

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT JOYCE, as Trustee of the KAREN A.
JOYCE FAMILY TRUST, ROBERT WAHLBECK,
JANIS WAHLBECK, and RUSSELL DEITHERT,

UNPUBLISHED
October 14, 2021

Plaintiffs-Appellees,

v

GOGEBIC COUNTY ROAD COMMISSION,

No. 353297; 354621
Gogebic Circuit Court
LC No. 2019-000159-AW

Defendant-Appellant.

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

In Docket No. 353297, defendant, the Gogebic County Road Commission, appeals as on leave granted the order denying its motion for summary disposition with respect to plaintiffs’¹ claim of inverse condemnation. In Docket No. 354621, defendant appeals by leave granted² the order denying its motion for summary disposition with respect to plaintiffs’ claim under Part 17, MCL 324.1701 *et seq.*, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.* This latter order also reaffirmed the denial of defendant’s motion for summary disposition of the inverse-condemnation claim. Finding errors warranting reversal, we reverse and remand for entry of an order granting summary disposition in favor of defendant.

¹ Plaintiffs, Robert Joyce, as Trustee of the Karen A. Joyce Family Trust, Robert Wahlbeck, Janis Wahlbeck, and Russell Deithert, are lake front property owners alleging adverse impact by defendant’s replacement of failing culverts.

² Our Supreme Court remanded Docket No. 353297 to this Court for consideration as on leave granted. *Joyce v Gogebic Co Rd Comm*, 506 Mich 1023 (2020). This Court granted leave to appeal in Docket No. 354621 and consolidated the appeals. *Karen A Joyce Family Trust v Gogebic Co Rd Comm*, unpublished order of the Court of Appeals, entered January 21, 2021 (Docket Nos. 353297; 354621).

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs own property abutting Duck Lake in Gogebic County. Three culverts diverting water from Duck Lake and directing water underneath a road had, in the past, been damaged and partially blocked, allowing Duck Lake to achieve a water level that suited plaintiffs. Defendant characterized the damage and blockage as vandalism. Specifically, defendant posited that landowners placed everything from cement bags to dumb bells to debris in the culverts to divert water flow. However, other persons owning property on Duck Lake were not happy with the higher water level and felt it should be lower.

Defendant considered whether to replace the culverts in connection with its duty to maintain roads. Specifically, there was concern that the damage to the culverts would result in a washout of the road. An analysis and discussion of the need to replace the culverts occurred in 2016-2017 by the county engineer, the county drain commissioner, and during road commission meetings. After initially concluding that the culverts did not need to be replaced, defendant eventually concluded that their replacement was necessary to avoid an emergency situation involving the road. Indeed, the county drain commissioner sent a letter to the county summarizing the need for culvert replacement and grates to prevent the problem from recurring:

As Drain Commissioner for Gogebic County I am requesting that the Road Commission replace the three culverts at Duck Lake Inlet. In examining the culverts at the site, I would have to say the culverts are failing and the road and shoulder is starting to erode. With the issues at the lake and the residents, I do believe this is the best course of action. I do realize that the culverts will be placed exactly the way they were placed years ago and that the permits from the DNR [sic] will state that placement. I am also requesting that the culverts have grates on both ends to prevent debris and man-made material [from] being placed inside the culverts.

Consequently, defendant sought and obtained a permit from the Department of Environment, Great Lakes, and Energy (EGLE).³ In the permit application, it was noted that no legal lake level had been established for Duck Lake. Ultimately, defendant replaced the three culverts with three identical, but new, structures. As a result of the culvert replacement, the water level of Duck Lake receded. Plaintiffs asserted that the water level of the lake decreased by at least 18 inches. Plaintiffs sued defendant for inverse condemnation,⁴ alleging a decrease in the value of their properties as a result of the lower water level. In a second amended complaint, plaintiffs later added the claim under Part 17 of the NREPA, seeking equitable relief for defendant's actions in

³ At the time, EGLE was known as the Department of Environmental Quality. For ease of reference, this opinion will refer to the department as "EGLE."

