morley, securing a judgment requiring Morley to return the wetlands to their former condition and avoid future violations, and imposing a $ 30,000 fine. This Court affirmed that judgment in *Dep't. of Environmental Quality v. Morley*, 314 Mich. App. 306; 885 N.W.2d 892 (2015).

Dissatisfied with his lot, Morley filed suit against the township in 2014, claiming that the township's regrading of the park raised its elevation and prevented the natural flow of water from Morley's land across the park toward the Kawkawlin River. In this regard, Morley asserted that he possessed "a prescriptive flowage easement by the topography." Morley called the condition a "nuisance" and accused the township of taking his property through the "invasion of water and sediments." He sought indemnification as well as abatement of the issue.

The township sought summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The township contended that it was engaged in a governmental function (storing materials removed from the river to prevent flooding) and was therefore immune from liability. The township asserted that there is no nuisance or indemnification exception to governmental immunity. Moreover, the township claimed, Morley had caused his own damages by repeatedly violating wetland protection laws. And the township contended that Morley's takings claim was either not yet ripe for judicial review or was barred by the statute of limitations. The claim was not yet ripe because Morley had not availed himself of extrajudicial procedures to secure just compensation for his alleged loss. Even if the claim was ripe, the township continued, it had completed its activity at the park by 2000. Morley then had three years to file his takings claim under U.S. Const., Am. 5.

***3** Morley retorted that "[t]he historical condition of" the park land and his property was that "water ebbed and flowed ... across the respective properties on a transitory basis" until the township's activity of "moving soil and fill[ing] in lower elevations" altered that course "[o]nly in the last decade or so." The statute of limitations for abating nuisances such as reclaiming flowage easements, Morley noted, is actually 15 years. Moreover, the township's conduct was ongoing, creating a continuing violation with a fluid statutory limitation period. Accordingly, the township's activity within the last decade preserved his challenge. Morley argued that a six or 15-year statute of limitations should apply to his takings claim and that there was at least a question of fact that the taking occurred in that timeframe.

As to the substantive merits of his claims, Morley noted that the wetlands on his property had historically been in the southwest corner, not in the north near the park. The north part of the property only became sodden when the water could no longer cross the increased elevation of the park. Morley cited his experts' affidavits stating that the elevation at the park was greater than that permitted by

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state and federal authorities who approved the regrading. Morley further relied on Zielinski's communication that the township supervisor directed him to keep moving soil across the property line despite Morley's repeated complaints that drainage had been reduced. Morley denied that his past alleged violations of wetland regulations had any bearing on this case. The 1994 matter related to the southwest portion of his land, and the matter underlying this Court's prior opinion related to the southeast. He had made no property alterations to the north that could have caused the flooding conditions.

The township responded that the continuing violation doctrine had been abolished in Michigan and therefore could not be relied upon to save Morley's nuisance claim.

The circuit court summarily dismissed Morley's trespass-nuisance claim pursuant to MCR 2.116(C)(7), concluding that the township was immune from such claims pursuant to *Pohutski v. Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002). The court also dismissed the indemnification claim, a ruling that Morley does not challenge on appeal. The court denied the motion to dismiss Morley's takings claim "based upon interference with the flow of water" because Morley's allegations were "enough" to plead to a state-law claim. The state-law claim would have a 15-year statute of limitations, the court noted, and sufficient allegations supported that the challenged actions occurred within that time period. The complaint did not clearly allege a state-law claim, however, and the court ordered Morley to file an amended complaint with "a more clear statement" of his claim.

In his amended complaint, Morley again asserted that water previously flowed from his property, across the park land and toward the river, creating a water flowage easement. By raising the elevation of the park property, Morley complained, the township interfered with that easement. Not only did water on Morley's property pool, additional water from the park flowed onto his land. The standing water prevented Morley from using the land and led to further adverse action from the MDEQ. In the takings count, Morley alleged that the "physical invasion of water and sediments" on his property occurred as a result of the township's "blocking a natural flow easement" and "physical placement of soil" on his land. These actions occurred from 2004 to the present and resulted in a taking of the land, Morley asserted.

The township again sought summary disposition of Morley's takings claim pursuant to MCR 2.116(C)(7) (statute of limitations), (8), and (10). The township contended that Morley had not pleaded or proven the elements of a state-law takings claim. Morley's claim sounded in inverse condemnation, the township opined, and he was therefore required to establish "that the government's action was a substantial cause of the decline of the plaintiff's property, and that the government abused its legitimate powers through affirmative action directly aimed at the plaintiff's property." The township further noted that Morley was required to show that the value of the property was so reduced by the township's activities that the land was essentially taken. The specific property interest at issue in this case was a prescriptive flowage easement. However, the township argued, "property owned by a municipality is not subject to an easement by prescription." This was true under the common law and under MCL 600.5821(2), prior to 2016, and MCL 600.5821(2)(c) after the enactment of 2016 PA 52, the township contended. As the easement legally did not exist in the first place, it could not be taken.

***4** The township further contended that its actions did not cause the alleged damage to Morley's property. It presented the affidavit of former township supervisor and longtime township resident Joseph Rivet attesting that Morley's property had always been prone to flooding in the area in question. Moreover, spoils had been deposited on the park since at least 1978; the park had not been in its "natural state for decades" and no sudden change caused the flow of water to be blocked or reversed.

The township asserted that the takings claim was barred by the statute of limitations. The township cited a six-year statute of limitations for inverse condemnation claims, citing *Hart v. Detroit*, 416 Mich. 488; 331 N.W.2d 438 (1982). The 15-year statute of limitations to recover possession of lands found in MCL 600.5801(4) does not apply in such cases pursuant to *Hart*, 416 Mich. at 498, because the plaintiff is seeking compensation for the value taken and not truly repossession of the land. The township cited the board's 1999 vote to level the spoils dump site and letter indicating that the project was complete to support that the six-year statute of limitations had long passed by the time Morley filed suit in 2014. The township cited Morley's trial testimony in the earlier MDEQ action and his deposition testimony in this case as blaming the influx of water into the northern portion of his property on the USACOE's dredging of the Lagoon Beach Canal off the Kawkawlin River. This occurred no later than December 5, 1999.

In his response, Morley did not address the township's legal assertion that Morley could not adversely take an easement for the flow of water across public land and therefore Morley could not claim that his easement was "taken." Although Morley tried to lay out a timeline of

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more recent activity, he focused his argument around the already dismissed trespass-nuisance count, not on the taking of his property.

The circuit court ultimately dismissed the takings claim as well. The court noted that the claim sounded in inverse condemnation. However, under Michigan law, a private citizen cannot claim a prescriptive easement over public land. Accordingly, Morley never had a prescriptive easement for the flow of water across the park and could not file suit against the township for taking that easement. The court dismissed the takings claim under MCR 2.116(C)(8), failure to state a claim upon which relief could be granted. The court went on, however, to hold that the claims were also barred by the statute of limitations, supporting dismissal under (C)(7). The court concluded by noting:

> but it really doesn't matter since you can't bring that action, anyway.... It is, in essence, a claim for taking of a prescriptive right to the water flow, ... so it doesn't matter about the statute of limitations, really, because you can't bring that type of suit against the township, anyway. Do I think that's right and fair? No. But that's just my personal opinion, and I have to follow the law, and that's what the law is.

Morley appeals, challenging the circuit court's dismissal of his takings claim based on the statute of limitations and governmental immunity, and the court's dismissal of his claim seeking nuisance abatement.

II. STANDARD OF REVIEW

We review de novo a circuit court's resolution of a summary disposition motion. *Zaher v. Miotke*, 300 Mich. App. 132, 139; 832 N.W.2d 266 (2013). A court may grant summary disposition under MCR 2.116(C)(7) if the moving party is entitled to "immunity granted by law." *Odom v. Wayne Co.*, 482 Mich. 459, 466; 760 N.W.2d 217 (2008). We review de novo the applicability of governmental immunity. *Seldon v. Suburban Mobility Auth. for Regional Transp.*, 297 Mich. App. 427, 433; 824 N.W.2d 318 (2012). When reviewing a motion under subsection (C)(7), we "must accept all well-pleaded allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 428; 789 N.W.2d 211 (2010). Further, we must consider "any affidavits, depositions, admissions, or other documentary evidence" submitted. *Id.* at 429.

> ***5** Summary disposition under MCR 2.116(C)(7) is [also] appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute. [*Stephens v. Worden Ins. Agency, LLC*; 307 Mich. App. 220, 227; 859 N.W.2d 723 (2014) (cleaned up)[2].]
>
> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery. [*Zaher*, 300 Mich. App. at 139 (cleaned up).]

III. NATURE OF THE CLAIMS

Morley appeals the dismissal of two claims. The first is essentially for the abatement of a trespass nuisance. The second claims a taking of an easement for the flow of water.

A trespass nuisance is a

> trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation

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> or control (by government). [*Hadfield v. Oakland Co. Drain Comm'r.*, 430 Mich. 139, 169; 422 N.W.2d 205 (1988), overruled by *Pohutski v. Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002).]

Morley's takings claim sounds in inverse condemnation; he claims that the township's policy and action on the park property impacted his land, causing a loss of beneficial use. "Inverse condemnation is a taking of private property for a public use without the commencement of condemnation proceedings. Under the Michigan and United States Constitutions, a victim of such a taking is entitled to just compensation for the value of the property taken." *Hart*, 416 Mich. at 494. A claim for inverse condemnation also stands "[w]here the property has been damaged rather than completely taken by governmental actions." *Merkur Steel Supply, Inc. v. Detroit*, 261 Mich. App. 116, 129; 680 N.W.2d 485 (2004).

> What governmental action constitutes a "taking" is not narrowly construed, nor does it require an actual physical invasion of the property. No precise formula exists. Pertinent factors include whether the governmental entity abused its exercise of legitimate eminent domain power to plaintiff's detriment. Further, a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages. A plaintiff alleging a de facto taking or inverse condemnation must prove that the government's actions were a substantial cause of the decline of his property's value and also establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. [*Hinojosa v. Dep't. of Natural Resources*, 263 Mich. App. 537, 548; 688 N.W.2d 550 (2004) (cleaned up).]

***6** The property interest at issue in this case is the right to have water naturally flow from one's property.

> "The right of flowage is an easement that can only be acquired by prescription or by a writing such as a deed." *Lenawee Co. Bd. of Comm'rs. v. Abraham*, 93 Mich. App. 774; 287 N.W.2d 371 (1979), citing *Beaverton Power Co. v. Wolverine Power Co.*, 245 Mich. 541, 546; 222 NW 703 (1929).... "[I]t is an easement to flow water over another's land." [*Abraham*, 93 Mich. App. at 780.] [*Terlecki v. Stewart*, 278 Mich. App. 644, 660; 754 N.W.2d 899 (2008).]

IV. TRESPASS NUISANCE

The circuit court improperly dismissed Morley's claim for the abatement of a trespass nuisance on governmental immunity grounds.

MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, states, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." The act provides five exceptions to the immunity granted by § 1407(1): the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the proprietary function exception, MCL 691.1413; and the governmental hospital exception, MCL 691.1407(4). The Legislature may also provide for a cause of action against a governmental agency when enacting specific legislation. *Mack v. Detroit*, 467 Mich. 186, 195; 649 N.W.2d 47 (2002). The Supreme Court clearly and emphatically held in *Pohutski*, 465 Mich. at 690, that "the plain language of the [GTLA] does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the five exceptions to immunity set forth in the [GTLA]."

Morley argued in the circuit court that his action survived because he sought only abatement of the nuisance, not monetary damages. The Supreme Court stated in *Hadfield*, 430 Mich. at 152 n 5, "Generally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of

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governmental immunity." The *Hadfield* decision, however, was a nonbinding plurality opinion. This Court subsequently held in *Jackson Co. Drain Comm'r v. Stockbridge Village*, 270 Mich. App. 273, 284; 717 N.W.2d 391 (2006):

> The plain language of [MCL 691.1407] does not limit the immunity from tort liability to liability for damages. As noted in *Pohutski*, [465 Mich.] at 689, governmental immunity is to be broadly construed, while exceptions to immunity are to be narrowly construed. To construe the statute as plaintiffs urge in the instant case [such that governmental immunity does not apply where plaintiffs' trespass-nuisance action seeks only equitable relief], would be to construe governmental immunity narrowly.

After this Court's decision in *Jackson Co.*, the Supreme Court reversed course and followed the *Hadfield* plurality. In *Lash v. Traverse City*, 479 Mich. 180, 204-205; 735 N.W.2d 628 (2007), the Court indicated that governmental immunity does not apply to claims seeking declaratory or injunctive relief. The plaintiff in *Lash* sued Traverse City for monetary damages, alleging that the city denied him employment because he did not meet the city's residency requirement and that the residency requirement violated MCL 15.602(2). *Lash*, 479 Mich. at 182-183. The Supreme Court held that the city's residency requirement violated MCL 15.602(2); however, the Court also held that nothing in the statute permitted the plaintiff to maintain a private cause of action for damages against the city. *Lash*, 479 Mich. at 183. In response to the plaintiff's contention that a private cause of action for damages was the only mechanism to enforce the statute, the Court opined that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1). *Lash*, 479 Mich. at 196.

***7** [1]An action to abate a nuisance is "equitable in nature." *Ypsilanti Charter Twp. v. Kircher*, 281 Mich. App. 251, 270; 761 N.W.2d 761 (2008), citing MCL 600.2940(5); see also *Hadfield*, 430 Mich. at 152 n 5. Governmental immunity does not protect Bangor Township from a declaration that its actions created a nuisance, an injunction to prevent future nuisance, or a judgment to abate an existing nuisance. Accordingly, the circuit court improperly dismissed Morley's trespass-nuisance claim on governmental immunity grounds. We vacate the court's judgment in that regard.[3]

Our vacation and remand does not necessarily entitle Morley to a trial on his action for abatement of a trespass nuisance. The township also argued that the claim was raised beyond the applicable statute of limitations, that Morley failed to state an actionable claim, and that Morley failed to create a genuine issue of material fact. On remand, the township may reassert these challenges for the circuit court's consideration.

V. TAKING

The circuit court did properly dismiss Morley's takings claim, however, on statute of limitations grounds.

[2]There is a distinction between cases in which a governmental entity diverts water onto another's property and cases in which the governmental actor blocks the flow of draining surface water. "It is well settled that a governmental actor may cause a taking of private property by flooding the property or diverting excess surface water onto the property." *Wiggins v. City of Burton*, 291 Mich. App. 532, 572; 805 N.W.2d 517 (2011). See also *Herro v. Chippewa Co. Rd. Comm'rs*, 368 Mich. 263, 265-267; 118 N.W.2d 271 (1962). Although Morley complained that the flow of water had been reversed and water was flooding the northern portion of his land, he did not otherwise state a claim for a taking based on the physical invasion. To establish a taking, a landowner must plead facts supporting "a diminution in the value of the property or a partial destruction." *Merkur Steel Supply*, 261 Mich. App. at 125. Morley alleged no facts and presented no evidence regarding any reduction in his property value. He did not describe the size of the area in question or explain how he previously used that portion of his land. Morley focused on the physical invasion of water onto his property in his trespass-nuisance claim instead.

Morley directed his takings claim at the township's interruption of the natural flow of water from his property across the park. The natural flow of water across

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another's property is an easement known as a "flowage easement." *Terlecki*, 278 Mich. App. at 660. As noted, a flowage easement can be granted in a deed, but otherwise must be taken adversely by prescription. *Id.*

When Morley filed suit against the township in 2014, MCL 600.5821 provided, in relevant part:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> ***8** (2) *Actions brought by any municipal corporations for the recovery of* the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations. [Emphasis added.]

The language in subsection (1)—"the recovery of any land"—is similar to the phrase in subsection (2)—"the recovery of the possession of"—and has been interpreted to preclude the claiming of prescriptive easements as well as title in actions against the state. See *Matthews v. Dep't of Natural Resources*, 288 Mich. App. 23, 35-36; 792 N.W.2d 40 (2010).

Subsection (2) of the statute has since been amended to more specifically provide for the preclusion of prescriptive easements across municipal land and to apply to actions both by and against municipalities:

> (2) *In an action involving the recovery or the possession of land*, including a public highway, street, alley, easement, or other public ground, *a municipal corporation ... is not subject to* any of the following:
>
> (a) The periods of limitations under this act.
>
> (b) Laches.
>
> (c) A claim for adverse possession, acquiescence for the statutory period, or a prescriptive easement. [MCL 600.5821(2), as amended by 2016 PA 52 (emphasis added).]

Even if the applicable version of MCL 600.5821(2) had expressly included a prohibition of prescriptive easements across municipal land, the statute would not preclude Morley's takings claim. The version of the statute in effect when Morley claims his interest was taken and when he filed suit only applies to actions *brought by* a municipality and not to actions against a municipality.[4] In *Adams Outdoor Advertising, Inc. v. Canton Charter Twp.*, 269 Mich. App. 365, 370; 711 N.W.2d 391 (2006), this Court stated in dicta: "It is also undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation." The municipal defendant in that case apparently did not challenge the applicability of the statute to an action brought against a municipality; "[t]he sole issue before [this Court was] whether the disputed property falls within the scope of 'public ground' immune from adverse possession claims under MCL 600.5821(2)." *Adams Outdoor Advertising*, 269 Mich. App. at 370.

This Court has since determined based on a more direct review of the pertinent language that the pre-amendment version of MCL 600.5821(2) only applied in an action *brought by* a municipality. In *Mason v. City of Menominee*, 282 Mich. App. 525, 528-529; 766 N.W.2d 888 (2009), this Court reasoned:

> While subsection (1) applies to "[a]ctions for the recovery of any land where the state is a party," subsection (2) applies to "[a]ctions brought by any municipal corporations ...." It is evident from the language employed in subsection (1) that the Legislature could have made subsection (2) applicable in all cases brought by or against a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection (2) to apply to any case in which a municipality is a party would render the words "brought by" in subsection (2) nugatory.

***9** Judge Beckering provided a concurring opinion in *Mason* "to express [her] concern that in actions involving a dispute over municipal land, the Legislature may not have anticipated the potential for inconsistent outcomes, depending on which party beats the other to the courthouse, given its chosen language in MCL 600.5821(2)." *Mason*, 282 Mich. App. at 533 (BECKERING, J., concurring). The Legislature took no action to address this concern until 2016. In the meantime, this Court followed *Mason*'s reasoning in *Waisanen v. Superior Twp.*, 305 Mich. App. 719; 854 N.W.2d 213 (2014).

[3]As in *Mason*, this case involves a private citizen suing a municipality for recovery of an interest in land. The action was not brought by the municipality and therefore the prohibition in the applicable version of the statute does not bar Morley's claim. Summary disposition pursuant to MCR 2.116(C)(8) was improper.

[4]The township alternatively argues, however, that

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summary disposition was appropriate based on the statute of limitations. The circuit court stated that the statute of limitations for an inverse condemnation claim is six years. Morley filed suit on December 18, 2014. Accordingly, he was required to present evidence that the township had taken his prescriptive easement on or after December 18, 2008. The court determined that Morley filed his claim beyond the statute of limitations because "under the facts that have been developed through [the] discovery process, that time is - - has run prior to the filing of the suit, regardless of whether you look at the work being completed in - - in 1999 or 2003 or [2004]...." Morley had urged a 15-year statute of limitations, which would require activity on or after December 18, 1999. The court noted that the limitations period had run even under that more generous period. "[E]ven if the 15 year statute would apply, the proofs brought out in discovery show that by the plaintiff's own testimony, the problem stems from work that was completed in 1999."

The latest activity that could have caused the reverse of the water flow across the park land was completed by December 13, 1999, according to the letter sent from the township to a former township supervisor. Morley presented no admissible evidence of any activity after that date. A party may support and challenge a motion for summary disposition under MCR 2.116(C)(7) only with evidence "the substance of which would be admissible at trial." *Odom v. Wayne Co.*, 482 Mich. 459, 466; 760 N.W.2d 217 (2008). Here, Morley provided his own affidavit stating that Zielinski told him on August 3, 2016, that he had been moving material across the property line for more than a decade on the township's directive. Morley's recitation of Zielinski's statements are inadmissible hearsay and he never proffered an affidavit or deposition testimony from the speaker. Other witnesses, such as Morley's expert professional engineer, observed fill material on Morley's side of the property line, but could not date the placement.

Based on this record, even under the more generous 15-year statute of limitations, Morley's takings claim would be time-barred. Accordingly, the circuit court properly dismissed this claim.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As neither party prevailed in full, neither may tax costs pursuant to MCR 7.219(A).

All Citations

Not Reported in N.W. Rptr., 2019 WL 1867640

Footnotes

1 At a later hearing, the township argued that Zielinski's statements as reported by Morley were inadmissible hearsay, and emphasized that Morley never sought to depose Zielinski.

2 This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J. App. Pract. & Process 143 (2017).

3 We acknowledge that this Court has previously declined to answer the question raised in this case and instead remanded to the circuit court for further proceedings. In that case, however, the circuit court had not reached the issue and we merely declined to consider the issue in the first instance without adequate argument from the parties. See *Wiggins v. City of Burton*, 291 Mich. App. 532, 573-574; 805 N.W.2d 517 (2011).

4 Statutory amendments are presumed to apply prospectively only. See *Johnson v. Pastoriza*, 491 Mich. 417, 429; 818 N.W.2d 279 (2012); *Brewer v. A.D. Transp. Express, Inc.*, 486 Mich. 50, 56; 782 N.W.2d 475 (2010).

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EXHIBIT D

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2022 WL 957534
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Northern Division.

Larry W. MINER, Plaintiff,
v.
OGEMAW COUNTY ROAD COMMISSION and Patrick J. Reinke, Defendants.

Case No. 1:21-cv-11192
|
Signed March 29, 2022

Attorneys and Law Firms

William Dane Carey, Bridget L. Saxton, Marc S. McKellar, II, Kuhn Rogers PLC, Traverse City, MI, William L. Carey, Carey & Jaskowski, Grayling, MI, for Plaintiff.

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OPINION AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND TO STRIKE WITNESSES, AND DIRECTING PLAINTIFF TO CORRECT DISCLOSURE

THOMAS L. LUDINGTON, United States District Judge

***1** At some point Defendant Ogemaw County Road Commission ("Ogemaw") installed a drain culvert under Sage Lake Road. Plaintiff believes that the culvert diverts water onto his land; Defendants believe that it merely allows water to flow along its natural course under the highway. Nothing in the record reflects the culvert's purpose: where Ogemaw intended the water to go when it reached Plaintiff's property.

Plaintiff alleges that he blocked the culvert to prevent it from flooding his house and land, and that Ogemaw opened it back up and then sought criminal charges against him for destruction of government property. He also contends that the culvert still floods his land and is therefore a taking. Ogemaw contests that the flooding is a taking.

Originally alleging eight counts, Plaintiff now only alleges a federal and state takings claim, a due-process violation, and common-law trespass against Defendants Ogemaw and its purported managing director, Patrick Reinke. Defendants have filed a motion to dismiss. As explained below, Plaintiff's remaining claims are viable, so Defendants' Motion to Dismiss will be denied.

I.

In 2017, Plaintiff Larry Wade Miner purchased Lots 2 and 3 in the East Twin Subdivision. [1] ECF Nos. 3 at PageID.58; 30 at PageID.311. He purchased adjacent Lot 4 on June 8, 2020. ECF No. 30-2 at PageID.338. The following survey shows his property in relation to Sage Lake Road:



ECF No. 25-1 at PageID.282.

As reflected in the survey, the Northern boundary of Plaintiff's property abuts the Southside of Sage Lake Road, an Ogemaw County highway. ECF No. 3 at PageID.58. Robert Reid [2]

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owns the real property on the Northside of Sage Lake Road and, according to Plaintiff, is the beneficiary of the culvert. *Id.*

Plaintiff claims that Defendant Ogemaw installed the metal culvert under Sage Lake Road within the last ten years. *Id.* Defendant Ogemaw contends that it installed the culvert in or before 1961. ECF No. 30 at PageID.317.

Plaintiff alleges that he contacted Defendant Ogemaw on "dozens of occasions during 2017–2019." ECF No. 3 at PageID.59. On October 24, 2017, Plaintiff notified Defendant Ogemaw the first of "many of times regarding water flooding his crawl space." ECF No. 30-2 at PageID.342. Three days later, Defendant Ogemaw "determined" that "the ditch in front of [Plaintiff's] house" is "off [Defendant Ogemaw's] right of way and on [Plaintiff's] private property[,] which will need to be taken care of by Plaintiff." *Id.* at PageID.343.

In July 2019, Plaintiff contacted Defendant Ogemaw, again, demanding "just compensation" for taking his property by flooding it. ECF Nos. 3 at PageID.59; 30 at PageID.311–12. In August 2019, Defendant Patrick Reinke told Plaintiff that Ogemaw County would not pay for the damage to his property. *See* ECF Nos. 3 at PageID.59; 30-2 at PageID.348 ("As a general rule a parcel of land downstream, or [of lower] elevation is subservient to the parcel of land that is of higher elevation and drains to the parcel of land that is lower elevation."). Plaintiff contacted Ogemaw County Drain Commissioner Mike DeMatio, who "confirmed that Defendant [Ogemaw] did not have any drainage easement" for the culvert. ECF No. 3 at PageID.59. Plaintiff secured a survey, which demonstrates that Defendant Ogemaw installed the culvert outside the Sage Lake Road right-of-way, thus, encumbering Lot 4. *Id.*

***2** On January 2, 2020, Plaintiff blocked the culvert to prevent flooding on his property. *Id.* at PageID.60; ECF No. 30-2 at PageID.343. The next day, employees from Defendant Ogemaw went onto Plaintiff's property, apparently without permission, to unblock and cut the culvert so that it no longer physically intruded onto Plaintiff's property. ECF No. 3 at PageID.60. The project cost approximately $296.95 in labor and parts. ECF No. 30-2 at PageID.343.

Defendant Patrick Reinke contacted Ogemaw County Sherriff's Deputy Justin Noffsinger and Ogemaw County Prosecutor Ladonna Schultz to secure criminal charges against Plaintiff for blocking the culvert. *See* ECF No. 3 at PageID.60. Deputy Justin Noffsinger filed a police report, *id.* (citing Ex. B), and then informed Plaintiff that he faced criminal charges if he blocked the culvert. *Id.* at PageID.61.

The 12 inches of culvert that Defendants removed did not stop Plaintiff's problems. The culvert, he alleges, not only was still physically located on his property but also was still draining water onto his property. *Id.*

In April 2020, the culvert flooded Plaintiff's land again, extensively damaging his property. ECF No. 3 at PageID.61. Then the culvert was blocked again. *Id.* Deputy Justin Noffsinger interrogated Plaintiff about the blocking, but Plaintiff denied any involvement. *See id.* at PageID.62. On April 30, 2020, Prosecutor Ladonna Schultz charged Plaintiff with willful and malicious destruction of "the personal property of Ogemaw County Road Commission," MICH. COMP. LAWS § 750.377a(1)(d).[3] ECF No. 3 at PageID.62 (citing Ex. C). Plaintiff contends that the charges were initiated in retaliation for Plaintiff's exercise of his property rights. *Id.*

Defendants continued to monitor the culvert on Plaintiff's property, and Plaintiff alleges that they again entered his property without permission to unblock the culvert on July 1 and July 13, 2020. ECF No. 30-2 at PageID.344.

After Plaintiff filed this suit, Prosecutor Ladonna Schultz pursued the criminal charges against Plaintiff. *See* ECF No. 3 at PageID.63. In January 2021, Plaintiff retained Kuhn Rogers to pursue the immediate case on his behalf. *Id.* In February 2021, Plaintiff's counsel made a FOIA request to Hill Township and Defendant Ogemaw, to which Defendant Ogemaw responded on March 3, 2021. *Id.* The next day, Prosecutor Ladonna Schultz obtained a warrant for Plaintiff's arrest based on the May 5, 2020 complaint and warrant. *Id.* According to Plaintiff, the FOIA request revealed that Defendants Ogemaw, Schultz, Nossinger, and Reid worked together to deprive Plaintiff of his property rights. *Id.*; *see also* ECF No. 30-2 at PageID.385. Among the records is a screenshot of texts between Defendants Reid and Reinke. ECF No. 3 at PageID.63.

On April 15, 2021, Plaintiff brought the instant eight-count complaint in the Ogemaw County Circuit Court, alleging: (Count I) violation of the federal Takings Clause under 42 U.S.C. § 1983; (Count II) violation of the Michigan takings clause, MICH. CONST. of 1963, art. X, § 2 (2006); (Count III) violation of due process under 42 U.S.C. § 1983; (Count IV) conspiracy to interfere with civil rights under 42 U.S.C. §

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1983; (Count V) trespass, MICH. COMP. LAWS § 750.552; (Count VI) malicious prosecution, MICH. COMP. LAWS § 600.2907; (Count VII) abuse of process, MICH. COMP. LAWS § 750.369; and (Count VIII) unlawful arrest. ECF No. 1-1 at PageID.5–19; *see also Miner v. Schultz*, No. 21-651788-CZ (Mich. 34th Cir. Ct. 2021).

***3** After a series of stipulations and dismissals, only Counts I, II, III, and V remain against Defendants Ogemaw and Reinke. ECF No. 36; *see* ECF Nos. 18; 28. Defendants Ogemaw and Reinke filed a motion to dismiss those four counts, ECF No. 30, and Plaintiff responded, ECF No. 32. Defendants also filed a motion to bar four of Plaintiff's witnesses from testifying, ECF No. 39, to which Plaintiff has responded, ECF No. 40. Defendants have not replied to either response. As explained below, both Motions will be denied.

II.

Defendants filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). *See* ECF No. 30. Specifically, Defendants make five arguments for dismissal: (1) Plaintiff's federal and state takings claims are time-barred; (2) Plaintiff has failed to state a claim under 42 U.S.C. § 1983; (3) Plaintiff has failed to state a claim for conspiracy;[4] (4) Plaintiff's state-law tort claims against Defendant Ogemaw are barred by governmental immunity; and (5) Plaintiff's state-law tort claims against Defendant Reinke are barred by governmental immunity. *Id.* Plaintiff responds that (1) Plaintiff's federal and state takings claims (Counts I and II) are not time-barred; (2) Plaintiff has stated a claim for violation of due process (Count III); and (3) Plaintiff's trespass claim (Count V) is not barred by governmental immunity. ECF No. 32.

A.

Under Rule 12(b)(6), a pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In considering a Rule 12(b)(6) motion, the court construes the pleading in the nonmovant's favor and accepts its factual allegations as true. *See Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). The nonmovant need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," but the court need not accept as true the complaint's legal conclusions. *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937 (quotations and citation omitted). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678, 129 S.Ct. 1937; *see also 16630 Southfield Ltd. v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013) ("The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct.").

In addition to these general principles, the Sixth Circuit has emphasized that, because the statute of limitations is an affirmative defense, a 12(b)(6) motion to dismiss "is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Yet there are exceptions to this general rule, including "[i]f the allegations, for example, show that relief is barred by the applicable statute of limitations." *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) (citing FED. R. CIV. P. 8(c)).

B.

Defendants allege that Plaintiff's Fifth Amendment[5] and Michigan[6] takings claims are time-barred. *See* ECF No. 30 at PageID.317–19. Specifically, Defendants argue that Plaintiff's takings claims are time-barred by the applicable 15-year statute of limitations because the culvert was installed in 1961, contrary to Plaintiff's assertion in the Complaint that Ogemaw County installed it within the last ten years. *See id.* (citing MICH. COMP. LAWS § 600.5801(4)). Defendants conclude that Plaintiff's takings claim accrued 61 years ago, in 1961, and that Plaintiff's Complaint is untimely. *See id.* at PageID.318–19.

***4** Plaintiff responds that the documents Defendants rely on do not demonstrate that the culvert was, in fact, installed in 1961. ECF No. 32 at PagID.410. For that reason, Plaintiff adds, this Court should accept the Complaint's well-pleaded

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facts as true and deny the Motion to Dismiss as to Counts I and II. *Id.* at PageID.411.

i.

Notably, "[w]hen ruling on a motion to dismiss, a court may not consider matters outside the pleadings." *Chamberlain v. Reddy Ice Holdings, Inc.*, No. CIVA 2:08-13451, 2010 WL 1711760, at *3 (E.D. Mich. Apr. 28, 2010) (citations omitted). But "[c]ourts may ... consider public records and filings with government agencies without converting a motion to dismiss under Rule 12(b)(6) to a summary judgment motion." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *abrogated on other grounds by Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002). Nevertheless, when documents attached to a motion to dismiss are not incorporated by reference in the plaintiff's complaint, the court may not consider them unless they (1) are readily verifiable and integral to the parties' dispute and (2) do not ask the court to adopt disputed facts as true. *Chamberlain*, 2010 WL 1711760, at *3 (quoting *In re Cardinal Health Inc. Sec. Litigs.*, 426 F. Supp. 2d 688, 713 (S.D. Ohio 2006)).

The exhibits do not support Defendants' version of the facts. Although exhibit 6 and 7 might indicate that *some* culvert was installed in 1961, they do not clearly substantiate that proposition. Indeed, Defendants do not even attempt to explain how those exhibits demonstrate the culvert's purported 1961 installation date. *See* ECF No. 30-2 at PageID.359. Likewise, those exhibits do not indicate that Defendants have not performed any work on the culvert since 2005. On the contrary, the parties agree that Defendant Ogemaw altered the culvert on January 3, 2020, and unblocked the culvert on July 2 and July 13, 2020. ECF Nos. 3 at PageID.60; 30-2 at PageID.343–44. Moreover, as Plaintiff notes, "documents included in those exhibits are of unknown origin and are not even accompanied by an affidavit or sworn statement of a custodian or other witness to lay a proper foundation for the documents." ECF No. 32 at PageID.410.

Defendants' exhibits at best demonstrate a genuine issue of material fact about the culvert's installation date. Therefore, those exhibits should not be considered at this stage in the litigation. *Id.* Even so, both parties apply the wrong law.

ii.

Under Michigan's "continuous wrong" doctrine,[7] Plaintiff's takings claims survive Defendants' challenge. Defendants correctly explain that if the culvert was installed in 1961 without any later change, Plaintiff's claim would have accrued in 1961 and would, therefore, be time-barred. *See Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009) (dismissing flood-based takings claims because "the water level of their wells does not depend on any continual intervention by the state"). Unlike the defendants in *Hensley*, however, Defendants concede that they altered the culvert after 1961.

