

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ALAINA M. ZANKE-JODWAY and TIMOTHY  
M. JODWAY,

UNPUBLISHED  
March 27, 2014

Plaintiff-Appellants,

v

No. 306206  
Charlevoix Circuit Court  
LC No. 08-027622-CZ

CAPITAL CONSULTANTS, INC, LAWRENCE  
FOX, JAMES E. HIRSCHENBERGER, CITY OF  
BOYNE CITY, ELEANOR STACKUS,  
RONALD GRUNCH, DAN ADKINSON, JERRY  
DOUGLAS, DENNIS JASON, MICHAEL CAIN,  
DAN MEADS, BEN SACKRIDER, PHILLIP  
VANDERMUS, TRI-COUNTY EXCAVATING,  
FIFTH THIRD MORTGAGE MI, LLC, ANN  
GABOS, Individually and as Trustee of the ANN  
GABOS REVOCABLE LIVING TRUST, and  
MICHAEL E. GABOS, Individually and as  
Trustee of the ANN GABOS REVOCABLE  
LIVING TRUST,

Defendants-Appellees,

and

JAMES J. LUYCKX, CAROLYN S. LUYCKX,  
HOLLI M. SUTPHIN, KYLE SUTPHIN,  
CONDOMINIUM SPRING ARBOR CLUB,  
DEBORAH SPENCE, TIMOTHY SMITH,  
GREGORY P. SMITH, VICTOR THOMAS,  
GREGORY A. YOUNG, DIANA YOUNG,  
RICHARD VIARD, PATRICIA VIARD,  
MICHELE THOMAS, BRUCE L. TRAVERSE,  
and HALINA TRAVERSE,

Defendants.

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Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

## I. INTRODUCTION

In this complex litigation over property in Boyne City that consists of a home and two lakefront lots, Plaintiffs, Alaina M. Zanke-Jodway and Timothy M. Jodway (the Jodways), appeal a succession of decisions in favor of Defendants, who fall into seven groups:

(1) Boyne City; Eleanor Stackus, the mayor of Boyne City; Ronald Grunch, a Commissioner of Boyne City; Dan Adkinson, a Commissioner of Boyne City; Jerry Douglas, a Commissioner of Boyne City; Dennis Jason, the Director of Boyne City's Public Works; Michael Cain, Boyne City's City Manager; and Dan Meads, the Director of Boyne City's Water Department (collectively, Boyne City);

(2) Capital Consultants, Inc; Lawrence M. Fox, an engineer for Capital Consultants; and James E. Hirschenberger, an engineer for Capital Consultants; (collectively, Capital Consultants);

(3) Tri-County Excavating; Ben Sackrider, a partner of Tri-County Excavating; and Phillip Vandermus, a partner of Tri-County Excavating (collectively, Tri-County Excavating);

(4) Michael Gabos, Ann Gabos, and the Ann Gabos Revocable Living Trust (collectively, the sellers);

(5) Fifth Third Mortgage, LLC (the mortgagee);

(6) Deborah Spence, who appraised the property (the appraiser); and

(7) James J. Luyckx, Carolyn S. Luyckx, Gregory P. Smith, Timothy Smith, Holli M. Sutphin, Kyle Sutphin, Victor Thomas, Michele Thomas, Bruce L. Traverse, Halina Traverse, Richard Viard, Patricia Viard, Gregory Young, Diana Young, and the Condominium Spring Arbor Club (collectively, the neighbors).

The Jodways filed suit after Boyne City reconstructed a road outside its platted right of way and installed a catch basin on their property, without permission or an easement to do so. The defendants removed the case to the United States District Court for the Western District of Michigan, where the federal district court judge dismissed the majority of the Jodways' claims. After the federal district court remanded the remaining claims to the Charlevoix Circuit Court, the trial court issued a series of orders dismissing the remaining claims.

We conclude that the federal district court had subject matter jurisdiction to hear the Jodways' claims in federal court. We also conclude that the trial court did not abuse its discretion by striking the Jodways' supplemental witness list. The Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal. Therefore, we affirm.