⁴ Plaintiffs also raised claims of mandamus, prescriptive rights, and quiet enjoyment. The trial court granted summary disposition of these three claims, and they are not at issue in these consolidated appeals.

impairing Duck Lake that caused plaintiffs' loss of riparian rights and an increase in invasive species.

Defendant moved for summary disposition of the claim of inverse condemnation, asserting that plaintiffs could not establish: (1) that they had a property right to a certain lake level; (2) that defendant abused its powers by replacing the culverts when it was issued a valid EGLE permit; and (3) that they suffered alleged harm that differed from similarly situated property owners. Rather, defendant claimed that it was required to fulfill its duty to maintain the roads, but it had no duty to maintain lake levels. Defendant submitted that it replaced the existing culverts in-kind, and the replacement was necessary because of the damage to the culverts. When renewing its request for summary disposition of the inverse condemnation claim, defendant also claimed that plaintiffs were effectively claiming a "right of flowage." However, defendants asserted that plaintiffs did not have a right to a specific water level, particularly when vandalism of the culverts was used to dictate the flow and water level. Addressing Part 17 of the NREPA claim, defendants moved for summary disposition claiming that it was not actionable because defendant's actions were approved through the permitting process by EGLE. Because plaintiffs had failed to follow the proper channels for disputing the issuance of the permit, this claim was not supported. Rather, plaintiffs should have pursued establishment of the lake level.

Plaintiffs alleged that summary disposition of the inverse condemnation claim was improper because defendant knew that its replacement of the culverts would lower the lake level and the result would cause damage to plaintiffs' properties. It was further contended that defendant could not rely on the EGLE permit to validate its' action because the scope of the issued permit was exceeded when the lake levels were altered by the culvert replacement. Plaintiffs also submitted that they suffered special harm different than other similarly situated property owners because of the preference by other landowners for lower lake levels. With regard to the Part 17 of NREPA claim, plaintiffs submitted that the issuance of the EGLE permit did not prevent this claim from being raised. Additionally, plaintiffs alleged that defendant did not substantiate the flowage easement claim.

The trial court denied defendant's motions for summary disposition with regard to both claims. It concluded that there was a factual question addressing whether defendant abused its powers by knowingly lowering the lake level. Further, because plaintiffs allegedly suffered harm different from property owners at the north end of the lake, it declined to dismiss the inverse condemnation claim. The trial court also cited a lack of evidence addressing a flowage easement to warrant summary disposition. Lastly, the trial court determined that the Part 17 of NREPA claim could be raised in a separate action and was not limited to the permitting process. From these decisions, defendant appeals.

II. APPLICABLE STANDARDS

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint premised on a review of the pleadings alone. *Teal v Prasad*, 283 Mich App 384, 390 n 2; 772 NW2d 57 (2009). The well-pleaded allegations are accepted as true. *Id.* However, when documentary evidence was attached to the motion, we may treat the motion as having been granted under MCR 2.116(C)(10).

See *Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, 506-507; 885 NW2d 86 (2016). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is “no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10).

In their second amended complaint, plaintiffs contested defendant’s compliance with its duty to maintain the roads, a duty governed by statute. In *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 495-496; 948 NW2d 452 (2019), we set forth the rules addressing the construction of a statute:

Issues involving statutory interpretation present questions of law that are reviewed de novo. *Meisner Law Group, PC v Weston Downs Condo Ass’n*, 321 Mich App 702, 714; 909 NW2d 890 (2017). “The primary goal of statutory interpretation is to give effect to the intent of the Legislature.” *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). The most reliable evidence of legislative intent is the plain language of the statute. *South Dearborn Environmental Improvement Ass’n, Inc v Dep’t of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Gardner v Dep’t of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015). The court’s interpretation of a statute must give effect to every word, phrase, and clause. *South Dearborn*, 502 Mich at 361. Further, an interpretation that would render any part of the statute surplusage or nugatory must be avoided. *Id.* Common words and phrases are given their plain meaning as determined by the context in which the words are used, and a dictionary may be consulted to ascertain the meaning of an undefined word or phrase. *Id.* “In construing a legislative enactment we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used.” *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977).

III. INVERSE CONDEMNATION

Defendant alleges that plaintiffs cannot meet the elements to support the claim for inverse condemnation, and therefore, the trial court erred in denying the motion for summary disposition on this ground. We agree.

“An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings.” *Blue Harvest, Inc v Dep’t of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010). To raise an inverse condemnation claim, the plaintiff must allege that (1) the defendant’s actions were a substantial cause of a decline in the value of the plaintiff’s property and (2) the defendant abused its powers by engaging in affirmative conduct specifically directed toward the plaintiff’s property. *Id.* Also, the plaintiff must demonstrate a causal connection between the government’s action and the alleged damages. *Id.*

Thus, in the context of inverse condemnation, a taking occurs when there is some action by the defendant specifically directed toward the plaintiff's property that causes a limitation on the use of the property. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009). In addition, the plaintiff must allege a unique or special harm that differs from any harm sustained by similarly situated people. *Spiek v Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998). The harm must be different in kind, and not simply in degree, from that suffered by others similarly situated. *Id.*

In *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 539; 688 NW2d 550 (2004), we addressed the requirement that a defendant abused its powers by its actions specifically directed toward the plaintiffs' property. In *Hinojosa*, the state acquired title to a home located at 2015 Lansing Street in Detroit in May 2000, when no one redeemed the property following a tax sale. In January 2001, the home was damaged by fire. City inspectors concluded that the home was in violation of the city's building code, deemed it a dangerous building, and gave notice in September 2001, that the property would be demolished because it was an unsafe structure. *Id.*

The Hinojosa plaintiffs, neighboring property owners without homeowners' insurance, contacted city officials on several occasions to alert them to the condition of 2015 Lansing Street. Apparently, following the January 2001 fire, vagrants were using a hole in the floor of the structure to build a fire and warm themselves. In March 2002, a fire occurred at the vacant home again, and it spread to and damaged the Hinojosa home. Consequently, these plaintiffs filed suit alleging trespass-nuisance and an unconstitutional taking or inverse condemnation. The trial court granted the defendant's motion to dismiss. *Id.* at 539-540.

On appeal, this Court affirmed, concluding that summary disposition was appropriate because the plaintiffs' failed to state a cause of action for inverse condemnation, MCR 2.116(C)(8). After delineating the law addressing the elements of inverse condemnation as noted above, this Court concluded:

When we apply the settled principles of required proof to establish a de facto taking or inverse condemnation to the present case, we conclude that the trial court correctly ruled that plaintiffs' constitutional claim fails because plaintiffs did not allege *any overt action by the state directed at plaintiffs' properties*. In fact, plaintiffs admitted that no facts existed that would support amending the complaint to allege the necessary overt act. We therefore hold that plaintiffs' failed to allege a "taking" or "inverse condemnation" for which just compensation is required. . . . Because plaintiffs failed to allege that the state took affirmative action directed at plaintiffs' properties, which was a substantial cause of the decline of their property's value, plaintiffs "failed to state a claim on which relief can be granted." [*Id.* at 550 (emphasis added).]

Although plaintiffs contend that defendant's replacement of the culverts constituted an abuse of its powers for purposes of inverse condemnation, defendant was statutorily responsible for culvert maintenance. MCL 224.19 addresses the powers and duties of the board of county road commission, and provides in pertinent part:

(1) The board of county road commissioners may grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, and may extend and enlarge an improvement. *The board may* construct bridges and culverts on the line of the road, and *repair and maintain roads, bridges, and culverts.* [Emphases added.]

MCL 224.21(2) states:

A county *shall* keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel. [Emphasis added.]

