2006-06

STATE OF MICHIGAN

IN THE COURT OF APPEALS

MUSKEGON CONSERVATION CLUB,

Plaintiff-Appellee,

-vs-

CITY OF NORTH MUSKEGON

Defendant-Appellant,

_____/

Court of Appeals No. 270643

Muskegon County Circuit Court
No. 03-042755-ND

MICHIGAN MUNICIPAL LEAGUE'S AMICUS BRIEF
IN SUPPORT OF CITY OF NORTH MUSKEGON

PROOF OF SERVICE

PLUNKETT & COONEY, PC.
MARY MASSARON ROSS (P43885)
Attorney For Amicus the Michigan Municipal League
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

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STATEMENT OF THE BASIS OF JURISDICTION OF THE COURT OF APPEALS

The Michigan Municipal League relies on the jurisdictional statement set forth in the City of Muskegon's brief on appeal.

STATEMENT OF THE QUESTION INVOLVED

MUST AN UNCONSTITUTIONAL TAKING REST ON MORE THAN CLAIMED DAMAGE TO A SEAWALL THAT DID NOT AMOUNT TO A PERMANENT DEPRIVATION OR INVASION OF PROPERTY AND DID NOT RESULT FROM GOVERNMENT CONDUCT DIRECTLY AIMED TOWARD THE PROPERTY?

The Muskegon Conservation Club answers "No."

The City of North Muskegon answers "Yes."

The Sanilac County Circuit Court answers "No."

Amicus Curiae the Michigan Municipal League answers "Yes."

STATEMENT OF FACTS

The Michigan Municipal League relies on the statement of facts set forth in the City of Muskegon's brief on appeal.

ARGUMENT

AN UNCONSTITUTIONAL TAKING MUST REST ON MORE THAN CLAIMED DAMAGE TO A SEAWALL THAT DID NOT AMOUNT TO A PERMANENT DEPRIVATION OR INVASION OF PROPERTY AND DID NOT RESULT FROM GOVERNMENT CONDUCT DIRECTLY AIMED TOWARD THE PROPERTY.

A. STANDARD OF REVIEW.

This Court reviews a trial court's findings of fact for a clear error and disturbs the trial court's findings only when "left with the definite and firm conviction that a mistake has been made." *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003). Whether the government has effected a taking of one's property is a constitutional issue, US Const, Am V; Const 1963, art 10, § 2, which this Court reviews de novo. *K&K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

B. AN UNCONSTITUTIONAL TAKING REQUIRES AFFIRMATIVE ACTION DIRECTLY AIMED AT THE PROPERTY, WHICH CAUSES A PERMANENT DEPRIVATION OR INVASION OF THE PROPERTY.

Both the Fifth Amendment of the United States Constitution and the Michigan Constitution, Const 1963, art 10, § 2, prohibit the government from taking private property without just compensation. Michigan's takings clause provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law....

Const 1963, art 10, § 2.

A primary rule in construing provisions of the Michigan constitution is the rule of common understanding. *Federated Publications, Inc v Michigan State University Bd of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999). The Supreme Court has embraced Justice Cooley's explanation of this principle:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it.

Traverse City School Dist v Attorney General, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81. The Court has also taught that it is appropriate to consider "the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish. *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). If the text includes a technical, legal term then the court is to rely on the understanding of the term by those sophisticated in the law understood at the time of the constitutional drafting and ratification. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). See also *Michigan Coalition of State Employee Unions v Civil Service Comm'n*, 465 Mich 212, 222; 634 NW2d 692 (2001).

In *Bevan v Bryan Twp*, 438 Mich 385; 475 NW2d 35 (1991) *cert den* 502 US 1060; 117 L Ed 2d 111; 112 S Ct 941 (1992), the Michigan Supreme Court defined a taking as follows:

> a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, see, e.g., *Berman v Parker*, 348 U.S. 26; 75 S Ct 98; 99 L Ed 27 (1954) (Fifth Amendment taking), or where a governmental entity exercises its police power through regulation which restricts the use of property, see *Pennsylvania Coal Co v Mahon*, 260 U.S. 393, 415; 43 S Ct 158; 67 L Ed 322 (1922) (this claim may be framed as a Fifth Amendment taking or as a Fourteenth Amendment "due process" type taking).

