

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

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LEONARD GUST and SHARON GUST,  
  
Plaintiffs-Appellees,

UNPUBLISHED  
August 26, 2014

v

LENAWEE COUNTY ROAD COMMISSION  
and LENAWE COUNTY BOARD OF ROAD  
COMMISSIONERS,

No. 311844  
Lenawee Circuit Court  
LC No. 10-003769-CZ

Defendants-Appellants.

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Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Defendants appeal by leave granted<sup>1</sup> the trial court's order granting plaintiffs' motion for partial summary disposition under MCR 2.116(C)(10) regarding their claim for inverse condemnation or a "taking" related to flooding on their property. We reverse and remand.

This lawsuit was before a panel of this Court on a prior appeal, *Gust v Lenawee County Road Commission*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2011 (Docket No. 304142). The prior panel's opinion set forth the following facts, which are also relevant to the present appeal:

The Gusts are husband and wife and the owners of real property consisting of acreage on both the north and south sides of Sandy Beach Road in Lenawee County. The property has been owned by Gust family members in excess of 100 years. Sandy Beach Road runs in an east-west direction and bisects the Gusts' property. The Gusts maintain a residence and other buildings on the northern section of the property and allege the natural flow of water on the property runs from north to south.

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<sup>1</sup> This Court denied defendants' original application for leave to appeal, after which defendants sought leave to appeal to the Michigan Supreme Court. The Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Gust v Lenawee County Road Commission*, 495 Mich 879; 838 NW2d 558 (2013).

The Gusts sued the Commission for inverse condemnation, trespass and negligence. The Gusts set forth that the portion of Sandy Beach Road that bisects their property “incorporates a drain,” which “was constructed and maintained at said location several feet higher than the adjacent lands on each side” of the roadway. The roadway “now acts as a dam preventing water . . . from naturally flowing to the lands on the south side of Sandy Beach Road” and further on “to adjoining lands.” Since the construction of the roadway a drain has existed beneath the roadbed that permitted surface water to flow to the south and prevent flooding. Within the last six years the drain has purportedly “ceased to function” and has resulted in turning the roadway into a dam that creates “ponding” on the northern portion of the Gusts’ property. The ponding has allegedly resulted in water accumulation at a depth of several feet over 8 to 10 acres of their property. The Gusts claimed that “the construction of said roadway and drain, coupled with said failure to maintain and/or repair said drain, was the sole course [sic] of the resultant flooding.” The Gusts contended that the flooding rendered their property inhabitable as the flooding has destroyed the septic systems for the residence and seriously damaged other buildings. [*Gust*, unpub op at 1-2.]

The parties’ actions on May 12, 2010, are also relevant to the present appeal. Plaintiffs claimed that on that date, they attempted to repair the culvert running underneath Sandy Beach Road by building a dike on the north side of the road where the water was then approximately 13 feet deep. According to plaintiffs, they had tried for years to get the Commission to assist with the water accumulation, but received no help and thus took it upon themselves to alleviate the flooding through construction of the dike. The Lenawee County Sheriff’s Department was called to the scene as the result of a report that plaintiffs—during their construction of the dike—piled dirt onto the westbound lane of Sandy Beach Road. A representative of the Commission was also called to the scene. According to defendants, the Sheriff’s Department required plaintiffs to remove the dirt from the road. The Commission then brought in four loads of gravel to fill the hole that plaintiffs had created and to stabilize the road against cave-in. Plaintiffs contended that the Commission’s action of dumping the gravel further obstructed the flow of surface waters into and through the culvert, resulting in additional flooding of their property.

Plaintiffs moved for partial summary disposition concerning their inverse-condemnation claim. In response, defendants asserted that there were numerous issues of fact regarding whether they could be said to have caused the flooding and whether defendants acted in accordance with statutory duties. Defendants also claimed that summary disposition would be premature based on the need for additional discovery. Defendants cited evidence, including plaintiffs’ deposition testimony, that there was a field drainage system consisting of permeable clay drain tile on either side of the culvert and that defendants were not responsible for maintaining these tiles. Defendants further claimed that the installation of other culverts had remediated much of the flooding on plaintiffs’ property.

On June 25, 2012, the trial court held a hearing on plaintiffs’ motion for partial summary disposition. The trial court noted that it had viewed the site on several occasions and stated, in relevant part:

Really, in this entire case the only thing that the court believes is profound is the actions of the road commission. In this particular case there is no question that the Plaintiffs in this case asked to have the problem resolved and that the road commission said it wasn't their problem.

The Plaintiffs then attempted to mitigate their damages to their property by opening up the culvert. And the road commission then deliberately trespassed on their property. They said they cannot go on the property to fix it but yet they then trespassed on the property and dumped gravel on the culvert to stop the culvert from doing what it was supposed to do, very deliberately and very willfully and wantonly I think stopped the culvert from being repaired and allowing the water to drain.

The damages are astounding. The place looked like New Orleans after the big hurricane that occurred there a couple of years ago.

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Reasonable minds couldn't possibly differ after the facts that were admitted by the road commission and you look at the property. There is a valley that goes through there that naturally drains that property. You don't have to be a rocket scientist to figure that out when you look at it.

It's clear that the road looks and acts like a dam. And if there is no way to drain the property it would be a dam. It wasn't built that way. There is a drain culvert down below. It's a metal culvert. It appears to be in okay shape. I saw it with my own two eyes. It drained that property at one time, apparently. It looks like it did. And now it's plugged up. It looks like a dam and it was a dam. When it looks like a duck and it quacks like a duck it's a duck.

There is no question of fact. There is nothing to argue about. It acted like a dam and it ruined these people's property. And it was done for whatever reason. I have no idea why the road commission acted in the way they acted in blocking that culvert.

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And once we have a lake now the government says you have a wetland and you can't abate it. It's reckless. You put these [homeowners] and these people without compensating them in any way, shape or form and you destroy their property [sic]. And they have no remedy or recourse except to come to court and ask the court to be recompensed for the damages that have occurred.

It's hard to see it any other way. I don't know how any reasonable minds can differ when you look at the property and listen to the arguments of counsel and you see what is in the affidavit and you look at the pleadings.

There are no two ways about it. It was a taking. And there will be damages paid. And we will set this matter for a hearing on the issue of damages. Your motion is granted.

The trial court entered its order granting partial summary disposition for plaintiffs, and defendants filed an application for leave to appeal and a motion for peremptory reversal in this Court. This Court denied the requested relief. *Gust v Lenawee County Road Commission*, unpublished order of the Court of Appeals, entered April 9, 2013 (Docket No. 311844). Defendants then filed an application for leave to appeal to the Michigan Supreme Court. On October 28, 2013, the Supreme Court, in lieu of granting leave, remanded the case to this Court for consideration as on leave granted. *Gust v Lenawee County Road Commission*, 495 Mich 879; 838 NW2d 558 (2013).

In this appeal, defendants argue that there exist genuine issues of material fact precluding entry of partial summary disposition for plaintiffs. We agree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Summary disposition is proper if "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).

The United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; see *Wiggins v City of Burton*, 291 Mich App 532, 571; 805 NW2d 517 (2011). To establish a claim of inverse condemnation, a plaintiff must "prove that the government's actions were a *substantial* cause of the decline of the property's value and also establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* at 571 (emphasis in original; internal citations and quotation marks omitted).

The trial court's statements during the summary-disposition hearing demonstrate that its ruling was primarily motivated by its perception of the May 12, 2010, events, particularly the Commission's conduct of dumping gravel into the area then being excavated by plaintiffs. We conclude that there is a genuine issue of material fact regarding the reason for the Commission's action. While plaintiffs argued that the Commission exacerbated the flooding when it backfilled over the culvert, defendants presented affidavit testimony from civil engineer Scott Merrillat that described the situation and the Commission's actions, including that plaintiffs had excavated a 10-foot wide by 10-foot deep hole directly adjacent to the road that was "causing the road embankment to cave in." Merrillat stated that "[t]he Sherriff's Department required [plaintiffs] to remove the dirt from the road" and that the Commission dumped the gravel "to stabilize the road against the cave-in which [plaintiffs] had created." Merrillat opined that these actions "were necessary to protect the motoring public and to preserve the integrity of Sandy Beach Road."

The evidence concerning the Commission's reasons for filling the hole on May 12, 2010, creates an issue of fact regarding whether the Commission abused its legitimate powers sufficient to establish an inverse condemnation. Viewing the evidence in the light most favorable to defendants—as is required at the summary-disposition stage—there is a factual dispute regarding this element. The Commission presented evidence that it had bona fide reasons to backfill the hole as it did. Indeed, the Commission had statutory obligations to maintain the road in a safe condition. See MCL 224.21(2). In addition, defendants' requirement that plaintiffs obtain a permit, as required under MCL 224.19b(1), before performing work adjacent to the roadway does not establish inverse condemnation. A trier of fact could conclude that the Commission based its actions on legitimate concern for the immediate integrity of the road and safety of the public.

Insofar as plaintiffs' third amended complaint can be read as alleging an inverse condemnation before the May 12, 2010 incident, we conclude that plaintiffs also have not established such a claim as a matter of law. Plaintiffs alleged that the steel culvert/drain under Sandy Beach Road failed as early as 2004, causing the road to act as a dam and prevent water from flowing. Plaintiffs alleged that the Commission installed the culvert, had a duty to maintain the culvert, and refused plaintiffs' repeated requests to fix the culvert to ensure the natural flow of water.

Defendants, however, presented evidence that the Commission performed only routine maintenance on Sandy Beach Road over the prior 50 years and first became aware of the metal pipe characterized as the "culvert" running underneath the road in 2011 when the parties were engaging in steps related to the water problem and plaintiffs unearthed it. Defendants presented sworn testimony that it never maintained the culvert and did not assert jurisdiction over the culvert, and that the culvert did not serve the primary function of removing water from the roadway. While plaintiffs presented affidavit testimony from an area resident who recalled seeing the culvert soon after its installation in 1963, there is, at least, a question of fact concerning timing and whether—at any time before May 12, 2010—defendants abused legitimate powers in affirmative actions directly aimed at plaintiffs' property. See *Wiggins*, 291 Mich App at 571.

Defendants also introduced evidence sufficient to create issues of fact concerning causation. There was evidence that a tile system existed on plaintiffs' north and south parcels. Merillat stated that this was evidence of a type of drainage system used to help dry farmland. To the extent that such tiles existed, they were not under the control or jurisdiction of defendants; Merillat stated that "the Road Commission has never installed clay tile on farmers' properties . . . ." Plaintiff Leonard Gust's testimony at deposition indicated that there was some level of damage or deterioration to the tiles that would have to be fixed in order to ensure water flow off the land; Leonard referred at one point to "broken tile that we found." Leonard stated, "It's our property. We can [repair the tiles]." He further stated that if the culvert obstruction were cleared, water would flow "[o]nce we hooked all the tile up to [the culvert]." Merillat opined that "[a]ny additional measures to successfully remove additional water from [plaintiffs'] property would require replacement or repair of the clay drain tiles. Such [a]dditional measures will not remove subsurface water at all without attachment to a functioning drain tile system on both sides of the road. Mr. Gust has acknowledged that such repair would be the Gusts' responsibility."

Even assuming, for purposes of argument, that defendants were responsible for the culvert underneath the road and that the culvert was in fact obstructed, there is a question of fact regarding whether the culvert obstruction was a substantial cause of the flooding. See *Wiggins*, 291 Mich App at 571. Under the facts as presented, a trier of fact could find that damaged tiles were substantially to blame.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra  
/s/ Patrick M. Meter  
/s/ Deborah A. Servitto