## II. FACTS

### A. FACTUAL BACKGROUND

In 2003, a survey revealed that portions of Bay Street were outside the platted right-of-way, and encroached on bordering properties. In March 2005, Boyne City began looking for a contractor to design and supervise the reconstruction of Bay Street. Boyne City hired Capital Consultants to design and construct the project, and also hired Tri-County Excavating to perform construction work.

On April 25, 2005, Boyne City and Capital Consultants held a pre-construction meeting at which they discussed that Boyne City did not have a right-of-way over certain property bordering Bay Street. At a meeting on August 5, 2005, Boyne City's commissioners discussed that it was questionable whether Boyne City had a right-of-way to Bay Street in its existing location. Commissioners proposed putting the reconstruction project on hold to obtain easements. Jason, Boyne City's Public Works Director, appeared to believe that the City had acquired the property by adverse use of the road. Boyne City ultimately voted to move forward with the project.

The Jodways purchased the property from the sellers on August 3, 2005. The Jodways were not on Boyne City's mailing list and were not informed about the project when Boyne City notified residents on September 2, 2005, that the project would be commencing shortly. As part of the project, Capital Consultants and Tri-County excavating replaced the Jodways' private catch basin with a larger catch basin and connected to the Jodways' existing pipes.

In June 2006, the Jodways informed Boyne City that Boyne City did not have a drainage easement, and that the catch basin was causing storm water to flow onto their property, in turn causing flooding and erosion. The Jodways later asserted that the water discharge contained high levels of e-coli, which prevented them from using their lakefront property.

### B. PROCEDURAL HISTORY

#### 1. COMPLAINT

On September 11, 2008, the Jodways filed a complaint in Charlevoix Circuit Court against the defendants. The Jodways' complaint asserted in part that Boyne City had violated the Jodways' federal constitutional rights under the Fifth Amendment, Fourteenth Amendment, and the Contracts Clause, that Boyne City had violated the Jodways' federal rights under 42 USC 1983, and that Boyne City had taken their property without just compensation. The remainder of the Jodways' claims were state law claims.

#### 2. REMOVAL TO FEDERAL COURT

On October 2, 2008, the defendants removed the Jodways' suit to the United States District Court for the Western District of Michigan. The defendants filed various motions for summary judgment in federal district court. The Jodways only responded to the motions by Capital Consultants and Tri-County Excavating. On June 23, 2009, a federal district court magistrate ordered the Jodways to respond to the remaining defendants' motions. After the

Jodways failed to do so and failed to show good cause, the federal district court dismissed the Jodways' claims against Boyne City, the neighbors, the mortgagee, the appraiser, and the sellers for failing to prosecute the claims.

The federal district court considered Capital Consultants's and Tri-County Excavating's motions for summary judgment, and concluded that the Michigan Supreme Court's decision in *Fultz v Union Commerce Associates*<sup>1</sup> precluded the Jodways' negligence claim against Capital Consultants, and precluded the Jodways' claims of negligence, nuisance, and trespass against Tri-County Excavating. Noting that the Jodways' only surviving claims were state law environmental claims against Tri-County Excavating and Capital Consultants, and claims of nuisance per se, trespass, and intentional infliction of emotional distress against Capital Consultants, the federal district court remanded the case to Charlevoix Circuit Court.

### 3. REMAND TO CHARLEVOIX CIRCUIT COURT

After remand from federal district court, Tri-County Excavating moved for summary disposition on the Jodways' remaining environmental claims. Capital Consultants joined in the motion. Capital Consultants also asserted it was impossible for the trial court to grant relief on the Jodways' nuisance claim because Boyne City was no longer a party to the suit. The trial court granted Tri-County Excavating and Capital Consultants's motions on the Jodways' environmental claims. The trial court also granted Capital Consultants's motion for summary disposition on the Jodways' nuisance claim on impossibility grounds.

The Jodways moved the trial court to set aside the federal district court's order dismissing its claims against Tri-County Excavating and Boyne City under MCR 2.612. The trial court denied the motions, opining that the federal district court's order controlled the case and that it could not set aside the order under that court rule because the order was not a final order.

The Jodways also moved for summary disposition under MCR 2.116(C)(10) on their trespass claim against Capital Consultants, asserting that Capital Consultants trespassed on their property by knowingly locating the Bay Street reconstruction outside the right-of-way. Capital Consultants counter-moved for summary disposition, asserting that *Fultz* precluded the Jodways' claim. The trial court denied both the Jodways' motion and Capital Consultants' motion, ruling that Capital Consultants had a duty separate from its contract with Boyne City not to trespass on the Jodways' property, but that questions of fact existed regarding whether Capital Consultants had actually trespassed.

### 4. THE WITNESS LIST

Following a scheduling conference, the trial court ordered the parties to file witness lists by July 1, 2010. The trial court's order informed the parties that failing to disclose witnesses by that date would "bar the introduction of the evidence or testimony at trial unless good cause is

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<sup>1</sup> *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004).

shown . . . .” The Jodways submitted a witness list, in which they purportedly reserved a right to amend their witness list.

On April 14, 2011, the day before the close of discovery, the Jodways filed an amended witness list. The Jodways proposed to add three witnesses: James Harrison, Nancy Vashaw, and Monica Ross. According to Zanke-Jodway’s testimony at deposition, James Harrison made a bid on the Jodways’ house, and Monica Ross conducted a market analysis of the Jodways’ property.

Capital Consultants moved to strike the Jodways’ supplemental witness list because it was nine months past the deadline for exchanging witness lists, it was one day before the close of discovery, and the Jodways had not moved the trial court for permission to amend. After a hearing, the trial court granted Capital Consultants’ motion to strike the witness list on the basis of the Jodways’ failure to comply with previous discovery orders and scheduling, and because re-opening discovery for additional depositions would be unreasonable.

The Jodways again moved the trial court for relief from judgment under MCR 2.613(C), and the trial court again ruled that relief under that court rule was inappropriate because the order was not a final order.

## 5. MOTION IN LIMINE ON DAMAGES

Capital Consultants subsequently brought a motion in limine, seeking to preclude the Jodways from mentioning damages at trial because the Jodways did not have any witnesses who could testify about the property’s diminution in value, which was the proper measure of damages for trespass. The Jodways asserted that Zanke-Jodway was competent to testify about the value of her own property and that the cost of restoration was the appropriate measure of damages.

At arguments on the motion, the Jodways conceded that the property’s diminution in value was the proper measure of damages. But the Jodways asserted that Zanke-Jodway was competent to testify concerning the property’s diminution in value. The trial court ruled that Zanke-Jodway could not act as a witness because she was representing her husband and a lawyer cannot testify on behalf of a client. The trial court then granted Capital Consultants’ motion in limine and dismissed the case because the Jodways did not have a witness who would testify concerning the diminution in value of the property.

## III. COLLATERAL ESTOPPEL AND SUBJECT MATTER JURISDICTION

### A. THIS COURT’S JURISDICTION TO CONSIDER THE ISSUE

As an initial matter, Capital Consultants asserts that this Court does not have jurisdiction to address this issue because the Jodways are appealing a federal court order. This assertion is incorrect. The Jodways appeal the Charlevoix Circuit Court’s decision to enforce the federal order. They do not appeal that order itself. The final order in this case was the circuit court’s August 26, 2011 order because that was the first order dismissing the last remaining claims in

this case.<sup>2</sup> This order is appealable as of right, and the Jodways also have the right to appeal any issues related to the previous orders.<sup>3</sup> Therefore, we conclude that we have jurisdiction to consider this issue.

## B. STANDARD OF REVIEW AND ISSUE PRESERVATION

“Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal.”<sup>4</sup> The Jodways never raised this issue below, and it was not addressed by any court. Thus, it is unpreserved.

However, issues of subject-matter jurisdiction “can never be forfeited or waived.”<sup>5</sup> While a party can waive the issue of the propriety of a case’s removal to federal court, the party cannot waive whether the federal district court had jurisdiction.<sup>6</sup> Courts must consider issues of subject matter jurisdiction at any time, even if first raised on appeal.<sup>7</sup> Therefore, we must consider this issue.