When a statute is written in clear and unambiguous language, the appellate court must apply the plain meaning to the intent expressed by the Legislature. See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 611-612; 321 NW2d 668 (1982). Additionally, the use of the term "shall" is presumed to require mandatory action while the use of the term "may" is permissive. *Id.* at 612. According to MCL 224.19(1), defendant "may" construct bridges and culverts on the line of the road. However, upon the construction of a culvert, defendant "shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel . . . culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel." MCL 224.21(2). The plain language of MCL 224.21(2) reflects the mandatory requirement that a constructed culvert shall be maintained in reasonable repair. Accordingly, in light of the statutory authorization and requirement that defendant repair the culverts, defendant did not abuse its powers by engaging in affirmative conduct. *Blue Harvest, Inc*, 288 Mich App at 277.

Nonetheless, plaintiffs conclude that the replacement of the culverts was conduct directed toward their property. However, the replacement of the culverts addressed defendant's concerns regarding their function, deterioration, and impact on the road in accordance with the fulfillment of the statutory duty to keep the culverts in reasonable repair. Yet, it was the deliberate placement of debris in the location of the culverts that caused the elevated lake levels that plaintiffs preferred to enjoy their properties. Thus, any action by defendant was taken in accordance with its statutory requirement to keep the culverts in reasonable repair, and the associated removal of debris to fulfill that statutory duty and replace the culverts was not overt action by defendant directed at plaintiffs' properties. *Hinojosa*, 263 Mich App at 550.

Indeed, in plaintiffs' second amended complaint, it was alleged and recognized that defendant was responsible for road and culvert maintenance. This complaint stated, in relevant part:

20. The Road Commission is responsible for East Duck Lake Road and the Culverts.

21. The Culverts . . . deteriorated . . . having originally been installed many years prior when a bridge structure was removed and subsequently replaced in the early 1980's.

22. The deteriorated Culverts were *plugged by naturally occurring and intentionally placed debris causing The Culverts to substantially fail resulting in a back up of water from the lake and down The Creek. . . .*

23. The Culvert failure, by accounts of concerned residents, became apparent to the residents 15-20 years ago. [Emphasis added.]

Plaintiffs' second amended complaint then alleged that there was correspondence and discussion by the road commission engineer regarding the impact of culvert replacement on the water level of Duck Lake. They further asserted that the engineer requested that a water lake level be established.⁵ Plaintiffs conclude that this evidence, attached to the complaint, demonstrated that by making the decision to replace the culverts "the Road Commission knowingly decided to lower the level of Duck Lake." However, plaintiffs failed to recognize that it was not the replacement of the culverts that had any adverse impact directed toward plaintiffs' property. Rather, *as they alleged in their complaint*, the alteration to the water level was not caused by the culverts themselves or even the deterioration, but rather blockage "by naturally occurring and intentionally placed debris causing the Culverts to substantially fail resulting in a back up of water from the lake and down the Creek." Defendant replaced the culverts in compliance with its statutory duty, MCL 224.21(2), and the replacement of the culverts did not cause the lower water level, rather the necessary removal of inappropriately placed debris was responsible. Thus, defendants did not take action directed toward plaintiffs' properties, but rather, acted upon the culverts. In the course of the culverts' replacement, the debris causing the elevated water levels was removed, thereby lowering the water levels. In light of defendant's action upon the culvert and plaintiffs' allegation that the higher water level was caused by the debris placed in the culverts, plaintiffs failed to state a claim upon which relief may be granted with regard to the elements of inverse condemnation.⁶

Plaintiffs' reliance on *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994), to avoid the grant of summary disposition is misplaced. The *Peterman* Court noted that the loss of property must be necessary or possess an essential nexus to the reduced water level. *Id.* at 201-202. Here, defendant was required by law to maintain the road and culvert and replacing the culverts would necessarily impact the water level and a loss of enjoyment to property owners who constructed docks in light of the existing water level. However, the culverts did not control

⁵ The duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. See *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Thus, the recommendations of the engineer are not dispositive on establishment and maintenance of lake levels. Additionally, Part 307 of the NREPA, MCL 324.30701 *et seq.*, known in its prior iteration as the "Inland Lake Levels Act," sets forth a scheme for determining a proper lake level. Indeed, a county board may initiate or take action on a petition from 2/3 of the landowners abutting an inland lake to determine the normal level of the inland lake. See MCL 324.30702. Defendant did not have such a statutory obligation, and there was no indication that the authority was delegated to it. MCL 324.30702(2).

⁶ In light of our resolution of this issue, we do not address defendant's alternative grounds to reverse the trial court's denial of the motion for summary disposition.

the water level. The inappropriately placed debris was the source. Plaintiffs had no right to the continued placement of debris in the culverts to alter the water level to their desired liking. Moreover, plaintiffs had the ability to petition the county commission to act regarding specific water levels under Part 307 of NREPA. *Yee v Shiawassee Bd of Comm'rs*, 251 Mich App 379, 397-398; 651 NW2d 756 (2002). Therefore, the trial court erred in denying defendant's motion for summary disposition of plaintiffs' inverse condemnation claim.

IV. NREPA CLAIM

Next, defendant contends that the trial court erred in failing to dismiss this claim because its replacement of the culvert was authorized by the EGLE permit and plaintiffs failed to challenge the issuance of the permit during the applicable notice period. To the extent defendant's argument challenges the sufficiency of the pleadings for purposes of the NREPA claim, we agree that the gravamen of plaintiffs' claim is not for environmental damages in accordance with the statute, but an attempt to establish a legal lake level for Duck Lake.

A court determines the "gravamen of a party's claim by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading." *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9-10; 807 NW2d 343 (2011). "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). In *Jahnke v Allen*, 308 Mich App 472, 475; 865 NW2d 491 (2014), this Court stated that a court is not bound by the label a party gives its claim.

When viewing the second amended complaint as a whole, it is clear that plaintiffs, while nominally making a claim for environmental damage, are, in actuality, attempting to establish a legal lake level for Duck Lake—an issue plainly in dispute. Pertinent to this issue, plaintiffs alleged the following in their second amended complaint:

52. Defendant's actions have and will continue to result in Plaintiff's [sic] loss of and substantial decrease in riparian rights on Duck Lake.

53. Defendant's actions have and will continue to result in risk exposing Duck Lake to increased expansion of invasive species.

54. Duck Lake is a unique natural resource.

55. The normal lake level of Duck Lake before the Defendant undertook [sic] its culvert project[] had historic significance and was relied on by the Plaintiffs at the time they purchased their properties and continuing through the acts undertaken by the Defendant.

56. The Gogebic County Road Commission's actions have had and will continue to have a significant negative consequential effect on Duck Lake by:

a. Causing increased sedimentation

b. Loss of surface acreage of Duck Lake

c. Increased existence of invasive species

d. Loss of and decreased riparian activities by Plaintiffs and the Public[.]

The gravamen of plaintiffs' claims of a loss of riparian rights as alleged in the second amended complaint does not pertain to environmental damage. Rather, it is the loss in water level that plaintiffs contest. Moreover, as noted, part 307 of the NREPA, MCL 324.30701 *et seq.*, known in its prior iteration as the "Inland Lake Levels Act," sets forth the scheme for determining a proper lake level. Indeed, a circuit court is without authority to be the first to determine the legal lake level. Rather, the Legislature enacted a comprehensive scheme for the establishment and maintenance of legal lake levels. See *Yee*, 251 Mich App at 387-389. This legislative enactment vests authority to initiate the proceeding before the county board of commissioners or its delegated authority. *Id.* In light of the Legislature's placement of the authority with the county board, plaintiff's claim in this context is not viable. Accordingly, the trial court erred in denying defendant's motion for summary disposition of this claim.

Reversed and remanded for entry of an order granting summary disposition in defendant's favor. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs.

/s/ James Robert Redford

/s/ Kirsten Frank Kelly

/s/ Anica Letica