***5** "In an inverse condemnation action [alleging] a continuous wrong by the condemnor, it is well settled that the statute of limitations does not begin to run until the consequences of the condemnor's actions have stabilized." *Hart v. City of Detroit*, 416 Mich. 488, 331 N.W.2d 438, 445 (1982) (first citing *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947); and then citing *Silverstein v. City of Detroit*, 335 F. Supp. 1306 (E.D. Mich. 1971)). The precise time when the limitations period begins is based on the facts and circumstances of each case. *Id.*

In the Sixth Circuit, a "continuous wrong" exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiff accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided. *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) (citations omitted). But plaintiffs cannot claim a "continuous wrong" based on water flooding onto their land. M. Bryan Schneider & Jody L. Sturtz, *Civil Procedure*, 43 WAYNE L. REV. 439, 583–85 (1997) (citing *Horvath v. Delida*, 213 Mich.App. 620, 540 N.W.2d 760 (1995)). Michigan courts have limited the doctrine to "trespass and nuisance claims." *Id.* at 583–84 (first citing *Defnet v. City of Detroit*, 327 Mich. 254, 41 N.W.2d 539, 541 (1950) (en banc) (applying doctrine to trespass claim)); and then citing *Moore v. City of Pontiac*, 143 Mich.App. 610, 372 N.W.2d 627, 629 (1985) (applying doctrine to nuisance claim)).

Assuming the facts as true, at this Court must at the motion-to-dismiss stage, Plaintiff's takings claims are not time-barred. On January 3, 2020, Defendants entered Plaintiff's land and trimmed the length of the culvert. ECF Nos. 3 at PageID.60; 30-2 at PageID.343. Defendants again unblocked the culvert on July 1 and July 13, 2020. ECF No. 30-2 at PageID.344. Had these events not occurred, Plaintiff's claims would be time-barred because the flooding itself does not affect the statute

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of limitations for Plaintiff's takings claims. *See Hensley*, 557 F.3d at 697. But because Defendants altered and unblocked the culvert in January and July 2020, which flooded Plaintiff's land at least once afterward in April 2020, *see* ECF No. 3 at PageID.61, Plaintiff's claims survive under the "continuous wrong" doctrine. In this way, the 15-year statute of limitations began to run on July 13, 2020, and Plaintiff could therefore bring his takings claims until July 13, 2035.

Notably, despite innumerable available theories,[8] Defendants have not offered any public-use rationale or state interest for the alleged taking. *See* Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 276 (1998) (noting that "actions that amount to physical invasions of property" are "takings per se" (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992))).

Taking the allegations in Plaintiff's Complaint as true, as this Court must, Plaintiff has properly pled that Defendants have unconstitutionally taken his property through actions that occurred within the applicable 15-year limitation period. Defendants' Motion to Dismiss must therefore be denied as to Counts I and II.

C.

***6** Defendant's second argument is that Plaintiff has not properly pled a due-process claim under § 1983, and that even if he has, it is barred because it is subsumed by the rights that he has invoked in his takings claims. *See* ECF No. 30 at PageID.319–24.

Plaintiff has not sufficiently pled his due-process claim. Plaintiff's Complaint does not identify the life, liberty, or property interest at stake. Rather, Plaintiff's due-process claim merely quotes the Due Process Clause, asserts that Defendants violated it, alleges that Defendants' violations harmed him, and then "incorporates the preceding paragraphs as if stated fully herein." *See* ECF No. 3 at PageID.67. There is not even a hint of how those assertions interface with Plaintiff's puzzling due-process claim. For that reason, Defendant's Motion to Dismiss should be granted as to Count III. FED. R. CIV. P. 12(b)(6); *Jirjis v. Wachovia*, No. 10-11728, 2011 WL 87247, at *5 (E.D. Mich. Jan. 11, 2011) ("[B]are-bones allegations are plainly insufficient to survive a 12(b)(6) motion to dismiss.").

But Plaintiff's response puts more meat on the bones: "Plaintiff's complaint alleges that Defendants did not effect a taking of his land for a *public* purpose, but rather for the *private* benefit of the Hill Township Supervisor, Robert Reid." ECF No. 32 at PageID.412 (citing ECF No. 3 at PageID.58–60). "The Fifth Amendment ... implies that the power of eminent domain does not permit takings of private property for strictly private uses, regardless of whether just compensation is paid." *Montgomery v. Carter Cnty.*, 226 F.3d 758, 765 (6th Cir. 2000) (internal citation omitted) (citing *Coniston Corp. v. Vill. of Hoffman Ests.*, 844 F.2d 461, 464 (7th Cir. 1988)).

Defendants are correct that "substantive due process concepts are not available to provide relief when another provision of the Constitution directly addresses the type of illegal government conduct alleged by a plaintiff." ECF No. 30 at PageID.320 (first citing *Choate's Air Conditioning & Heating Inc., v. Light, Gas, Water Div. of Memphis*, 16 F. App'x 323, 330–331 (6th Cir. 2001) (unpublished); and then citing *Montgomery v. Carter Cnty.*, 226 F.3d 758, 769 (6th Cir. 2000)).

But in the takings cases that Defendants cite for that proposition, the plaintiffs attempted to establish standing to challenge private-use takings in federal court without exhausting state procedures as required. Accordingly, the courts were addressing an "end run" around the ripeness doctrine. *See Choate's*, 16 F. App'x at 331; *Montgomery*, 226 F.3d at 769–71. Ripeness is not at issue in this case, because Plaintiff properly pleaded his takings claims under the "continuous wrong" doctrine. Moreover, the due-process analyses in those cases are at most dicta. *See Choate's*, 16 F. App'x at 332; *Montgomery*, 226 F.3d at 770. And Defendant has not cited any controlling precedent requiring dismissal of a due-process claim for a taking when the plaintiff has also pled a Fifth Amendment or state-law taking.

Further, Plaintiff's claim that Defendants took his property for a private use invokes a separate property interest than his claim that Defendants took his property for a public use.

For these reasons, Defendant's Motion to Dismiss will be denied as to Count III.

D.

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***7** Defendants next argue that governmental immunity bars Plaintiff's Michigan trespass claim against Defendants Ogemaw and Reinke. *See* ECF No. 30 at PageID.326–31. Specifically, Defendants claim that Michigan Compiled Laws § 691.1401 *et seq.*[9] immunizes Defendant Ogemaw, and that Michigan Compiled Laws § 691.1407(5)[10] immunizes Defendant Reinke. *Id.*

Political subdivisions of the State of Michigan, like Defendant Ogemaw, enjoy immunity from tort liability under the Governmental Tort Liability Act (GTLA), MICH. COMP. LAWS § 691.1401 *et seq.* *See* MICH. COMP. LAWS § 691.1401(d) (defining "governmental agency" as "the state or a political subdivision"). Under the GTLA, Defendant Ogemaw is immune from tort liability "unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v. City of Detroit*, 467 Mich. 186, 649 N.W.2d 47, 52 (2002).

The GTLA permits a cause of action to be brought against a governmental agency in only six discrete areas, none of which apply here. *See Lash v. City of Traverse City*, 479 Mich. 180, 735 N.W.2d 628, 637 n.33 (2007) (listing the other five exceptions).