Jurisdictional questions are questions of law that this Court reviews de novo.<sup>8</sup> When reviewing federal law, we are bound by the holdings of federal courts on federal questions unless the federal courts of appeal are divided on the issue.<sup>9</sup>

## C. LEGAL STANDARDS

The doctrine of collateral estoppel precludes relitigation of an issue if there was (1) a final judgment on an issue, (2) the issue was actually litigated, (3) the issue was necessarily determined, (4) the party against whom collateral estoppel is asserted “had a full and fair opportunity to litigate the issue,” and (5) the parties were the same parties involved.<sup>10</sup> A federal

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<sup>2</sup> See MCR 7.202(6)(1)(i).

<sup>3</sup> See MCR 7.203(A)(1); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

<sup>4</sup> *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

<sup>5</sup> *Arbaugh v Y & H Corp*, 546 US 500, 514; 126 S Ct 1235; 163 L Ed 2d 1097 (2006) (quotation marks and citation omitted). See *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001).

<sup>6</sup> *Grubbs v Gen Electric Credit Corp*, 405 US 699, 702; 92 S Ct 1344; 31 L Ed 2d 612 (1972).

<sup>7</sup> *Lehman v Lehman*, 312 Mich 102, 105-106; 19 NW2d 502 (1945); *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

<sup>8</sup> *Travelers Ins Co*, 465 Mich at 205.

<sup>9</sup> *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960); *Woodman v Miesel Sysco Food Servs Co*, 254 Mich App 159, 165; 657 NW2d 122 (2002).

<sup>10</sup> *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 145; 486 NW2d 326 (1992).

court's order granting summary judgment is a final disposition on the merits.<sup>11</sup> Therefore, the federal court's order granting summary judgment precludes the Jodways from relitigating issues that were actually and necessarily determined.

However, a collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter."<sup>12</sup> A claim may be removed to federal court if a party brought a civil action in state court over which "the district courts of the United States have original jurisdiction . . ."<sup>13</sup> The federal courts jurisdiction to hear any case "arising under the Constitution, laws, or treaties of the United States."<sup>14</sup> For a federal court to have jurisdiction over a federal question, "a right or immunity created by the constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."<sup>15</sup> A federal court has supplemental subject matter jurisdiction over claims related to claims over which it has original jurisdiction, if those claims are part of the same case or controversy.<sup>16</sup>

"[I]f a [taking] claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim."<sup>17</sup> A taking claim is not ripe if the plaintiff "did not seek compensation through the procedures the State has provided for doing so."<sup>18</sup> A takings claim is ripe if (1) the state inflicted an actual concrete injury and (2) the plaintiff unsuccessfully sought compensation for the injury through available state procedures.<sup>19</sup>

#### D. APPLYING THE STANDARDS

The Jodways assert that the trial court erred by enforcing the federal district court's order because the federal district court lacked subject matter jurisdiction over their unripe claim. We disagree, and conclude that the Jodways' takings claim was ripe for two reasons.

First, the Jodways' federal procedural due process claim was not ancillary to their takings claim. Federal courts must also dismiss claims that are ancillary to an unripe takings claim.<sup>20</sup> A claim is ancillary to a takings claim if it "occurs alongside a takings claim" and does not allege a

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<sup>11</sup> *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

<sup>12</sup> *Edwards v Meinberg*, 334 Mich 355, 358; 54 NW2d 684 (1952). See *Bowie*, 441 Mich at 56.

<sup>13</sup> 28 USC 1441(a).

<sup>14</sup> 28 USC 1331.

<sup>15</sup> *Gully v First Nat'l Bank in Meridian*, 299 US 109, 112; 57 S Ct 96; 81 L Ed 2d 70 (1936).

<sup>16</sup> 28 USC 1367.

<sup>17</sup> *Broughton Lumber Co v Columbia River Gorge Comm*, 975 F2d 616, 621 (CA 9, 1992).

<sup>18</sup> *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 194; 105 S Ct 3108; 87 L Ed 2d 126 (1985).

<sup>19</sup> *Id.* at 193, 195.

<sup>20</sup> *Braun v Ann Arbor Charter Twp*, 519 F3d 564, 573 (CA 6, 2008).

separate, concrete injury.<sup>21</sup> However, a plaintiff’s procedural due process claim is *not* ancillary if the procedural due process claim “addresses a separate injury—the deprivation of a property interest without a predeprivation hearing.”<sup>22</sup>

Here, the Jodways asserted that Boyne City violated their rights to procedural due process because “[o]ther Bay Street property owners received notice of the design phase, an opportunity to participate and be heard regarding the project, an express request for drainage rights over their private property and notice of the commencement of the Bay Street reconstruction while the Jodways did not.” To put it another way, the Jodways asserted that Boyne City deprived them of notice and the opportunity to be heard. This injury was complete at the moment that Boyne City denied the Jodways notice. Thus, in this case, the Jodways asserted an injury separate and distinct from the taking of their property. We conclude that the Jodways’ federal procedural due process claim was not ancillary to their takings claim. Therefore, the federal court had subject matter jurisdiction over the Jodways’ unrelated federal claim.

Second, the Jodways’ takings claim was ripe because the Jodways sought compensation in state court but the defendants removed the case to federal court. A party’s takings claim is ripe if the plaintiff brings the claim in state court, but the defendants remove the claim to federal court:

[A] plaintiff cannot bring a takings claim in federal court without having been denied just compensation by the state; such a claim can come into federal court before the state has denied compensation only when the state or its political subdivision chooses to remove the case to federal court.<sup>[23]</sup>

A state waives *Williamson*’s ripeness requirement when it removes the case to federal court.<sup>24</sup>

Here, the defendants waived *Williamson*’s ripeness requirement by removing this case to federal district court. Therefore, this claim was ripe for review in the federal district court and the federal district court had subject matter jurisdiction over the Jodways’ claims.

#### IV. TAKINGS CLAIM AGAINST BOYNE CITY

The Jodways contend that they are entitled to relief in their takings claims against Boyne City. We decline to review this issue because it is premised on the Jodways’ success on the first issue. Because the trial court properly granted comity to the federal district court’s order, Boyne City is not a party from whom the Jodways can recover.

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<sup>21</sup> *Id.* at 572.

<sup>22</sup> *Warren v City of Athens, Ohio*, 411 F3d 697, 708 (CA 6, 2005). See *Nasierowski Bros Investment Co v City of Sterling Heights*, 946 F3d 890, 893-894 (CA 6, 1991).

<sup>23</sup> *Sansotta v Town of Nags Head*, 724 F3d 533, 546 (CA 4, 2013).

<sup>24</sup> *Id.* at 544.

## V. DISMISSAL OF THE JODWAYS' NUISANCE, NEGLIGENCE, AND TRESPASS CLAIMS AGAINST TRI-COUNTY EXCAVATING AND CAPITAL CONSULTANTS

### A. STANDARD OF REVIEW

“This Court reviews de novo issue of law.”<sup>25</sup> We also review de novo the trial court’s ruling on a motion for summary disposition.<sup>26</sup>

### B. CLAIMS AGAINST TRI-COUNTY EXCAVATING

#### 1. LEGAL STANDARDS

Collateral estoppel precludes relitigation of issues on which a court has reached a valid final judgment.<sup>27</sup>

#### 2. APPLYING THE STANDARDS

The Jodways assert that the federal district court improperly applied the Michigan Supreme Court’s decision in *Fultz* when dismissing their claims of nuisance, negligence, and trespass against Tri-County Excavating. The Jodways appear to base this argument on success on the first issue, since they provide no authority under which this Court may review the propriety of a valid federal court order. As discussed above, the trial court properly enforced the federal district court’s order. We therefore decline to determine whether the federal district court properly applied *Fultz*.

The Jodways also contend that they asserted nuisance in fact against Tri-County Excavating, as well as nuisance per se, but that the federal district court failed to address the claim. We decline to consider this issue. An issue is preserved if it is raised before, addressed, or decided by the trial court.<sup>28</sup> “We need not address issues first raised on appeal.”<sup>29</sup> The Jodways have not properly preserved this issue by raising it before the trial court. Therefore, we decline to address it.