Bevan, supra, 438 Mich at 390, quoting *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 68; 445 NW2d 61 (1989). Courts have recognized three types of taking claims: 1) taking claims based upon the government's exercise of eminent domain; 2) taking claims based on a government regulation that extends so far as to amount to a taking; and 3) taking claims premised upon a permanent intrusion onto property that amounts to an ouster and permanent deprivation. A taking, whether direct or inverse, requires a showing that government action has permanently deprived the property owner of possession or use of the property. *Jack Loeks*

Theaters, Inc v Kentwood, 189 Mich App 603, 608; 474 NW2d 140 (1991) and *Murphy v Detroit*, 201 Mich App 54; 506 NW2d 5 (1993).

To demonstrate a taking, the property owner must show that the government abused its legitimate powers by engaging in conduct directly aimed toward the plaintiff's property, which had the effect of limiting its use. *Hinojosa v Michigan Basic Property Ins Ass'n*, 263 Mich App 537; 688 NW2d 550 (2004). The *Hinojosa* court addressed the question of whether Const 1963, art 10, § 2 required the State to compensate neighboring property owners for damage caused by a fire that spread from an abandoned house following the State's acquisition of the property through tax delinquency proceedings. In this analogous case, the plaintiff filed a two-count complaint alleging trespass nuisance and unconstitutional taking or inverse condemnation. The *Hinojosa* court rejected the plaintiffs' claim for taking because the complaint alleged no affirmative action by the State directed at the plaintiffs property. At most, the complaint alleged a negligent failure to abate a nuisance. The complained-of conduct was, at best, a tort for which the Michigan Governmental Tort Liability Act provides no exception. MCL 691.1401, *et seq*. Thus, this Court held that the claim was barred by governmental immunity.

The *Hinojosa* court explained that a plaintiff must also prove a causal connection between the government's actions and the alleged damages. A plaintiff claiming a de facto taking must prove that the government's actions were a substantial cause of the decline of the property value and also that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. Thus, the *Hinojosa* court confirmed two elements necessary for proving an inverse condemnation case, to-wit: (1) the plaintiff in an inverse condemnation action must prove that the government's actions were a substantial cause of the decline of the plaintiff's property and (2) the plaintiff in an inverse condemnation case must establish that the government abused its legitimate powers in affirmative actions directly aimed

at the plaintiff's property. Applying that two-pronged test to the facts before it, the *Hinojosa* court determined that the plaintiffs lacked a viable claim for inverse condemnation:

> We find this court's decision in *Ankersen, supra*, instructive in applying these principles to the case at bar. In *Ankersen*, the attorney general sought to abate a nuisance; the improper storage of hazardous chemicals that created a fire hazard. The "innocent" land owners brought a counter-claim against the Director of the Department of Natural Resources and the Natural Resources Commission alleging that the "counter-defendants participated in the creation of a nuisance and that their actions amounted to an uncompensated taking." The court stated that two elements of an inverse condemnation claim are (1) "That the government's actions were a substantial cause of the decline of his property's value," and (2) "that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." First, the *Ankersen* court concluded that the state's action of licensing a personal corporation to conduct a private business "cannot be regarded as a taking of private property by the government for public use." Secondly, the state's alleged misfeasance in licensing and supervising the operation does not constitute "affirmative actions directly aimed at the property." Thus ... the inaction and omissions by the state cannot be found to constitute a "taking...."
>
> 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 property. In fact, plaintiffs admitted that no facts existed which 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 by Const 1963, Art 10, § 2. Because plaintiffs failed to allege that the state took affirmative action directed at plaintiffs' property, 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."

263 Mich App 549-550.

The City's argument that a constitutional taking claim cannot be predicated on mere property damage is strengthened by reference to the constitutional convention record. State of Michigan Constitutional Record Official Minutes, p 2580. A committee proposed broadening the power of eminent domain by adopting the following language:

> In the exercise of the power of eminent domain, private property shall not be taken or damaged by the public nor by any corporation for public use or purpose, without the necessity (therefore) being first determined and just and equitable

> compensation (therefore being first made or secured in such manner as shall be prescribed by law) for the losses and damages suffered thereby being first paid.

The proposal to add the language "or damaged" was defeated at the convention. Like Michigan's taking clause, the federal taking clause does not provide a remedy for temporary, intermittent, or accidental property damage.

The takings analysis should not be blended with the rules governing the pursuit of tort actions. Unlike some other state constitutions that prohibit the taking or damaging of private property for use without just compensation (*Hoover v Pierce County*, 903 P2d 464 [Wash, 1995]) Michigan's constitution only bars the taking of private property. (Between 1870 and 1910, over one-half of the states adopted constitutional provisions expanding the scope of the just compensation clause from the "taking" of property to the "taking or damaging" of private property.) Michigan has remained steadfast in its approach. Its constitution bars only the taking of property, but not the damaging of property, which may be remedied, if at all, by a tort claim.

Trespass cases are not predicated on notions of taking. Rather, the essence of the tort of trespass is an invasion of a plaintiffs interest in the exclusive possession of his land, *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999) and *Traver Lakes Community Maintenance Assoc v Douglas Co*, 224 Mich App 335; 568 NW2d 847 (1997). A trespass is usually associated with notions of "unauthorized intrusion or invasion" (*Antkiewicz v Motorist Mutual Ins Co*, 91 Mich App 389; 283 NW2d 749 [1979]) or an injury to one's right of possession (75 Am Jur 2d Trespass, § 1, p 11). The tort of trespass developed to remedy the situation where the defendant interfered with the complainant's interest in land, *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992). The focus is not the same in an action based on a wrongful taking. In fact, the authors in 75 Am Jur 2d Trespass, § 2, p 12 spoke to the essential difference between a trespass action and a claim for a wrongful taking:

> [A] trespass is temporary in nature, and a de facto taking is a permanent ouster of the owner or a permanent interference with his physical use, possession, and enjoyment of the property by one having condemnation powers.

See also, *Carr v Fleming*, 504 NYS2d 904, 906 (1986) (["An entry cannot be both a trespass and a taking because, in the latter instance, the condemnor acquires ownership."") and *Clempner v Southold*, 546 NYS2d 101 (1989). The court in the latter case explained that inverse condemnation, rather than trespass, is the appropriate remedy for granting damages to an injured landowner where the trespasser is cloaked with the power of eminent domain. 546 NYS2d at 104.

The takings clause of the Fifth Amendment also states that private property shall not be taken for public use without just compensation. The takings clause of the Fifth Amendment provides:

> ...nor shall private property be taken for public use, without just compensation.

US Const, Am V. In order to prevail in a constitutional takings case, the claimant must demonstrate the following: (1) an intent on the part of the government to take the owner's property; (2) an authorized taking by the government; and (3) that the taking was the direct, natural and probable consequence of the government's action, *Teegarden v United States*, 42 Fed Cl 252 (1998) and *Columbia Basin Orchard v United States*, 132 Ct Cl 445, 450 (1955). The court in the latter case further explained that an accidental or negligent impairment of the value of private property is not a taking, but, at most, is a tort. Critical to such a determination is a resolution of the question of whether a plaintiff's purported cause of action resembles a "tortious invasion of their property rights or 'rises to the magnitude of an appropriation of some interest in [their] property permanently to the use of the government,'" *Baird v United States*, 5 Cl Ct 324, 329 (1984), quoting *National By-Prods, Inc v United States*, 186 Ct Cl 546, 577 (1969). The *Teegarden* plaintiffs were unable to prove any such constitutional taking. Under the facts

involved there, it was the fire, and not the conduct of the forest service, that caused the destruction of the subject property:

> In the context of a claim for inverse condemnation, damages resulting from "'a random event induced more by an extraordinary natural phenomenon than by government interference' cannot rise to the level of a compensable taking, even if there is permanent damage to property partially attributable to government activity" ...

42 Fed Cl 252, 257. In further support of its holding, the *Teegarden* court pointed out that the conduct of the government neither diminished the value of the plaintiffs' land through enactment of a regulation nor resulted in the construction of a structure detrimentally infringing on the plaintiffs' property rights nor culminated in the physical appropriation of plaintiffs' property to protect government lands. Thus, it could not properly be considered a taking.

The court in *Thune v United States*, 41 Fed Cl 49 (1998) also discussed the factors that serve to distinguish takings from torts. Doing so, that court emphasized that challenges to the propriety or the lawfulness of government actions sound in tort. Beyond that, the court stressed the fact that, in order to state a taking claim, a plaintiff must plead and prove an intent on the part of the defendant to take the plaintiff's property or an intention to do an act, the natural consequence of which was to take the plaintiff's property. Those requirements are consistent with the notion that in a true takings case, the property loss "must have been the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action", *Columbia Basin Orchard v United States, supra* at 450. And the probability and foreseeability of the damage stands as a primary determinative element in resolving whether a taking or a tort occurred. *Baird, supra* at 330.

As in *Thune, supra*, the allegations of the instant plaintiffs' class action complaint, even if taken as true, do not implicate a taking. That is because a claim for damages resulting from

the government's faulty, negligent, or improper implementation of an authorized project sounds in tort. 41 Fed Cl 49, 52. The court elaborated further at footnote 3 of its opinion:

> Likewise, accidental or incidental damage resulting from the government's non-negligent implementation of an authorized project is not a taking. For instance, in *Harris v United States*, 205 F2d 765 (10th Cir. 1953), the government sprayed herbicides on federal land to eliminate unwanted vegetation. Although the government conducted the spraying in a non-negligent manner, some of the chemicals drifted beyond the spraying area onto plaintiffs' property, damaging cotton and peanut crops. The court rejected plaintiffs' taking claim, stating that it did "not understand that a single isolated and unintentional act of the United States resulting in damage or destruction of personal property amounts to a taking in a constitutional sense. It is, we think, rather a tortious act for which the government is only consensually liable." *Id* at 768; see also *Keokuk & Hamilton Bridge Co v United States*, 260 US 125, 43 S Ct 37, 67 L Ed 165 (1922) (incidental damage to plaintiff's pier resulting from non-negligent government blasting not a taking).

Applying that rationale to the precise facts of the case before it, the *Thune* court readily concluded that no compensable taking had occurred there:

> The finding in the district court's decision that unexpected wind changes rather than government negligence caused the fire to burn out of control does not convert plaintiff's tort claim into a taking. "[D]amage due to 'a random event induced more by a natural phenomenon than by government interference' "does not give rise to a taking" 'even if there is permanent damage to property partially attributable to Government activity.'" *Baird*, 5 Cl Ct at 330 (quoting *Berenholz v United States*, 1 Cl Ct 620, 626 (1982), *aff'd*, 723 F2d 68 (Fed Cir 1983)).

41 Fed Cl 49, 53. In sum, the damage to those plaintiffs' property was not a direct, natural and probable consequence of the government project functioning as it was designed. At best, the plaintiffs' claim was based on an "accidental or negligent impairment of the value of property [which] is not a taking, but, at most, a tort..." 41 Fed Cl at 54.

The United States Supreme Court has distinguished between flooding cases involving a permanent physical occupation, and those involving a temporary invasion. In *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982), the Court explained that a "taking has been found only in the former situation." The *Loretto* court emphasized that to "be a taking, flooding must 'constitute an actual permanent invasion of the

land, amounting to an appropriation of, and not merely an injury to, the property.'" 458 US at 427 quoting *Sanguinetti v United States*, 264 US 146, 149; 44 S Ct 265; 68 L Ed 608 (1924). Citing *Pumpelly v Green Bay Co*, 13 Wall (80 US) 166; 20 L Ed 557 (1872), the *Loretto* court described the invasion as a permanent flooding and characterized it as a "practical ouster of his possession." 458 US at 427 quoting *Pumpelly*.

A trespass-nuisance is a pure tort; it is not a "taking." One's property is taken in the constitutional sense only "when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v Dickinson*, 331 US 745, 748; 67 S Ct 1382; 91 L Ed 1789 (1947). Stated otherwise, conduct is properly deemed to constitute a taking when it is defined and permanent enough that it is as if the wrongdoer subjected the owner's property to an easement, moving a strand from the owner's bundle of rights." *Eaton v Boston, Concord & Montreal RR*, 51 NH 504 (1872). In order to constitute a taking, government flooding must be frequent, inevitably recurring and proximately result in substantial damage. *Fromme v United States*, 188 Ct Cl 1112, 1118 (1969).

A trespass-nuisance is a pure tort; it is not a "taking." One's property is taken in the constitutional sense only "when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v Dickinson*, 331 US 745, 748; 67 S Ct 1382; 91 L Ed 1789 (1947). Stated otherwise, conduct is properly deemed to constitute a taking when it is defined and permanent enough that it is as if the wrongdoer subjected the owner's property to an easement, moving a strand from the owner's bundle of rights." *Eaton v Boston, Concord & Montreal RR*, 51 NH 504 (1872). In order to constitute a taking, government flooding must be frequent, inevitably

recurring and proximately result in substantial damage. *Fromme v United States*, 188 Ct Cl 1112, 1118 (1969).

C. THE MUSKEGON CONSERVATION CLUB HAS NOT SATISFIED THIS TEST.

The Muskegon Conservation Club has not come close to satisfying this demanding test. The Club did not plead, and could not prove, a practical ouster of possession. At best, it alleged a temporary and partial invasion of the land that is "merely an injury" to small portions of the property, not a permanent invasion that deprives the Club of the substantial value of their possession. Thus, no takings rationale can be used to provide support for the judicially created exception to trespass nuisance.