Yet "Plaintiff could enforce the statute by seeking injunctive relief pursuant to [Michigan Compiled Laws § 3.310]," or declaratory relief pursuant to [Michigan Compiled Laws § 2.605(A)(1)]." *Lash v. Traverse City*, 479 Mich. 180, 735 N.W.2d 628, 638 (2007); *see also Morley v. Twp. of Bangor*, No. 340636, 2019 WL 1867640, at *7 (Mich. Ct. App. Apr. 25, 2019) (unpublished) (per curiam) ("An action to abate a nuisance is 'equitable in nature.' " (quoting *Ypsilanti Charter Twp. v. Kircher*, 281 Mich.App. 251, 761 N.W.2d 761 (2008))). In this way, Defendant Ogemaw is not immune from Plaintiff's trespass claim if he seeks declaratory or injunctive relief.

The same analysis applies to Defendant Reinke's claim for absolute immunity under Michigan Compiled Laws § 691.1407(5). Even so, Defendant Reinke has not submitted any evidence to establish "whether [his] executive authority actually included the ability to [take the actions he took]." *Petipren v. Jaskowski*, 494 Mich. 190, 212, 833 N.W.2d 247 (2013). Indeed, Defendant Reinke has not submitted an affidavit or other documentary evidence describing his responsibilities as managing director or the official job description for his position. Without such evidence, it is not possible to evaluate Defendant Reinke's entitlement to absolute immunity under Michigan Compiled Laws § 691.1407(5).

***8** Moreover, Defendant Reinke is subject to money damages for trespass. Although municipalities are immune from money damages for intentional torts. *Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219, 229 (2002) ("[T]he plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity [for municipal corporations]." (citing MICH. COMP. LAWS § 691.1507(1))). But the express language of § 691.1407(3) removes intentional torts like trespass from the scope of the qualified immunity afforded to officers and employees of governmental agencies under § 691.1407(2). *See* MICH. COMP. LAWS § 691.1407(2), (3). Assuming Plaintiff's alleged facts as true, as this Court must at this stage, Plaintiff has pled a viable trespass claim for money damages against Defendant Reinke.

Under any measure, then, Defendant Reinke is not immune from Plaintiff's trespass claim.

Plaintiff seeks declaratory and injunctive relief for Defendants' trespass on his property. *See* ECF No. 3 at PageID.72. Because governmental immunity only bars Plaintiff from recovering *monetary damages* for state common-law tort claims from Ogemaw, and Plaintiff seeks injunctive relief from Ogemaw and injunctive and monetary relief from Defendant Reinke, Defendants' Motion to Dismiss will be denied.

E.

Defendants also allege that they are "are entitled to reimbursement of their costs, attorney's fees, and expert fees pursuant to 42 U.S.C. § 1988." ECF No. 30 at PageID.331–33. Specifically, Defendants conclude that "justice demands that Plaintiff be ordered to reimburse Defendants Reinke and Ogemaw for the costs incurred in defending against Plaintiff's groundless claims, including their attorneys' fees and expert fees." *Id.* at PageID.333.

Plaintiff responds that "even if the Court does grant Defendants' motion to dismiss as to one or more of the claims asserted in Plaintiff's complaint, Defendants' request for reimbursement should nevertheless be denied because Plaintiff's action is not 'frivolous, unreasonable, or without

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foundation.' " ECF No. 32 at PageID.416 (quoting *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980))

Defendants are not entitled to costs or fees. Defendants' request is conditioned on this Court dismissing Plaintiff's claims. As explained earlier, none of Plaintiff's outstanding claims will be dismissed. *See* discussion *supra* Part II. Consequently, Defendants' request for costs and fees will be denied.

III.

Defendants also filed a motion to "strik[e] Plaintiff's expert witness, professional surveyor, and any expert testimony from Plaintiff's treating physicians." ECF No. 39 at PageID.433 (first citing FED. R. CIV. P. 26(a)(2)(B); and then citing FED. R. CIV. P. 37(c)(1)). Defendants add that "Plaintiff has not filed any accompanying reports as are required for his filings to be compliant with the federal rules." ECF No. 39 at PageID.436. Defendants elaborate that "[b]ecause the end of discovery is fast approaching, [they] will be prejudiced by any of Plaintiff's experts testifying." ECF No. 39 at PageID.437.

Plaintiff responds that his only expert witness "was Andrew S[m]its," an environmental and geological engineer who is the elected drain commissioner of Grand Traverse County. *See* ECF No. 40 at PageID.450. Plaintiff explains that "Mr. S[m]its is therefore the only expert for which Plaintiff was required to include a written report under Fed. R. Civ. P. 26(a)(2)(B)." *Id.* Plaintiff therefore concludes, "As it pertains to all other witnesses who may provide expert testimony but do not fall within the purview of Rule 26(a)(2)(B), Plaintiff has made proper disclosure." *Id.*

Defendants' Motion to Strike is confusing. Their Motion seemingly requests that this Court strike Plaintiff's one expert witness and all his lay witnesses because he did not disclose any expert reports under Rule 26(a)(2)(B).

A.

***9** Plaintiff concedes that he did not file an expert report for Andrew Smits because it was not required. ECF No. 40 at PageID.448 ("Plaintiff does not intend to call Mr. Smits as an expert witness unless his testimony is needed to rebut expert testimony elicited from one or more of Defendants' retained experts in this case.").

Rule 26 requires disclosures of rebuttal expert testimony within 30 days of the expert disclosure triggering the rebuttal. *See* FED. R. CIV. P. 26(a)(2)(D)(ii); *see also Miller v. Gentry*, No. 1:16-CV-707, 2018 WL 11243682, at *1 (W.D. Mich. Apr. 25, 2018) ("Unless the witness is intended solely to rebut an opposing party's expert witness on the same subject matter, the expert witness must be disclosed at least 90 days before trial." (citing FED. R. CIV. P. 26(a)(2)(D)(i) and (ii)). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1).

Plaintiff did not disclose Andrew Smits as required, but that failure was substantially justified and harmless. Plaintiff timely disclosed Andrew Smits as an expert witness. *See* ECF Nos. 17 at PageID.199; 39-2 at PageID.442. Thus, Defendants knew of Andrew Smits's intended testimony since September 30, 2021. *See* ECF No. 39-2 at PageID.442. Plaintiff had the opportunity to disclose Andrew Smits's expert report within 30 days of Defendants' disclosure of the expert testimony that Andrew Smits will rebut. Yet Plaintiff still has not made the disclosure. But as Plaintiff notes, this Court issued an order refusing to extend the disclosure deadline for Andrew Smits's written report even though he could not complete it before the disclosure deadline. *See* ECF No. 40 at PageID.448. So Plaintiff chose to call Andrew Smits as a rebuttal expert instead. Defendants had the opportunity to depose Andrew Smits as a rebuttal expert after Plaintiff disclosed him, yet Defendants cancelled their scheduled deposition. *See* ECF No. 40 at PageID.448. As indicated, Plaintiff's failure to disclose Andrew Smits's expert report was substantially justified and harmless. *See Lewis v. Allstate Ins.*, No. CV H-18-3931, 2021 WL 415439, at *5 (S.D. Tex. Feb. 5, 2021) (finding a failure to disclose expert testimony justified and harmless when because "their views and opinions [were] likely known to the plaintiffs").