### C. CLAIMS AGAINST CAPITAL CONSULTANTS

#### 1. NEGLIGENCE

The federal district court also dismissed the Jodways’ claim for negligence against Capital Consultants. For the same reasons as above, we decline to review this issue.

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<sup>25</sup> *DeCosta v Gossage*, 486 Mich 116, 122; 782 NW2d 734 (2010).

<sup>26</sup> *Travelers Ins Co*, 465 Mich at 205.

<sup>27</sup> *In re Forfeiture of \$1,159,420*, 194 Mich App at 145; *City of Detroit*, 434 Mich at 356 n 27.

<sup>28</sup> *Polkton Charter Twp*, 265 Mich App at 95.

<sup>29</sup> *Id.*

## 2. NUISANCE

As stated above, the Jodways did not assert below that the federal district court failed to address a claim of nuisance in fact. Because the Jodways have not preserved this issue by raising it before the trial court, we decline to review it.

Regarding nuisance per se, the Jodways do not address the basis of the trial court's decision. A party abandons an issue if he or she does not raise it in the statement of questions presented.<sup>30</sup> Further, if a party does not address the basis of the trial court's decision, we need not even consider granting them relief.<sup>31</sup>

The Jodways contend in their statement of issues presented that the trial court improperly applied *Fultz* to their nuisance claims. However, the trial court dismissed the Jodways' nuisance claims against Capital Consultants because of the impossibility of awarding the Jodways relief. Because the Jodways do not address the basis of the trial court's decision, we conclude that they have abandoned this issue.

## 3. TRESPASS

The Jodways contend that the trial court improperly applied *Fultz* to their trespass claim. However, the trial court ultimately dismissed the Jodways trespass claim because they would be unable to provide any proof on damages at trial, not because *Fultz* barred the claim. Thus, we conclude that the Jodways have also abandoned this issue by failing to address the basis of the trial court's decision.

## VI. SUPPLEMENTAL WITNESS LIST

### A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to impose discovery sanctions.<sup>32</sup> The trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes or when it makes an error of law.<sup>33</sup>

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<sup>30</sup> MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

<sup>31</sup> *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

<sup>32</sup> *KBD & Assocs, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012).

<sup>33</sup> *Id.*; *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

## B. LEGAL STANDARDS

The trial court has discretion to bar a witness or dismiss an action to sanction a party for failing to timely file a witness list.<sup>34</sup> Before deciding to bar a witness, the trial court should consider a variety of factors:

Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful [sic] or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.<sup>[35]</sup>

The trial court should take particular care to consider a variety of factors and options before exercising this sanction if barring the witness will result in the dismissal of the plaintiff's claim.<sup>36</sup>

## C. APPLYING THE STANDARDS

The Jodways contend that the trial court abused its discretion by striking their supplemental witness list. We disagree.

The trial court considered a variety of factors when ruling on Capital Consultants's, motion. The trial court noted that the Jodways did not provide authority to support their position that a party may retain a right to supplement a witness list in violation of a discovery order. The trial court inquired into whether the Jodways had adequately disclosed the witnesses during discovery to prevent surprise to Capital Consultants. The trial court found that the Jodways had a history of failing to comply with its orders, including discovery orders. The trial court found that the Jodways did not file supplemental answers to interrogatories regarding the new witnesses. The trial court also found that the case was at a "late stage." Finally, the trial court opined that it would be unreasonable to re-open discovery so that Capital Consultants could depose the new witnesses.

Our review of the lower court record discloses that the Jodways' assertion that they previously disclosed the witnesses during discovery is not entirely accurate. Neither the purported disclosure in the Jodways' answers to interrogatories, nor the stipulated discovery order, identifies the additional witnesses by name, indicates the subject of their proposed

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<sup>34</sup> *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

<sup>35</sup> *Id.* at 32-33 (footnote citations omitted).

<sup>36</sup> *Id.* at 32.

testimony, or even indicates that the additional witness would act as witnesses. Similarly, Zanke-Jodway mentioned at deposition that Jim Harris had bid \$279,000 on the house and that Monica Ross had done a market study concluding that the most she could get for the house was \$350,000, but Zanke-Jodway did not identify either person as a potential witness.

Further, we are not convinced that the trial court's refusal to permit these witnesses to testify resulted in the dismissal of the Jodways' case. The trial court ultimately dismissed the Jodways' case because no witness could testify concerning the property's diminution in value caused by the trespass. The Jodways conceded at the hearing on the motion that Capital Consultants's motion to dismiss that part of the reduction in the property's value to \$350,000 was due to adverse economic conditions. Even had the trial court not struck the Jodways' proposed witnesses, there is no indication that either proposed witness was competent to testify concerning the diminution in the property's value *caused by the trespass*.

We conclude that the trial court did not abuse its discretion when it struck the Jodways' supplemental witness list as a discovery sanction for failing to comply with its discovery orders. The trial court considered a variety of factors, including the Jodways' failure to comply with trial court orders, the prejudice to Capital Consultants, the lack of notice to Capital Consultants regarding the witnesses' proposed testimonies, and whether the Jodways attempted to timely cure the defect. The trial court did not need to consider further factors and options because striking the proposed witnesses did not result in the dismissal of the Jodways' case.

#### D. MOTION FOR RELIEF FROM JUDGMENT

The Jodways contend that the trial court erred in denying their motion for relief from judgment under MCR 2.612(C) because they had good cause to supplement their witness list. This argument utterly lacks merit.

By its language, MCR 2.612(C) applies to "a final judgment, order, or proceeding . . ." <sup>37</sup> A final order is the first order dismissing the last remaining claims in this case. <sup>38</sup> The trial court's ruling regarding the Jodways' supplemental witness list did not dismiss the last remaining claim in the case. Therefore, it was not a final order and MCR 2.612(C) simply did not apply.

### VII. MOTION IN LIMINE ON DAMAGES

#### A. PROPER MEASURE OF DAMAGES

The Jodways assert that the trial court incorrectly determined that the diminution in value of the property was the proper measure of damages for their claim of trespass against Capital Consultants. We conclude that the Jodways have waived this issue.

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<sup>37</sup> MCR 2.612(C)(1).

<sup>38</sup> MCR 7.202(6)(1)(i).

A party may not “create[] the very error that it wishes to correct on appeal[.]”<sup>39</sup> A party may not take a position before the trial court, take an opposite position before this Court, and expect to obtain relief.<sup>40</sup>

Here, at the hearing on Capital Consultants’s motion to dismiss, the Jodways agreed that the proper measure of trespass damages was the property’s diminution in value. Thus, if the trial court erred in determining the proper measure of damages, the Jodways’ conduct at the hearing on the motion contributed to any error. We conclude that, by contributing to this error, the Jodways have waived our review of this issue.

#### B. WITNESSES AVAILABLE TO TESTIFY CONCERNING DAMAGES

The Jodways’ next contend that the trial court erred by determining that the Jodways did not have a witness who could testify on damages because Zanke-Jodway, as a homeowner, is competent to offer testimony on the value of her own property. We decline to consider this issue because we conclude that the Jodways fail to address the basis of the trial court’s decision.

Here, the trial court ruled that Zanke-Jodway was not competent to testify at trial concerning the diminution in value of the property because a lawyer may not testify on behalf of his or her client. The Jodways do not address this issue, but rather contend that Zanke-Jodway was competent to offer an opinion on the property’s value because she owns it. As stated above, if a party does not address the basis of the trial court’s decision, we need not even consider granting them relief.<sup>41</sup> We decline to address this issue because the Jodways do not address the basis of the trial court’s decision.

### VIII. CONCLUSION

We conclude that the federal district court did not lack subject matter jurisdiction to hear the Jodways’ claims in federal court. We also concluded that the trial court did not abuse its discretion by striking the Jodways’ supplemental witness list. We conclude that the Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal.

We affirm. Defendants, as the prevailing parties, may tax costs.<sup>42</sup>

/s/ Amy Ronayne Krause  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck

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<sup>39</sup> *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

<sup>40</sup> *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 832 NW2d 401 (2013).

<sup>41</sup> *Derderian*, 263 Mich App at 381.

<sup>42</sup> MCR 7.219(A).