The trial court recognized a claim based upon government conduct that left Muskegon Conservation Club in possession of property, which was arguably damaged by an intermittent and temporary intrusion. In its opinion and order denying the City's motion in limine and motion to affix damages, the trial court acknowledged that "this type of taking is not really addressed anywhere in the cases cited or the treatise noted above." (Opinion and Order Denying Defendant's Motion In Limine and Motion To Affix Damages, 2/13/06). The trial court characterized the basis for the taking as

> not a complete taking, or even a partial taking. It can probably best be described as a temporary, partial taking. A portion of the property is temporarily flooded.

(*Id.*, p 2). The court observed that it was "unable to locate any Michigan case concerning the land owner's entitlement to monetary damages for repair costs attributable to the governmental taking." (*Id.*) The court also noted that the repair damages sought for damage to the property might cost more than the total value of the property. (*Id.*, p 4). The court concluded that "there are no cases which squarely cover this situation, and these particular facts are highly unusual." (*Id.*)

The unusual nature of the facts and absence of decisional authority merely underscores the difficulty with fitting this trespass-intruding nuisance claim into the category of condemnation. The facts are consistent with tort claims for trespass or intruding nuisance but not with claims for a taking. As a result, no decisional authority could be found affixing damages. The Muskegon Conservation Club described the property damage as follows:

> The City produced testimony from its witnesses that the seawall was only damaged after the sump flooded and only where flood waters reached the wall. Transcript I, p 106. There was also abundant testimony regarding how the seawall was damaged, how such damage was consistent with flooding from the sump, and how much repairs had cost and would cost in the future. Transcript II, pp. 95, 98. There was no testimony offered by the City that would suggest that the seawall damage was only temporary. Similarly, there was no testimony that the erosion caused by the repeated floods would somehow spontaneously reverse itself. Without repairs made by the Club, these damages would have been permanent.

(Muskegon Conservation Club Brief, p 5). At best, this claim was predicated on intermittent floods, erosion, and damage to a seawall. The trial court so described the proofs in denying the City's motion for directed verdict. (Tr, 3/29/06, pp 198-200). The court compared the claim to one based on a city's conduct in parking its cars on private property, and concluded that the City "is parking its water there [on the Club's property] at different times." (*Id.*, p 200). The court elaborated on this reasoning:

> Is it predictable? No. Is it occasional? Yes. But I think it comprises of takings that how much that's worth and whether factual [sic] these things are happening are things for the jurors to decide. Weighing the evidence isn't what the Court must do now. So your motion is denied.

(Tr, 3/29/06, p 200).

Such a showing is inadequate to satisfy either the state or federal constitutional requirement that property be taken. Rather, it describes a classic trespass claim - a tort that is not actionable against the City because MCL 691.1401, *et seq.* provides immunity. *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Recognition of a claim on this basis

cannot be reconciled with Michigan's constitutional history of interpreting its taking clause, which has never recognized a constitutionally-derived cause of action for mere property damage, and has rejected the contention that trespass-intruding nuisance claims are constitutionally based. Nor can it be based on federal takings law.

The trial court's ruling rests upon an expansion of the law of takings, recognizing as a taking, claims in which government conduct causes intermittent and correctable property damage or intrusions. Such conduct may constitute a tort; but this Court should resist the request by plaintiff to expand the law of takings to permit recovery for conduct or damage that might have constituted an actionable trespass or intruding nuisance, but is insufficient to satisfy the traditional test for a taking.

RELIEF

WHEREFORE, the Michigan Municipal League, by and through its attorneys, Plunkett & Cooney, P.C., respectfully requests that this Court grant judgment in favor of the City of North Muskegon on the basis that the Muskegon Conservation Club failed to satisfy the test for a taking, and grant it such other relief as is proper in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, PC.

BY: Mary Massaron Ross

MARY MASSARON ROSS (P43885)
Attorney for Amicus the
Michigan Municipal League
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

DATED: November 21, 2006

STATE OF MICHIGAN

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-vs-

CITY OF NORTH MUSKEGON

Defendant-Appellant,

_____/

Court of Appeals No. 270643

Muskegon County Circuit Court
No. 03-042755-ND

PROOF OF SERVICE

CHRISTINE M. WARNEZ, states that on November 21, 2006, a copy of the Michigan Municipal League's Amicus Brief in Support of City of North Muskegon, was served on BRUCE P. RISSI, Attorney for Plaintiff-Appellee, PO Box 454, Grand Haven, MI 49417-0454; and ADAM G. ZUWERINK, Attorney for Defendant-Appellant, PO Box 786, Muskegon, MI 49443, by depositing same in the United States Mail with postage fully prepaid.

Christine M. Warnez

CHRISTINE M. WARNEZ