In applying the Federal Rule of Civil Procedure, district courts retain "broad discretion to supervise discovery." *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 664 (6th Cir. 2005) (applying Rule 26(e)(1)) (citing *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)); *see also Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, No. 3:13-CV-82-CRS-CHL, 2017 WL 4799815, at *3 (W.D. Ky. Oct. 24, 2017) ("It is axiomatic that the Court has broad discretion in determining the proper scope of

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discovery." (citing *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981))). Given that six months have passed since Plaintiff's first attempt to submit Andrew Smits's report, the report is likely complete, and Plaintiff could likely remedy his shortcoming with ease. For this reason, "the proper course is for [Plaintiff] to supplement or correct [his] disclosure to bring [Andrew Smits's] report in compliance with Rule 26." *Davis v. Rockwall Cnty.*, No. 3:08-CV-01773-F, 2010 WL 11561780, at *2 (N.D. Tex. Nov. 22, 2010).

***10** Plaintiff will be directed to supplement his disclosure of Andrew Smits's expert report. Although a scheduling order currently governs discovery in this case, it is silent on supplemental expert reports. *See* ECF No. 17 at PageID.199. Yet Rule 26(e) plainly requires supplementation of an expert report in response to a court order. *In re Flint Water Cases*, No. 17-10164, 2021 WL 5124253, at *2 (E.D. Mich. Nov. 4, 2021) (citing FED. R. CIV. P. 26(e)(1)(B)); *see also Wright v. Best Recovery Servs. LLC*, No. 14-CV-12476, 2015 WL 1849405, at *3 (E.D. Mich. Apr. 22, 2015) ("The Court may also order the disclosure of undisclosed information."). Sixth Circuit policy "values the disposition of cases on their merits." *Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006). This Court will not prejudice Plaintiff for failing to follow a provision that does not exist in the scheduling order. For these reasons, Plaintiff will be directed to submit the expert report of Andrew Smits within 30 days of this Order. Defendant will have until June 1, 2022 to depose Andrew Smits.

B.

Defendants' Motion is inapposite to the extent that it seeks to exclude Plaintiff's lay witnesses, because Plaintiff disclosed them as required under Federal Rule of Civil Procedure 26, and lay witnesses do not need to disclose expert reports.

Defendants' Motion also seeks to exclude Plaintiff's treating physicians, Drs. Asma Saboor and Scott Huffaker, and Plaintiff's land surveyor, Mark Jakubik. *See* ECF Nos. 39 at PageID.437; 39-2 at PageID.445. Defendants argue that those three witnesses should be excluded because they will give expert testimony but did not provide expert reports.

But Plaintiff did not retain those three witnesses in anticipation of litigation and, therefore, he did not need to disclose written reports for them. *See* FED. R. CIV. P. (a)(2)(B); *Kassim v. United Airlines, Inc.*, 320 F.R.D. 451, 452 (E.D. Mich. 2017) (noting that "experts who are not retained or specially employed to provide expert testimony" must comply with Rule 26(a)(2)(C)). The doctors are Plaintiff's treating physicians. And the land surveyor conducted the pre-litigation land survey that this Court invited Plaintiff to disclose. *See* ECF Nos. 22 at PageID.254; 25-1 at PageID.282. Plaintiff did not retain those three experts to offer expert testimony in this litigation. Thus, Plaintiff instead had to follow Rule 26(a)(2)(C), which he did. *See* ECF No. 39-2 at PageID.445 (describing the subject matter of the evidence the three witnesses will present and a summary of the facts and opinions to which the witnesses will testify). Because Plaintiff properly disclosed Asma Saboor, Scott Huffaker, and Mark Jakubik, they may testify.

For these reasons, Defendants' Motion to Strike will be denied.

IV.

Accordingly, it is **ORDERED** that Defendants' Motion to Dismiss, ECF No. 30, is **DENIED.**

Further, it is **ORDERED** that Defendants' Motion to Strike, ECF No. 39, is **DENIED WITHOUT PREJUDICE**.

Further, it is **ORDERED** that Plaintiff is **DIRECTED** to supplement or correct his disclosure of Andrew Smits's expert report **on or before 30 days of this Order**.

Further, it is **ORDERED** that Defendant is **DIRECTED** to depose Andrew Smits **on or before June 1, 2022**.

Further, the in-person settlement conference remains scheduled for **April 13, 2022 at 4:00 PM.**

All Citations

--- F.Supp.3d ----, 2022 WL 957534

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Footnotes

1 Notably, the property is listed in both Larry's name and his wife's name, Linda L. Miner. *See* ECF No. 30-2 at PageID.339. Linda Miner is not a party to this action.

2 Robert Reid was a defendant in the original complaint but has since been dismissed per the parties' stipulation. ECF No. 18.

3 Section 750.377a(1)(d) reads in full:

> A person who willfully and maliciously destroys or injures the personal property of another person is guilty of a crime as follows: If the amount of the destruction or injury is less than $200.00, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00 or 3 times the amount of the destruction or injury, whichever is greater, or both imprisonment and a fine.

MICH. COMP. LAWS § 750.377a(1)(d).

4 This argument will not be considered because Plaintiff withdrew Count IV. *See* ECF No. 36.

5 "The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of 'life, liberty, or property' without 'due process of law.' The same due process principles apply to state governments under the Fourteenth Amendment to the United States Constitution." Bradford C. Mank, *Can Judges Use Due Process Concepts in* Obergefell *to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of* Juliana v. United States, 7 BELMONT L. REV. 277, 279 n.8 (2020) (first citing U.S. CONST. amend. V; and then citing U.S. CONST. amend. XIV) (other citations omitted).

6 "The 2006 amendment to the Michigan constitution restricted the state's taking power. Thus, under limited circumstances, local governments in Michigan are permitted to take private property for economic revitalization and community enhancement." James A. Martone, Note, *Rethinking Eminent Domain in Michigan*, 58 WAYNE L. REV. 537, 539 (2012).

7 Ample precedent supporting the continuing-wrong doctrine exists in Michigan. Peggy L. Miller, *Repeated Wrongs Do Not Make A Right: Continuing-Wrong Doctrine & Personal Injury Claims*, 9 T.M. COOLEY L. REV. 369, 373 (1992) (collecting cases).

8 *E.g.*, Mason E. Heidt & Joshua Wysor, *Don't Condemn My Creek: Using Eminent Domain to Satisfy Environmental Obligations*, 7 BELMONT L. REV. 370, 377 (2020) (discussing "environmental protection" as a possible public use); *see also* Michael B. Kent, Jr., *Public Pension Reform and the Takings Clause*, 4 BELMONT L. REV. 1, 25 (2017) ("[I]n the context of regulatory takings, there is a general presumption that the government's action is supported by a public purpose.").

9 The Governmental Tort Liability Act states, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MICH. COMP. LAWS § 691.1401 *et seq.*

10 Under Michigan Compiled Laws § 691.1407(5):

> To qualify for absolute immunity from tort liability an individual governmental employee must prove his or her entitlement to immunity by establishing, consistently with the statute's plain language, (1) that he or

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she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority.

Petipren v. Jaskowski, 494 Mich. 190, 833 N.W.2d 247 (2013).

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