# STATE OF MICHIGAN

# COURT OF APPEALS

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SENKO FISH COMPANY, INC., a Michigan Corporation, and WALTER OPANASENKO,

Plaintiffs-Appellants,

v

DON D. NELSON, JOHN A. SCOTT, DAVID D. BORGENSON, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

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UNPUBLISHED
September 20, 1996

No. 181197
LC No. 89-12515-CM

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

Plaintiff Senko Fishing Company is owned by plaintiff Walter Opanasenko. Senko is the holder of a commercial fishing license as well as a noxious fish permit, and operates in the eastern side of the Saginaw Bay. In 1989, plaintiffs filed suit against defendants, stating several claims. On appeal, plaintiffs' claims concern actions taken by defendants which, according to plaintiffs, amount to an unconstitutional taking of property without compensation.

Plaintiffs claim they have a compensable right to harvest fish, and that defendants' regulatory actions established an unconstitutional taking of plaintiffs' property. We disagree.

Fish in the Great Lakes are the property of the state, and the taking of fish from the Lakes is a privilege, not a right. MCL 308.1; MSA 13.491; *Tallman v Dep't of Natural Resources*, 421 Mich 585, 619-622; 365 NW2d 724 (1984). Therefore, plaintiffs have no "right" to harvest fish from the Great Lakes.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs' commercial fishing license was issued pursuant to MCL 308.1; MSA 13.1491, which states, in relevant part, that fish from the Great Lakes, "shall be taken, transported, sold and possessed only in accordance with the provisions of this act," and MCL 308.1b; MSA 13.1491(2), clearly states that commercial fishing licenses may contain restrictions and requirements deemed necessary by the DNR. Plaintiffs' noxious fish permit was issued pursuant to MCL 305.8; MSA 13.1630, which states that the issuance of such permits is in the discretion of the DNR, and that issued permits are also subject to regulation and restrictions deemed necessary by the DNR. Therefore, defendants had the power to act as they did and restrict plaintiffs' activities.

However, plaintiffs argue that the restrictions imposed went too far and amount to an unconstitutional taking of property because they have deprived plaintiffs of "most of" the economically viable use of the license and permit. Even assuming, without deciding, that plaintiffs' license and permit are property interests, plaintiffs are not entitled to compensation. In the regulatory context, a compensable taking occurs when the government uses its power to so "restrict the use of property that its owner has been deprived of all economically viable use." *Miller Brothers v Dep't of Natural Resources*, 203 Mich App 674, 679; 513 NW2d 217 (1994). When the regulation merely results in diminution of the property's value, the property owner is not entitled to compensation. *Volkema v Dep't of Natural Resources*, 214 Mich App 66, 70; 542 NW2d 282 (1995). In this case, although defendants' restrictions may have diminished the value of plaintiffs' license and permit, because they do have some economically viable use, plaintiffs are not entitled to compensation.

In sum, fish are the property of the state, and fishing is a privilege subject to regulation by defendants. Because defendants' actions in this case were a valid exercise of statutory power and the restrictions imposed did not deprive plaintiffs of all economically viable use of any property interest they may have had, as a matter of law, there was no unconstitutional taking. The trial court applied the proper summary disposition standards under MCR 2.116(C)(8) and MCR 2.116(C)(10), and reached the correct result.

Plaintiffs also argue that defendants' confiscating and removing nets from plaintiffs' fishing ground constituted a taking. Defendants concede that they did confiscate plaintiffs' nets because they believed plaintiffs were in violation of a limitation placed on the number of nets allowed to be set by plaintiffs. We agree with the trial court that this enforcement of an agency limitation was not a taking, but may have been tortious. However, defendants are immune from tort liability. MCL 691.1407; MSA 3.996(107). Summary disposition was proper. MCR 2.116(C)(7).

Plaintiffs also assert that they were improperly denied an administrative hearing in violation of due process. However, because this issue is not properly presented, *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535 NW2d 215 (1995), and plaintiffs cite no authority in support of their argument, *Vugterveen v Olde Millpond*, 210 Mich App 34, 46-47; 533 NW2d 320 (1995), we will not address it.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak